IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA

CASE NO. 3D08-3044

FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES,

Appellant,

v.

IN RE MATTER OF ADOPTION OF: X.X.G. and N.R.G.,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

LOWER CASE NO. 06-033881 FC 04

ANSWER BRIEF OF APPELLEE, F.M.G.

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STATEMENT OF THE CASE AND OF THE FACTS

John and James Doe were placed in foster care with petitioner, F.M.G. ("Petitioner"), and his partner, Tom Roe[1] by the Department of Children and Families ("DCF") and the Center for Family and Child Enrichment ("CFCE") in December, 2004. R.694 (Stipulated Facts ("Stip.") 45). John was 4 years old and James was 4 months old. R.1117. They have been with this family ever since.

The children have been free for adoption since July, 2006. R.694 (Stip.47). In September, 2006, Petitioner submitted an application to adopt them with CFCE, the agency supervising the boys' placement. R.694 (Stip.48). CFCE conducted a home study and determined that Petitioner met all the criteria to adopt the boys but because he is gay, state law prohibited its recommendation to approve the adoptions. R.695 (Stip.49). DCF denied Petitioner's application solely on the basis of Fla. Stat. § 63.042(3), which provides that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual," and acknowledged that it would have approved the application but for the statute. R.695 (Stip.50, 54).

Petitioner filed a petition to adopt John and James in the Circuit Court. He asserted that his petition may not be denied on the basis of Fla. Stat. § 63.042(3)

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[1] The public version of the Final Judgment of Adoption used the pseudonyms John and James Doe to refer to the children X.X.G. and N.R.G., respectively. It used the pseudonym Tom Roe for Petitioner's partner out of concern for the privacy of Roe's biological son who has the same name. Roe's son is identified as Tom Roe, Jr.. Petitioner uses these pseudonyms in this brief.

because the law violates the rights to equal protection, privacy and due process under the Florida Constitution, Art. I, §§ 2, 9, and 23, Fla. Const. John and James, through counsel, asserted that the law violates their right to equal protection by treating them differently than children in the care of heterosexuals, and their due process right to permanency, and that it intrudes on the authority of juvenile courts.

DCF filed a motion to dismiss. The court dismissed Petitioner's privacy claim but allowed all of the remaining claims to proceed. R. 230.

Before trial, Petitioner and the children asserted that the statute is also an invalid special law prohibited by Art. III, § 11 of the Florida Constitution. DCF objected to the late introduction of the argument and the court did not consider it.

The trial commenced in the Circuit Court on October 1, 2008, and lasted for four days. The court heard extensive expert testimony. The expert witnesses presented by DCF's counsel asserted a number of child welfare interests that they claimed were furthered by excluding gay people from adopting. However, prior to trial, *DCF itself*, through stipulations and testimony of its Rule 1.310(b)(6) witnesses 1) disavowed all of these asserted interests, 2) recognized that gay people and heterosexuals make equally good parents, 3) agreed that being placed with gay parents does not disadvantage children, 4) admitted that it places children in permanent unsupervised care with gay guardians, 5) admitted that the gay exclusion does not promote children's interests in any way, and 6) agreed that

eliminating the ban would serve the interests of foster children as some would be able to be adopted. R.692-93 (Stip. 24-32), 4339-41, 4346-62, 4367-80, 4578-80.

The court also heard from a psychologist who evaluated the boys, who testified that they are bonded with Petitioner and his family and thriving in their care; that being removed from this family would be emotionally devastating for them and cause long-term damage; and that it is in their best interests to be adopted by Petitioner. R.1473-76, 1485-88. The guardian ad litem provided a similar assessment and agreed adoption by Petitioner is in the boys' best interest. R.1447-52. The adoption caseworker testified that if Petitioner cannot adopt John and James, state law will require CFCE to recruit other families for them. R. 2010-11.

On November 25, 2008, the court issued the Final Judgment of Adoption, concluding that being adopted by Petitioner served the children's best interests and that Fla. Stat. § 63.042(3) is unconstitutional. It held that the statute violated Petitioner's and the children's right to equal protection because it fails rational basis review, and violates the children's due process right to permanency. These conclusions were based on the court's factual findings, based on the expert testimony, that: 1) parental sexual orientation has no impact on children's well-being, as reflected by professional consensus on the matter, R.695-97; 2) there is no factual basis for any of DCF's asserted bases for the exclusion of gay people from adopting, R.670-87; and 3) the exclusion harms children in care by depriving

them of good parents, R.687-90. Thus, the court found it "beyond dispute" that the exclusion does not serve children's interests. R.697. DCF appealed.

SUMMARY OF ARGUMENT

After making extensive findings of fact concerning the well-being of children of gay parents, with which DCF—through its practices and admissions in this litigation—agrees, the Circuit Court correctly held that the blanket exclusion of gay people from adopting violates the equal protection clause of the Florida Constitution because it fails the rational basis test. DCF essentially makes three arguments for overturning this ruling. First, it says the rational basis test gives such "uber deference" to the Legislature that "a classification may be based on rational speculation without any evidentiary or empirical basis whatsoever." Initial Brief of DCF ("DCF Brf.") at 15, 24. Second, it says the Court should reverse based on evidence offered by Petitioner's experts, which it says establishes rationales for the ban. Third, it says the Circuit Court improperly discredited its experts because of their religious faiths. All of these arguments fail.

DCF gets Florida's rational basis test wrong. The Florida Supreme Court has insisted on a fact-based standard when evaluating claims brought under the Florida Constitution's equal protection clause and has specifically held that the statute at issue here cannot be evaluated under rational basis review without a complete factual record. *Cox v. D.H.R.S.*, 656 So. 2d 902, 903 (Fla. 1995).

DCF's other arguments flout time-honored rules about appellate review of trial court fact-finding. The court's ruling is based on well supported findings. DCF never argues lack of competent substantial evidence. Instead, it points to fragments of testimony by Petitioner's experts (much of which it grossly mischaracterizes) and says that this Court should disregard the Circuit Court's findings and accept DCF's characterization of the record, which the court rejected. But this Court is not free to reject the rules of appellate review, reweigh evidence, and pick and choose among shards of testimony unmoored from any findings.

DCF's suggestion that this Court should overturn the Circuit Court's witness credibility determinations also flies in the face of the rules of appellate review, which instruct deference to the trial judge, who had the opportunity to see and hear the witnesses. A plain reading of the Judgment does not support DCF's assertion that the court rejected its witnesses' testimony because of their religious faiths.

DCF cannot prevail unless this Court applies rational basis review inconsistently with Florida Supreme Court precedent, including precedent concerning review of the very statute at issue here. And it cannot prevail unless this Court disregards structurally vital rules about how appellate courts review factual findings and witness credibility determinations made by trial courts.

While the court correctly concluded that the statute fails rational basis review, heightened scrutiny (which DCF cannot meet) applies because the law

penalizes Petitioner's exercise of the fundamental right to intimate association protected by the privacy and due process clauses of the Florida Constitution. The law is also an invalid special law because it rests on no differences inherent in or peculiar to gay people. The Court can affirm on either of these alternative grounds.

ARGUMENT[2]

The Circuit Court found that "[t]he record clearly reflects that it is in [John and James'] best interests to remain in this placement permanently and to be adopted by Petitioner." R.704. This is not disputed by DCF. R.695 (Stip.54)(but for the statute, DCF would have approved Petitioner's application to adopt the boys). And the guardian ad litem, the adoption case worker and the psychologist who examined the boys all agree that being adopted by Petitioner is in their best interest. R.1451-52, 1487, 2009-10. Everyone is in agreement because undisputed evidence showed that John and James are thriving in the care of Petitioner and his partner, they have formed deep attachments to this family after being part of it for four years, and if they can't be adopted by Petitioner, they are at risk of being separated from this family, which would be devastating for them. R.663-70 (1120-

[2] **Standard of review:** "A trial court's ruling concerning the constitutionality of a statute following a trial . . . is generally a mixed question of law and fact. . . . the trial court's ultimate ruling must be subjected to *de novo* review, but the court's factual findings must be sustained if supported by . . . competent substantial evidence." *North Fla. Women's Health & Couns. Servs., Inc. v. State*, 866 So.2d 612, 626-27 (Fla. 2003).

23, 1136-48, 1447-51, 1474-90, 2005, 2009-11).[3]

The only issue is whether the sole obstacle standing in the way of the adoptions—Fla. Stat. § 63.042(3)—is constitutional. The court correctly held that the statute violates the equal protection clause because it fails even rational basis review. The Judgment should also be affirmed because heightened scrutiny applies and the statute is an invalid special law.[4]

I. The Circuit Court correctly concluded that Fla. Stat. § 63.042(3) fails equal protection rational basis review.[5]

A. The Florida Supreme Court demands a factual basis to justify the exclusion under rational basis review.

Under the rational basis test articulated by the Florida Supreme Court, a law that singles out a group for unequal treatment can be upheld only if it "bears a rational and reasonable relationship to a legitimate state objective." *Amerisure Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 897 So. 2d 1287, 1291 n.2 (Fla. 2005). The

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[3] Where a record cite is immediately followed by a parenthetical containing additional record cites, the first cite is to findings of fact by the court and the cites in the parenthetical refer to evidence in the record that supports those findings.

[4] The court also correctly held that the statute violated the children's right to equal protection and due process right to permanency, addressed in the children's brief.

[5] Whether this statute violates Florida's equal protection guarantee is an open question and was not decided in *Cox v. D.H.R.S.*, 656 So. 2d 902 (Fla. 1995), or *Lofton v. Sec'y, Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004), which addressed earlier challenges to this statute. In *Cox*, the Florida Supreme Court vacated the DCA's ruling that the statute comported with Florida's equal protection clause and remanded that claim. *Cox*, 656 So. 2d at 903. *Lofton* addressed only federal constitutional claims.

Court made clear that under Florida's equal protection clause, a rationale for a classification must be based in factual reality. In *Cox*, 656 So. at 903, it concluded with respect to the plaintiffs' equal protection claim that,

> [t]he record is insufficient to determine that this statute can be sustained against an attack as to its constitutional validity on the rational-basis standard for equal protection under article I, section 2 of the Florida Constitution. A more complete record is necessary in order to determine this issue.

The Court thus remanded the case for "a factual completion of the record as to this single constitutional issue and a decision as to this issue based upon the completed record." *Id. See also State v. Leicht*, 402 So.2d 1153, 1154-55 (Fla. 1981)(classification must be "based on a real difference which is reasonably related" to the purpose); *Coy v. Fla. Birth-Related Neurological Injury Comp. Plan*, 595 So. 2d 943, 945-47 (Fla. 1992)(relying on "comprehensive findings of fact" of trial judge based on "competent substantial evidence" in applying rational basis test). The Florida Supreme Court has not hesitated to invalidate laws under rational basis review where the facts did not support the asserted rationales.[6]

DCF asserts a very different rational basis test than the standard applied by

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[6] *See, e.g., Shriners Hosp. for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990)(striking down law voiding charitable bequests where will was executed less than 6 months prior to death because statute does not in fact serve to address the expressed concern of protecting testators against improper influence); *Osterndorf v. Turner*, 426 So. 2d 539, 545 (Fla. 1982)(striking down law limiting homestead exemption to individuals who have resided in state for five years, rejecting assertion that this was necessary to protect against fraudulent applications).

the Florida Supreme Court, arguing that "a classification may be based on rational speculation without any evidentiary or empirical basis whatsoever." DCF Brf. 15. But the cases it cites to support this proposition are federal cases discussing federal law.[7] More importantly, DCF studiously avoids discussing *Cox*, where, in reviewing precisely the statute at issue here, the Florida Supreme Court held that development of a factual record was required to complete rational basis analysis.[8]

The fact-based rational basis test described in *Cox* is very different than the rational basis test applied by the federal court in *Lofton v. Sec'y, Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), which accepted negative "assumptions" about gay parents without any factual record. *Lofton,* 358 F.3d at 819 (affirming summary judgment).[9] Florida is not alone in adopting a rational

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[7] The one Florida case DCF cites for this proposition, *Hamilton v. State*, 366 So.2d 8 (Fla. 1978), does not say, as stated in DCF's brief, that "rational speculation unsupported by evidence or empirical data" is sufficient under Florida's rational basis test. In fact, *Hamilton* applies a fact-based rational basis analysis, pointing to "expert opinion supporting" the health hazards of cannibis as justification for its classification under the criminal law. *Id.*, at 10.

[8] *A Choice for Women, Inc. v. Fla. Agency for Health Care Admin.*, 872 So. 2d 970 (Fla. 3d DCA 2004), cited by DCF, did not, as DCF implies, hold that Florida's equal protection right is synonymous with federal protections. And it certainly did not—nor could it—overrule *Cox's* requirement of a factual record to analyze whether the statute at issue here satisfies the rational basis test.

[9] Not only did the *Lofton* panel's rational basis analysis differ from the Florida Supreme Court's, it also departed from conventional federal rational basis review, sparking a bitter split among the members of the court, which denied the petition for rehearing *en banc* 6 to 6. In a passionate dissent, three judges concluded that the law lacks a rational basis. *Lofton v. Sec'y, Dep't of Children and Family Servs.*,

basis test that demands a factual basis.[10]

The Florida Supreme Court recognizes that the rational basis test serves the important purpose of ensuring that the classification was not enacted for the purpose of discriminating against the disadvantaged group. *Abdala v. World Omni Leasing, Inc.*, 583 So. 2d 330, 333 (Fla. 1991)(test is whether statute "bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary, or oppressive"); *see also Romer v. Evans*, 517 U.S. 620, 632-33, 635 (1996)(rational basis review "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law").[11]

Given the requirement of a factual basis for a classification, factually unsupported negative stereotypes cannot justify laws that disadvantage a group. *See, e.g., U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-539 (1973)(rejecting

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377 F.3d 1275, 1290-1303 (11th Cir. 2004) (Barkett, J., dissenting from denial of *en banc* review (joined by Anderson and Dubina, JJ.)). The other three dissenters expressed doubts about the law's constitutionality: "there is a serious and substantial question whether Florida can constitutionally declare all homosexuals ineligible to adopt while, at the same time, allowing them to become permanent foster parents, and not categorically barring any other groups such as convicted felons or drug addicts from adopting." *Id.* at 1313 (Marcus, J., dissenting from denial of *en banc* review (joined by Tjoflat and Wilson, JJ.)).

[10] *See, e.g., Estes Funeral Home v. Adkins*, 586 S.E.2d 162, 166 (Va. 2003)(demanding "the classification rest on real and not feigned differences."); *Smith v. State*, 118 S.W.3d 542, 547 (Ark. 2003)(same); *Ferdon v. Wis. Patients Comp. Fund*, 701 N.W.2d 440, 459 (Wis. 2005)(rational basis test asks "whether there are any real differences to distinguish" the class).

[11] Petitioner's challenge is based solely on the Florida Constitution. Any citations to case law from other jurisdictions are provided as persuasive authority only.

"unsubstantiated" charge that hippies are more likely to commit fraud as a justification for unequal access to food stamp program); *State v. Limon*, 122 P.3d 22, 36 (Kan. 2005)(in invalidating harsher penalty for same-sex than heterosexual teen sexual conduct, court rejected asserted justification that gay people "would have a higher tendency to be coercive" because it lacked "factual support.").

Moreover, a classification based on nothing but unsubstantiated stereotypes is not even grounded in "rational" speculation. Baseless stereotypes are arbitrary and, thus, illegitimate bases for unequal treatment by the government. *Abdala*, 583 So. 2d at 332. If unsupported stereotypes could justify laws that disadvantage unpopular groups, the government would have carte blanche to engage in invidious discrimination. Judicial review under such a standard would not be "uber deference," it would be no review at all. Just as Florida could not disadvantage blondes based on the baseless stereotype that they are dumb, it cannot disadvantage gay people based on the baseless stereotype that they make inferior parents.

Because Florida's rational basis test is fact-based, the court was correct to hear evidence from the parties to assess whether the gay exclusion is supported by a fact-based rationale or is based on unsupported stereotypes.

B. The Circuit Court's factual findings cannot be disturbed because they are based on substantial competent record evidence.

The court's conclusion that there is no rational relationship between the exclusion of gay people from adopting and promoting children's interests is based on extensive well-supported findings of fact. R.670-90, 695-97. DCF does not—and could not—argue lack of substantial competent evidence. Instead, it points to isolated fragments of testimony from Petitioner's experts that it says constitute rationales for the exclusion. As discussed below, many of DCF's descriptions of the testimony are grossly inaccurate. More importantly, this is not how findings of fact are evaluated on appeal. Factual findings can only be overturned if "totally unsupported by competent and substantial evidence." *Merslich v. Schnellenberger*, 578 So.2d 725, 726 (Fla. 3d DCA 1991). This Court cannot pick and choose as DCF suggests among bits of testimony and reweigh the evidence. *Lower Fla. Keys Health Sys. v. Beacon Health Plans, Inc.*, 946 So.2d 85, 87 (Fla. 3d DCA 2006).[12] This standard applies equally to appellate review of fact finding in cases involving constitutional challenges to state laws. *North Fla. Women's Health*, 866 So.2d at 626-27. In one such case, the Florida Supreme Court held that the DCA erred by "articulat[ing] numerous factual findings" that were not made by the trier-of-fact

[12] As the Florida Supreme Court explained, the reason for this deference is "the trial court's superior vantage point" to "evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses." *Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999).

and in many instances, were "contradicted by the trial court's findings on the same point." *Id., at* 631. "By ignoring the trial court's findings, the district court violated the basic precept of appellate review . . . ." *Id.*

The Circuit Court had the opportunity to hear all the evidence and made numerous findings of fact, including the rejection of all of DCF's asserted rationales and findings that it is a matter of scientific consensus and recognized by all the relevant professional groups that gay people and heterosexuals make equally good parents, and that the scientific evidence is so robust that it is "beyond dispute" that the exclusion does not promote the best interests of children. R.676, 696-97. These findings do not allow for DCF's assertion that the law is rationally related to any child welfare interest, or that this is even "arguable" or a subject about which there is "debatable evidence." DCF Brf. 22-24. All of the court's findings were amply supported by the record and, thus, cannot be disturbed.

1. Gay people and heterosexuals make equally good parents and raise equally well-adjusted children.

Based on the record, the court found: 1) "it is clear that sexual orientation is not a predictor of parenting ability"; 2) there is no difference in the adjustment of children of gay and heterosexual parents; 3) children raised by gay parents are no more likely than other children to be maladjusted or have behavioral, psychological, academic, relationship, gender identity or sexual identity problems;

and 4) it is a matter of scientific consensus recognized by professional groups including the American Psychological Association, the American Academy of Pediatrics, the Child Welfare League of America and the National Association of Social Workers that children of gay and heterosexual parents have equally good outcomes. R.675-78, 685, 688, 695-97(1005-10, 1194-1200, 1230-40, 1245-48, 1382-84). These findings are supported by testimony of Dr. Michael Lamb, Dr. Fred Berlin, and Patricia Lager, distinguished experts in children's development, sexuality, and child welfare, respectively. R. 980-89, 1165-80,1349-62.

These findings make clear that this is not a matter of scientific controversy or debate. Indeed, even one of DCF's experts admits that the rest of the scientific community disagrees with his views about the well-being of children of gay parents. R.1933. DCF's experts did not dispute that numerous studies have consistently concluded that parental sexual orientation has no bearing on children's healthy development.[13] Instead, they quarreled with the sufficiency and methodology of this body of research. But the court found, based on substantial competent evidence, that their characterization of the research is baseless because:

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[13] In the absence of any published academic studies to support its contrary position, DCF's expert relied on an unpublished student dissertation. In its brief, DCF also points to Dr. Lamb's testimony about a study by Sarantakos and suggests that this provides a basis for the exclusion. It does not because DCF has offered no basis to overturn the findings of the court, which was entitled to credit expert testimony that this study was not published in a recognized research journal and that the outcomes were explainable by children's differing exposure to divorce. R.1222-26.

1) numerous studies on gay parent families have been conducted by renowned and respected researchers; 2) these studies have been published in well-respected peer-reviewed journals and, thus, withstood the rigorous peer review process and were tested statistically and methodologically by seasoned professionals prior to publication; and 3) this body of research is both voluminous and broad, including both cross-sectional and longitudinal studies that followed children over many years, comparisons of children raised since birth by heterosexual married couples and lesbian couples, and studies of children adopted by gay parents. R.676-78, 696-97 (1194-1221, 1226-31, 1322).[14] Thus, the court found, "based on the robust nature of the evidence available in the field, . . . the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption." R.697.

These well-supported findings also show that contrary to the characterization of this body of research by the *Lofton* panel, the research on children raised by gay parents is not in its "nascent stage" or "inconclusive," it does not reach conflicting results[15], and it is not considered methodologically flawed by members of the field.

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[14] Contrary to DCF's suggestion, no expert for Petitioner or the children testified to "significant shortcomings" of this research, DCF Brf. 17, or suggested that it is insufficient to draw conclusions about the well-being of children of gay parents.

[15] The *Lofton* opinion stated that the legislature could "credit other studies that have found that children raised in homosexual households fare differently on a number of measures, doing worse on some of them, than children raised in similarly

The testimony supporting the Circuit Court's findings includes specific testimony that the *Lofton* court's characterization of the research was wrong. R.1205-22, 1226-27. *Lofton* was decided prior to trial with no expert testimony presented concerning the social science research on the well-being of children raised by gay parents. *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1383-84 (S.D. Fla. 2001).[16] The *Lofton* panel did its own review of the research and ultimately relied on unreliable sources. *See e.g., Lofton*, 358 F.3d at 825 n. 24 (relying on discredited study by Cameron, *see* note 16, *supra*, and manuscript entitled "No Basis" issued by the Marriage Law Project, which the Circuit Court also found unreliable based on expert testimony that this is not the type of source relied on by child development experts as the authors are not in the field and it is not from a scientific publisher. R.1203.). Here, in contrast, the Circuit Court had the opportunity to hear testimony from experts who are qualified to interpret the science and distinguish between the kinds of sources that scientists deem reliable (e.g., articles published in peer-

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situated heterosexual households." *Lofton*, 358 F.3d at 825. In support of that statement, it cited two articles. *Id.* at 825 n. 25. The first is a study by Paul Cameron. But the Circuit Court found based on undisputed testimony that this is not a reliable study; indeed, DCF's expert agreed that he does not trust the research of Cameron, who is affiliated with an anti-gay advocacy group. R.676 (1216-19, 1415-19, 1651-52, 1927).

The *Lofton* court's second example of a study finding worse outcomes for children of gay parents is an article by Stacey and Biblarz which the Circuit Court found based on undisputed testimony concluded the opposite—that children of gay and heterosexual parents are equally likely to be well adjusted. R.676 (1220-21).

[16] The same is true of *Hernandez v. Robles*, 855 N.E.2d 1, 7-8 (N.Y. 2006).

reviewed journals, *see* R.739) and those that lack reliability.

The Circuit Court's findings here show that the *Lofton* panel was wrong in its portrayal of the scientific research on gay parent families, even as it existed at that time. The research upon which the Circuit Court relied included studies published both well before and after the *Lofton* decision. Indeed, there was expert testimony that the suitability of gay parents has been established by a body of research going back at least to the 1980's. R.1196.[17]

Not only did the court find that there is no child welfare basis for the exclusion, but *DCF itself* agreed. Through stipulations and testimony of its rule 1.310(b)(6) witnesses, DCF admitted that gay and heterosexual people make equally good parents. R.693 (Stip. 31). Indeed, DCF places children in permanent unsupervised guardianships with gay people. R.693 (Stip.29).[18] DCF agreed that placing children with gay parents does not harm or disadvantage them emotionally or physically and that excluding gay people from adopting does not benefit children. R.4349-51, 4374-4380 (Deposition of Kathleen Waters[19]).[20] Despite

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[17] DCF argues that the research upon which the court's factual findings are based is limited to research that was conducted in the past four years since *Lofton*. But while the court noted that the research has developed during this time, its findings about gay parent families are based on research going back decades. *Id.*

[18] DCF says it can "more easily intervene in non-adoptive placements," DCF Brf., 30 n. 15, but that is not the case for unsupervised guardianships.

[19] Ms. Waters was designated pursuant to Fla. R. Civ. P. 1.310(b)(6) to testify on behalf of DCF regarding, *inter alia*, all state interests supporting the ban in

DCF's views, its counsel presented expert testimony that took the opposite position. But the Circuit Court rejected that testimony as baseless.

2. None of the State's asserted rationales constitutes a rational basis for the exclusion.

As rationales for the exclusion, DCF asserts that: 1) gay people have elevated rates of psychiatric disorders; 2) same-sex relationships "may be less stable and more prone to domestic violence"; 3) children of gay parents are more sexually active and prone to sexual experimentation; and 4) children of gay parents face discrimination and stigma. While DCF's counsel and the experts they retained made such assertions, *DCF itself rejected all of them as justifications for the exclusion*. R. 4353-62, 4372-74. Moreover, the court's finding that there is a scientific consensus that parental sexual orientation has no impact on parenting ability or child outcomes should end the rational basis inquiry. Nevertheless, Petitioner summarizes the court's findings that supported its rejection of each of DCF's asserted justifications and the evidence upon which they are based.

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adoption by gay people. R.4610-13. As DCF's Rule 1.310(b)(6) designee, Ms. Waters' testimony on these topics is the testimony of DCF. *See, e.g., Topp, Inc. v. Uniden America Corp.*, No. 05-21698-CIV, 2007 WL 4218998 (S.D.Fla. Nov. 28, 2007). Ms. Waters is also the Adoption Program Manager at DCF headquarters and the DCF official most relied upon at DCF for adoption policy. R.4272, 4283.

[20] Even DCF's expert agrees that whether gay people should be permitted to adopt should be determined by judges on a case by case basis. R.1937-38.

a. Psychiatric disorders.

DCF's experts try to justify the exclusion on the basis that gay people as a group have statistically higher rates than heterosexuals of mental health conditions such as depression, anxiety, suicidality and substance abuse. The court made the following findings of fact demonstrating that this does not constitute a rational basis for the exclusion: 1) research shows that sexual orientation is not a proxy for psychiatric disorders, including substance abuse and smoking; 2) elevated rates of psychiatric disorders are associated with various demographic characteristics such as race, gender, age, socioeconomic status and sexual orientation; and 3) while the rates of these conditions are higher among gay people than among heterosexuals, the rates are also higher for various other demographic groups such as American Indians, the less educated, and the unemployed. R.673-4 (856-82, 891-94). These findings were supported by the testimony of Dr. Susan Cochran, a distinguished expert in psychology and epidemiology and, specifically, minority health disparities. R.842-55.[21]

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[21] The court's findings were further supported by Dr. Cochran's undisputed testimony that other demographic groups that are not excluded from adopting have similar or higher rates of these disorders than gay people and that sexual orientation is not the strongest demographic predictor of psychiatric disorders. R.856-79. She also testified that if all groups with elevated rates of depression were excluded, the only group that would be left is Asian American men. R.905.

DCF's experts agreed that various demographic groups have elevated rates of mental health problems, including drug abuse. R.1676, 1682-83, 1906.

Based on these findings, the court concluded that "[s]exual orientation no more leads to psychiatric disorders, alcohol and substance abuse . . . than race, gender, socioeconomic class or any other demographic characteristic." R.695. DCF takes a single line from the Judgment—"homosexuals are no more susceptible to mental health or psychological disorders, substance or alcohol abuse . . . than their heterosexual counterparts," R.710—and suggests that this reflects a misunderstanding of the evidence. But when the opinion is read in its entirety, it is clear that the "heterosexual counterparts" the court refers to are the demographic groups it mentioned with similar rates, and that the court had no misunderstanding.

The court correctly held that singling out gay people but no other groups with similar or higher rates of psychiatric disorders fails rational basis review. R.709-10. Unless the targeted group poses a unique concern not posed by other groups, equal protection does not permit that group to be singled out for a burden even under rational basis review. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 449-50 (1985), the United States Supreme Court, applying rational basis review, struck down a zoning law prohibiting group homes for developmentally disabled adults. The court rejected asserted concerns about flooding and traffic because they failed to explain the decision to single out this one group while allowing other multiple-resident facilities. Because this group did not pose any "different or special hazard" with respect to any asserted purpose, the

ordinance failed rational basis review. *Id. at 449; see also Shriners*, 563 So. 2d at 70 (in striking down law voiding charitable bequests made within 6 months of testator's death, court rejected asserted interest in protecting testators from improper pressure from charities because law did not protect against undue influence of others, such as lawyers, doctors, or relatives); *Kuvin v. City of Coral Gables*, No. 3D05-2845, 2007 WL 2376654, *1-2 (Fla. 3d DCA, Aug. 22, 2007)(in striking down ordinance barring parking of personally-used pick up trucks in residential areas, Court rejected asserted interest in maintaining community's residential character because ordinance did not bar other kinds of vehicles that pose same concern).[22]

DCF argues that making comparisons to other demographic groups is improper because laws that discriminate against some of those groups are subject to equal protection strict scrutiny and federal law prohibits discrimination against some of them. DCF Brf. 29. But this argument ignores the fact that several of the groups identified were not groups that are given such legal protections, e.g. low-income people, people with low education and the unemployed. R.856-79.

Finally, the notion that the Legislature excluded gay people in order to keep out people with psychiatric disorders that could affect children's well-being is

[22] DCF asserts that gay people are differently situated because they have a "combination of risk factors" that are not present among other demographic groups, DCF Brf. 28, but offered no evidence to support this assertion.

simply implausible given that the screening process applied to all applicants includes a medical screening and anyone deemed unable to provide a healthy, stable home for a child is not approved to adopt a child in Florida. R.692 (Stip. 18, 19, 21). This makes it hard to believe that the challenged statute was enacted to achieve the very same goal. *Moreno*, 413 U.S. at 536-37 (1973)(rejecting fraud prevention as rationale for excluding households with unrelated persons from food stamp eligibility because the existence of other provisions in the Food Stamp Act "aimed specifically at the problems of fraud" "casts considerable doubt upon the proposition that the [challenged rule] could rationally have been intended to prevent those very same abuses.").[23]

b. Couple instability and partner violence.

DCF argues that gay couples "may be less stable and more prone to domestic violence." DCF Brf. 34 (emphasis added).

The court made the following factual findings leading it to reject the argument that couple instability constitutes a rational basis for excluding gay people from adopting: 1) the research shows that the relationships of lesbians and gay men are similar in stability, quality, satisfaction, shared experiences and

[23] DCF suggests that Dr. Cochran testified that screening for psychiatric disorders is ineffective. DCF Brf. 27. But the record shows that she declined to speculate about screening mechanisms because it's not her expertise. R.970-72.

conflict resolution to those of heterosexual couples, R.671 (743-80);[24] 2) the American Psychological Association has concluded that same-sex couples seek and are successful at having committed relationships, have relationships that are no more dysfunctional than heterosexual couples' relationships, are able to form committed, stable, enduring relationships, and their relationships are subject to the same processes as heterosexual couples, R.672 (778-80); 3) break up rates of gay couples are similar to those of heterosexual couples who live together without being married, R.671 (760-63), who are not excluded from adopting, R.4335-36; 4) sexual orientation is no more significant a predictor of break up than other demographic characteristics such as age, income, religion, education and race, R.671-72 (757-78, 784-95); and 5) the stability of a relationship is affected by multiple characteristics as opposed to one single factor, R.672-73 (784-94).[25] These findings were supported by the testimony of Dr. Anne Peplau, a

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[24] In an extraordinary distortion of the record, DCF says that "Dr. Peplau acknowledged a study showing that homosexuals may not feel the same moral obligation or family-based compulsion [as heterosexuals] to remain in a relationship." DCF Brf. 36. But the record shows that Dr. Peplau was criticizing Dr. Schumm for misleadingly characterizing the study as suggesting this. R.816-20. DCF's description of Dr. Peplau's testimony turns it on its head.

[25] Astonishingly, DCF objects to comparisons to break-up rates of other demographic groups such as African Americans because they could be explained by other variables such as education. DCF Brf. 28. Yet it ignored testimony that other variables could also account for the break-up rates of gay couples such as absence of children in the families studied. R.776-78. This further illustrates the irrationality of using demographic traits as proxies for couple instability.

distinguished expert on heterosexual and gay couple relationships. R.732-42.[26]

Given the similar break up rates of gay, unmarried heterosexual and married couples in various demographic groups, the court correctly concluded that relationship instability does not constitute a rational basis for singling out gay people and no other group for exclusion. *Cleburne*, 473 U.S. at 448-50 (classification can only be upheld if singled out group poses unique concern not posed by other groups); *Shriners*, 563 So. 2d 64; *Kuvin*, 2007 WL 2376654.

With respect to domestic violence, the court found that there is no basis for the assertion that gay couples have higher rates than heterosexual couples. R.671-72 (810-12). This was based on the expert testimony of Dr. Peplau, whose expertise includes domestic violence. R.735-36. And while DCF's expert raised domestic violence as an issue, he admitted that his views on this were "tentative[]" because he "didn't have enough data." R.1654-57. In the end, it was undisputed that studies show that the highest rate of domestic violence is experienced by women in heterosexual relationships and that the rates for people in same-sex couples and men in heterosexual relationships are lower. R.812.[27]

Finally, it is impossible to believe that the legislature enacted this exclusion

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[26] As the court noted, the Laumann study cited by DCF did not assess couple relationships but rather the number of sexual partners individuals have had. R.679.

[27] Dr. Peplau never opined, as DCF suggests, that the research on domestic violence is insufficient to draw conclusions. *See* R.811-12.

in order to protect against relationship instability and domestic violence when those problems are individually screened for. *Moreno*, 413 U.S. at 536-37. All adoption applicants are subjected to criminal records, child abuse registry and reference checks, a home study and a medical screening. R.692 (Stip. 18). Anyone deemed unable to provide a safe, stable home for a child is not approved to adopt. R.692 (Stip. 19, 21). And DCF admits that married and unmarried couples are screened for relationship stability the same way. R.692 (Stip. 20).

c. The sexuality of children of gay parents.

DCF asserts that children of gay parents "appear to have higher rates of sexual activity and experimentation." DCF Brf. 31. At trial, its expert testified that having gay parents leads to a higher likelihood of being gay, although he acknowledged that his view is not accepted among the scientific community, R.1919-20, and that most children of gay parents become heterosexual. R.1863.

The court found that there is no difference between children of lesbian and heterosexual parents in terms of their sexual orientation. R.677, 685 (1235-40, 1382-84).[28] This finding was based on the testimony of Drs. Lamb and Berlin.[29]

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[28] The evidence showed that parents' attitudes about homosexuality (e.g., accepting or intolerant) may affect how their children react to feelings of same-sex attraction if they have them when they grow up, *e.g.*, whether they acknowledge or act on them. This is the case regardless of the parents' sexual orientation. R.1235-40, 1386-88. But one's sexual orientation is not caused by his parents' orientation.

On appeal, DCF asserts, citing Dr. Lamb's testimony, that gay parents tolerate and support sexual activity by *minor children*. This is a complete distortion of the testimony of Petitioner's expert, who never testified that children of gay parents are prematurely sexually active. DCF points to Dr. Lamb's testimony about the sexuality of people raised by gay parents—how they react to feelings of same-sex attraction if they have such feelings, and that they hew less to the double standard for boys and girls, R.1234-40—and characterizes it as being about minors' sexual activity. But the court found, based on Dr. Lamb's testimony, that research showed no difference between children of gay and heterosexual parents with respect to the age at which they initiated sexual activity. R.677 (1235-36).[30]

d. Discrimination and stigma.

DCF asserts that the statute is justified to shield children from the prejudice

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[29] The *Lofton* panel's suggestion that parents' role modeling of sexual orientation can influence their children's sexual orientation was, thus, found to be factually false. Indeed, the Second DCA's opinion in *Cox* disclaimed "reliance upon any unsubstantiated notion that a homosexual parent could 'teach' a child to become a homosexual." *D.H.R.S. v. Cox*, 627 So. 2d 1210, 1220 (Fla. 2d DCA 1993).

Nor is there any factual basis for the *Lofton* court's assumption that children need parents of the same sexual orientation to be effectively guided through adolescence. The Circuit Court's findings about the well-being of children of gay parents are well supported by expert testimony, including specific testimony that heterosexuals are capable of effectively parenting gay teenagers and gay people are capable of effectively parenting heterosexual teenagers. R.1243-44.

[30] *Amicus* American College of Pediatricians suggests that being raised by gay parents poses a risk of childhood gender identity disorder, but the court rejected this based on expert testimony. R.676 (1231-33).

of others against gay people. The court made the following findings, based on competent substantial evidence presented by Dr. Lamb, demonstrating that shielding children from social stigma does not constitute a rational basis for the exclusion of gay people from adopting: 1) children raised by gay parents develop social relationships the same as those raised by heterosexuals; 2) children of gay parents are not ostracized any more than children of heterosexuals;[31] 3) children tease and bully their peers about a range of characteristics of their parents such as their appearance, employment, ethnic background and sexual orientation, all of which can be equally hurtful, thus, excluding gay people from adopting does not shield children from teasing. R.677-78 (1245-48, 1688-89).[32]

In addition to being refuted factually, excluding gay people to shield children from prejudice against this group is not even a legitimate government interest. The right to equal protection bars the government from disadvantaging an unpopular group based on disapproval of the group, whether the disapproval is the government's own or it is deferring to the views of others. *See Cleburne*, 473 U.S. at 448 (government cannot avoid the requirements of equal protection by deferring to the "objections of some faction of the body politic."). Nor may the government

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[31] The expert testimony showed that *if* children of gay parents face teasing, they are more likely than others to be teased about their parent's sexuality, but they are no more likely than other children to be teased. R.1246-47.

[32] Thus, singling out gay people to protect against prejudice lacks a rational basis. *Cleburne*, 473 U.S. at 449-50; *Shriners*, 563 So. 2d 64; *Kuvin*, 2007 WL 2376654.

discriminate against disfavored groups in the context of parenting in order to shield children from prejudice, however real. In *Jacoby v. Jacoby*, 763 So. 2d 410 (Fla. 2d DCA 2000), the court held that it is unconstitutional to rely on social stigma attaching to a mother's lesbian orientation when making child custody decisions because "the law cannot give effect to private biases." *Id.*, at 413, citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)(reversal of denial of custody to a mother based on concern about stigma to the child associated with mother's interracial relationship). Even the Second DCA's *Cox* opinion explicitly disavowed reliance on "possible injury the children might arguably sustain due to private biases or perceived prejudices against homosexuals," citing *Palmore*. *Cox*, 627 So.2d at 1220. Pandering to prejudice was not a legitimate state interest then and is not now.

3. There is no other conceivable basis for the exclusion.

Prior to trial, DCF's counsel and its experts asserted additional purported rationales for the exclusion: 1) gay people pose a risk of child sex abuse, R.337-39, 344-45, 2) gay people are excluded because of physical health problems such as HIV, R.346, 408-09, 3) gay people are excluded in order to get children placed in families with a mother and a father, which it said are "optimal", R.3700, and 4) "promoting public morality." R.3700. *However, DCF itself rejected all of these rationales.* R.4328, 4353-58, 4372-74; *see also* R.690-91 (Stips. 2-4, 6, 8). And DCF ultimately did not present evidence to support any of them at trial.

Nevertheless, Petitioner presented expert testimony rebutting them and the court made findings rejecting them. While the absence of any evidence at trial to support them should end the inquiry under Florida's rational basis test, Petitioner explains below why these abandoned rationales also fail rational basis review.

a. Child sex abuse

DCF's experts asserted the long-refuted myth of gay people as sexual predators, *see, e.g., State v. Blomquist*, 178 P.3d 42 (Kan. App. 2008) (collecting cases). The court found, based on the undisputed testimony of Dr. Berlin (an expert on child sex abuse, R. 1362) that gay people are no more likely than heterosexuals to sexually abuse children. R.685, 687(1403-15, 1424).

b. HIV

Any purported concerns raised by DCF's experts about HIV cannot constitute a rational basis for the exclusion because DCF stipulated that having HIV does not disqualify applicants seeking to adopt. R.691 (Stip. 11).[33] In any case, the court rejected this rationale as a factual matter based on undisputed expert testimony of Dr. Margaret Fischl, a distinguished HIV expert. R.684-85 (1047-87).

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[33] Moreover, state law prohibits excluding disabled people from adopting without a determination that the disability renders them "incapable of serving as an effective parent." § 63.042(4), Fla. Stat.; *see also Doe v. County of Centre*, 242 F.3d 437, 446-50 (3d Cir. 2001)(A.D.A. demands individualized determination).

c. Placing children in families with a married mother and a father.

The asserted interest in providing children a family with a married mother and father, which was accepted by the *Lofton* panel as a rational basis for the exclusion, fails the Florida rational basis test for two reasons.

i) The gay exclusion is not rationally related to the goal of placing children with married dual-gender couples.

First, assuming *arguendo* that families with a married mother and father are optimal for children, the exclusion fails the rational basis test because it does not rationally advance that goal. The challenged regulation disqualifies gay people; it does not limit adoption to married dual-gender couples. It is undisputed that DCF permits single heterosexuals to apply and be considered on their merits and makes over a third of adoptive placements with singles, R.690 (Stip. 1, 2), and does not exclude heterosexuals who live with unmarried partners. R.4335-36.

If Florida wished to limit adoptions to married dual-gender couples, excluding only gay people is a wildly illogical way to do so because it lets in the vast majority of people who do not fall into this category. R.808-09. This is not merely an imperfect fit between the classification and the purpose. It is simply implausible that a government body desiring to place children with married dual-gender couples would try to do so by excluding gay people. *See Hechtman v.*

Nations Title Ins. of N.Y., 840 So. 2d 993, 996 (Fla. 2003)(under rational basis test, court must determine whether it was "reasonable for the Legislature to believe that the challenged classification would promote [the asserted] purpose.").

The speculation that single heterosexuals might marry one day does not bridge the gap between the exclusion and this asserted interest. DCF admits that it makes placements with singles based on the assessment that the family is appropriate as is, and that a single person's stated intent never to marry does not disqualify her from adopting. R.690-01 (Stip. 5 and 6). And it is not plausible that a Legislature seeking to promote this interest would allow single heterosexuals to be approved on the gamble that after adopting, they might one day get married.[34]

The statute also lacks a rational relationship with this interest because, as DCF recognized, given the undisputed shortage of adoptive parents, R.693-94 (Stip. 33-40), 4300, no one could rationally believe that this exclusion would result in more children being placed in married dual-gender parent families. R.4355-56.

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[34] The *Lofton* panel accepted that the asserted interest in providing children a family with a married mother and father was rationally furthered by the exclusion of gay people. Not only is *Lofton* inapplicable because it applied federal law, but three dissenting judges explicitly disagreed with this conclusion, reasoning that because Florida's statutory scheme, which allows single heterosexuals to adopt, is "so riddled with exceptions" to placements with married mothers and fathers, the purported purpose of providing married dual-gender couples cannot "reasonably be regarded as [the law's] aim." *Lofton*, 377 F.3d at 1290-1303 (Barkett, J, dissenting from denial of *en banc* review (joined by Anderson and Dubina, JJ))(quoting *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972). The dissenting judges criticized the panel for "stretch[ing] mightily" to bridge this "glaring gap." *Id.* at 1297.

ii) The court found based on undisputed evidence that there is no factual basis for the assertion that children are best off with married dual-gender parents.

Even if the exclusion did rationally advance this goal, it is not a legitimate State interest because the court found based on undisputed expert testimony that there is no factual basis for the assertion that children are better off if raised by married dual-gender couples than by same-sex couples. R.678, 696-97. The Court may not accept unsubstantiated assumptions about the inferiority of gay couples as compared to heterosexual couples because *Cox* demands that rational basis review be based in factual reality. Moreover, the interest in promoting placement with married dual-gender couples is premised on the notion that men and women are fundamentally different in how they parent. The Court cannot rely on assumptions about differences in abilities of men and women. *See U.S. v. Virginia*, 518 U.S. 515 (1996)(striking down military academy's exclusion of women); *id.* at 541 ("we have cautioned reviewing courts to take a 'hard look' at generalizations or 'tendencies' of the kind pressed by Virginia" about men and women).

The Circuit Court found that it is a matter of scientific consensus that children raised by gay couples are not disadvantaged compared to children raised by heterosexual couples. R.676, 696-97. The court also found based on undisputed testimony that the commonly held assumption that children need a mother and

father to be well-adjusted is not supported by the research and there is a scientific consensus that they do not.[35] R.678 (1254-61).[36]

DCF itself, by its policies, practices, and admissions in this litigation, disavows this asserted interest. It is undisputed that Florida does not limit adoption placements to married heterosexual couples. Florida law expressly permits single heterosexuals to adopt. § 63.042(2)(b), Fla. Stat. DCF even recruits unmarried people to adopt, R.690 (Stip. 4), and reports that over a third of its adoptions are to singles. R.690 (Stip. 2). DCF admits that it does not limit adoption by singles to those who intend to marry. R.690-01 (Stip. 6). It does not even have a preference for married applicants. Fla. Admin. Code R. 65C-16.005(3)(e); R.4328. In fact, DCF agrees that for some children, single adoptive parents are preferred, even over available married couples. R.691 (Stip. 8). DCF admits that single people can make equally good parents, R.690 (Stip. 3), and that children do not need a male and female role model at home to develop optimally, R.4353. And the State does not exclude heterosexuals who live with an unmarried partner. R.4335-36.

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[35] *See Kutil v. Blake*, No. 34618, 2009 WL 1579493 (W.Va. June 5, 2009)(granting writ of prohibition and reversing trial court's decision to remove child from lesbian foster parents in order to find her a placement with a married couple, rejecting trial court's position that married couples are always the placement of choice).

[36] The undisputed expert testimony showed that while two-parent families tend to better promote good adjustment than single-parent families (which often suffer from lack of parenting time and resources and the experience of a divorce), there is no scientific basis for the assertion that the gender of parents—as opposed to the number of parents—is relevant to children's healthy adjustment. R.1256-59.

d. Promoting public morality.

The court correctly held that "public morality per se, disconnected from any separate legitimate interest, is not a legitimate government interest to justify unequal treatment." R.711. The equal protection guarantee prohibits the State from singling out a group of people for disfavored treatment for the purpose of disadvantaging that group. *See Romer*, 517 U.S. at 632-33. Under the rational basis test, a classification can only stand if it "bears a reasonable relationship to a permissive legislative objective and is not discriminatory, arbitrary, or oppressive." *Abdala*, 583 So. 2d at 333. There must be a separate legitimate objective that the classification reasonably furthers; discrimination for its own sake is not allowed.

The fact that the discrimination is based in some people's views of morality does not change that. The Florida Supreme Court made this clear in *In re Fla. Bd. of Bar Examiners,* 358 So. 2d 7, 8-9 (Fla. 1978), when it held that the moral fitness requirement for admission to the Florida Bar cannot bar the admission of gay lawyers because the right to equal protection requires that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law," and there was no evidence that being gay is incompatible with performing the duties of a member of the Bar. *Id.*, at 10 ("[g]overnmental regulation in the area of private morality is generally considered anachronistic" unless there is a substantial

connection to the "public interests and welfare.").[37]

A number of courts around the country have also rejected purely public morals-based justifications for laws that disadvantage a group of people—including gay people—as failing equal protection rational basis review. *See e.g., Limon*, 122 P.3d at 34-35 (different criminal penalties for same-sex and opposite-sex teen sexual conduct not justified by goal of preserving traditional sexual mores and promoting the moral development of children); *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002)(rejecting public morals justification for homosexual sodomy law).

There is no "morality" exception to equal protection. If there were, this guarantee would mean little as the government could simply cloak its desire to discriminate against unpopular groups in moral terms. The State's assertion that it seeks to protect minors does not change the analysis. *See Limon*, 122 P.3d 22. The Circuit Court found that the exclusion has no rational connection to promoting children's well-being. R.697. All that is left is moral disapproval of gay people, which, with nothing more, does not withstand rational basis review.[38]

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[37] Dicta in *Lofton* suggested that under federal equal protection principles, public morality may be a sufficient justification for a law that disadvantages a group, *Lofton*, 358 F.3d at 819 n. 17, although that is hard to square with *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003)(moral disapproval of homosexuality not a "legitimate state interest"). But a public morals justification for a law that disfavors a group of people does not comport with Florida's equal protection guarantee.

[38] All of the cases cited by DCF (at 30) discuss laws that apply to everyone, not laws that implicate equal protection by singling out only some.

The court also concluded that allowing gay people to be long-term foster parents but denying children in their care the legal relationship that comes with adoption does not rationally further an interest in morality. R.711-12.

4. The exclusion affirmatively harms children.

In addition to finding that the exclusion of gay people from adopting does nothing to promote children's welfare, the court found, based on undisputed evidence, that the statute actually harms the children it is purportedly meant to protect by reducing the number of potentially qualified adoptive parents. R.687-90.

First, as DCF acknowledged, the exclusion causes some children to be deprived of placement with the family that is best suited to meet their needs. DCF admits that the qualities that make an applicant the optimal match for a particular child could exist in a heterosexual or gay person. R.693 (Stip. 32). Thus, gay people could be the ideal placements for some children. R.1000-02, 1267, 4352.

In addition, as DCF further acknowledged, the statute gets in the way of finding permanent placements for children like John and James who are in the care of gay foster parents. R.4339, 4578, 4580 (Deposition of Ada Gonzalez[39]). The undisputed expert testimony showed that this creates the risk of having attachments broken, which can have profound negative consequences for their long-term

[39] Ada Gonzalez was also designated under to Fla. R. Civ. P. 1.310(b)(6) to testify on behalf of DCF. R.4610-13. *See supra* note 20.

development, including the inability to get along with people, problems in school, and juvenile delinquency. R.998, 1029, 1274-76, 1486-88. DCF admitted, and undisputed expert testimony confirmed, that alternative forms of permanency such as guardianship, in addition to denying children material benefits that come with adoption, *see* R.694 (Stip.43)), do not provide psychological permanency—the "sense of belonging" and a "forever relationship"—that being adopted provides. R.694 (Stip. 42-43), 1031, 1487-88, 1492-93. Thus, according to DCF, where reunification with birth family is not possible, adoption—not guardianship—is the optimal goal. R.694 (Stip. 41).

Finally, it is undisputed that the gay exclusion exacerbates the shortage of adoptive families, R.693-94 (Stip. 34-40[40]), leaving more children with no family at all. The long-term consequences of aging out of foster care without ever being adopted include emotional problems, drug abuse, homelessness, criminal conduct, unemployment and unplanned pregnancies. R.997-1000, 1488, 4289-91. DCF recognizes that the shortage of adoptive parents is a "serious problem" and that having a bigger pool of adoptive parents would help it find families for medically involved children, teens, large sibling groups and children with mental health

[40] At any given point, there are about 900 to 1000 children in Florida who need adoptive parents to be recruited for them. R.693 (Stip. 35-36). In 2006, 165 children aged out of the system without ever being adopted. R.693 (Stip. 37). The average length of stay for children in foster care in Florida before a finalized adoption was over 30 months in fiscal year 2005/2006. R.694 (Stip. 38).

problems. R.694 (Stip. 39-40). The State has set up various programs to increase recruitment of adoptive parents, R.693 (Stip. 34), yet the shortage persists.

DCF admitted that the exclusion is contrary to well-established best practices in child welfare, that it does not promote the interest of children or benefit children in any way, and that eliminating the ban would serve children's interests as it would be able to get some foster children adopted. R.4339-40, 4346-52, 4374-80.

5. The asserted interest in promoting children's welfare cannot be credited when the State does not categorically exclude the groups of people known to pose a threat to children.

While the State categorically excludes gay people, whom it acknowledges (through its admissions and placement practices) do not pose a risk to children, it does not categorically exclude those groups it knows pose a threat to children. Even convicted felons may apply to adopt and be considered. While Florida law permanently bars individuals convicted of domestic violence felonies and temporarily bars those with drug convictions from adopting children in state custody, people with such convictions are not barred from adopting children privately. R. 691 (Stip.12-14). Individuals convicted of any other crimes may be considered even for children in state custody. *Id.* Recognizing the potential danger of such individuals, the State requires that they undergo a special review process but they are not disqualified. *Id.* Even applicants who have previous verified

findings of child abuse, neglect or abandonment are not disqualified from adopting. Like felons, they are subject to special review, but not banned . R.692 (Stip.15).

It is impossible to believe that the legislature enacted the exclusion of gay people from adopting to promote children's welfare when it allows consideration of applicants from groups known to pose a threat to children. *See Lofton*, 377 F.3d at 1313 (Marcus, J., dissenting from denial of *en banc* review (joined by Tjoflat and Wilson, JJ.)("there is a serious and substantial question whether Florida can constitutionally declare all homosexuals ineligible to adopt while, at the same time, allowing them to become permanent foster parents, and not categorically barring any other groups such as convicted felons or drug addicts from adopting.").

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In sum, given the court's factual findings, just as the Arkansas Supreme Court unanimously agreed in *Howard v. Child Welfare Agency Review Bd.*, 238 S.W.3d 1 (Ark. 2006), and another Florida circuit court found last year (*Adoption of Doe*, 2008 WL 5070056 (Fla. 16th Cir. Ct. Aug. 29, 2008)), there is no factual basis to believe that children raised by gay parents are disadvantaged in any way or that the exclusion of gay people from adopting serves any child welfare purpose. Indeed, the Circuit Court found that the law works against the interests of children by depriving them of available qualified adoptive parents. R.687-90. The

Circuit Court properly concluded that the statute fails rational basis review.[41]

C. There is no basis to disturb the Circuit Court's witness credibility determinations.

DCF asks this Court to set aside the Circuit Court's credibility assessments of its expert witnesses. But this is "the province of the trier of fact." *Guzman v. State*, 721 So.2d 1155, 1159 (Fla. 1998). A trial judge's findings concerning the credibility of witnesses may not be set aside unless they are unsupported by substantial, competent evidence. *See, e.g., Burns v. State*, 944 So.2d 234, 247 (Fla. 2006). This is because she can see and hear and observe the demeanor of the

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[41] These facts also lead to the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634. The law is a "status-based enactment divorced from any factual context from which [to] discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake." *Id.*, at 635. It "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Id.* This, the equal protection clause does not permit.

In fact the legislative history of Fla. Stat. § 63.042(3), which Judge Barkett reviewed in her dissent in *Lofton*, demonstrates that the law was passed not out of an interest in promoting children's welfare, but to make gay people unequal. The law was enacted after an organized anti-gay campaign led by Anita Bryant after Dade County passed a sexual orientation anti-discrimination ordinance. *Lofton*, 377 F.3d at 1301-03 (Barkett, J., dissenting from denial of *en banc* review (joined by Anderson and Dubina, JJ)). She pointed to the virtual absence of discussion of children's welfare in the legislative proceedings and the bill sponsor's statement that the purpose of his bill was to send a message to gay people that "[w]e're really tired of you. We wish you would go back into the closet." *Id.*, at 1303. *See also Adoption of Doe*, 2008 WL 5070056, *10-15 (discussing state's history). There is no need to conclude that animus was at work to invalidate the law. The court correctly struck it down because of the lack of a rational basis. But this history helps explain how an adoption law so contrary to children's welfare came to pass.

witnesses. *Shaw v. Shaw*, 334 So.2d 13, 16 (Fla. 1976).[42]

DCF argues that the court rejected its experts' testimony "because of the[ir] religious backgrounds." DCF Brf. 40. This assertion is wholly inaccurate. With respect to Dr. Rekers, the court concluded, based on his "testimony and demeanor" that his testimony was not a "neutral and unbiased recitation of the relevant scientific evidence." R.683. The court listed a number of bases for this conclusion:

*He heavily cited a study by an individual who has been sharply criticized as distorting data and censured by the American Psychological Association. R.680 (1219, 1418-19, 1644-47);

*In a paper he wrote on gay parent families, he cited articles written by non-scientists. R.680 (1268-69);

*He testified that he favors removal of a child from a gay parent family even after being in the family for 10 years in favor of placement in a heterosexual household and, to the court's "astonishment," that the child could recover from the removal within a year. R.681 (1735-36);

*He wrote various books in which he merges psychology and his religious beliefs about homosexuality and gender roles. R.681-83 (1716-31).[43]

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[42] The court did not exclude this testimony so *de novo* review is not appropriate.

[43] Dr. Rekers attempted to distance himself from these publications, testifying that they were written in 1982 and he no longer believes what he wrote. Yet he took credit for them in a CV that he prepared in 2007 or 2008. R.1760-67.

The record is replete with additional evidence that Dr. Rekers' testimony was not an unbiased scientific presentation. *See, e.g.* R.1269-71 (Dr. Rekers was criticized in the academic literature for distorting evidence to make it accord with his ideological beliefs); *see also* R.916-18.

The Circuit Court is not the first to discredit Dr. Rekers' testimony on the subject of gay parents. *See Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530, *8 (Ark. Cir. Dec. 29, 2004)("Dr. Rekers' willingness to prioritize his personal beliefs over his function as an expert provider of fact rendered his testimony extremely suspect and of little, if any, assistance to the court . . ." and "Dr. Rekers' personal agenda caused him to have inconsistent testimony on several issues.").

With respect to Dr. Schumm, the court noted his lack of professional competence. In discussing his conclusions based on his re-analyses of other researchers' studies on gay parent families, the court noted Dr. Schumm's acknowledgement that he applies statistical standards that depart from conventions in the field, other experts' testimony that his analyses contained fundamental errors, and Dr. Schumm's recognition that much of the scientific community disagrees with his conclusions. R.683-84. The court also noted that he, too, "integrates his religious and ideological beliefs into his research" and has a religiously based disagreement with homosexual practices. R.683.

While evidence of religious beliefs is not admissible for purposes of showing a witness's tendency for truthfulness, Fla. R. Evid. 90.611, it is admissible if relevant for other purposes, such as demonstrating bias. Fla. R. Evid. 90.611, Law Revision Council Note- 1976. Here, the court did not judge DCF's experts' truthfulness based on their religious backgrounds. Rather, it found they merged their religious and scientific beliefs about homosexuality. This, among other evidence cited by the court, demonstrated their lack of neutrality as experts.

II. Fla. Stat. § 63.042(3) should be evaluated under heightened scrutiny.

An alternative ground to strike down the law is that it is appropriately evaluated under heightened scrutiny and DCF cannot meet its burden under that standard.[44] Heightened scrutiny applies because the statute penalizes Petitioner for exercising the fundamental right to maintain his relationship with his partner, which falls within the protection of the rights to substantive due process and privacy guaranteed by the Florida Constitution. Art. I, §§ 9 and 23, Fla. Const.[45]

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[44] Because the court found that the statute fails even rational basis review, this Court need not decide whether heightened scrutiny is applicable. *See, e.g. Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) ("[I]f the statutory scheme cannot pass even the minimum rationality test, our inquiry ends.").

[45] Although the Circuit Court apparently believed that Florida precedent barred this argument, in fact it is an open question. The rejection of these claims in *Cox* can no longer be considered binding precedent because the court's ruling was grounded in *Bowers v. Hardwick*, 478 U.S. 186 (1986)(holding the federal Constitution's right to due process does not protect the relationships of same-sex couples). That case was overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

The Florida Supreme Court has said that intimate relationships are protected by the right to privacy. *B.B. v. State*, 659 So. 2d 256 (Fla. 1995). And the due process clause of the Florida Constitution "protects the full panoply of individual rights from unwarranted encroachment by the government." *Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 960 (Fla. 1991). *See also Lawrence*, 539 U.S. 558 (same-sex couples have a liberty interest in their relationships protected by federal due process clause); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-20 (1984)(federal due process clause protects "highly personal" relationships of "deep attachment[] and commitment[].").

When laws burden the exercise of rights protected by the privacy and substantive due process guarantees, they are evaluated under strict scrutiny. *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Reg.*, 477 So. 2d 544, 547 (Fla. 1985)(burdens on right to privacy can only stand if State demonstrates that "the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means."); *State v. Robinson*, 873 So. 2d 1205, 1214 (Fla. 2004)(laws that burden fundamental rights protected by substantive due process clause subject to strict scrutiny).

Petitioner and Roe have a constitutionally protected intimate relationship. The court found based on undisputed evidence that they have been living together as a couple since 2000 and formally acknowledged their commitment in 2002 by

exchanging rings before family and friends; they support one another financially and share joint bank accounts; and they are raising children together as a family – John and James, as well as Roe's biological son, Tom Roe, Jr. R.663-65 (1101-05).

The statute must be evaluated under strict scrutiny because it penalizes Petitioner for exercising his fundamental right to maintain his relationship with his partner. The statute categorically excludes otherwise qualified "homosexuals" from adopting children, and in *Cox*, the State said that this term, as used in the statute, bars only those who engage in "current, voluntary homosexual activity." *D.H.R.S. v. Cox*, 627 So. 2d 1210, 1214 (Fla. 2d DCA 1993). Thus, Petitioner would be eligible to adopt in Florida if he severed his relationship with Roe and refrained from entering into any other.

Strict scrutiny is triggered whenever the government burdens the exercise of fundamental constitutional rights, whether by completely barring the exercise of the right or by penalizing individuals for doing so. For example, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court struck down a state policy that required residency in the state for one year to become eligible for certain government benefits. It held that this policy unconstitutionally penalized people based on their exercise of the right to travel interstate. The residency requirement did not bar anyone from entering the state, but the Court applied strict scrutiny because the requirement disadvantaged people who chose to do so by denying them benefits.

Shapiro, 394 U.S. at 634. *See also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974)(striking down school policy requiring pregnant teachers to take maternity leave because "[b]y acting to penalize the pregnant teacher for deciding to bear a child," the policy constituted a burden on the exercise of the teachers' constitutionally protected freedom of personal choice in matters of family life); *Speiser v. Randall*, 357 U.S. 513 (1958)(invalidating law penalizing veterans who refused to take loyalty oath by denying them tax exemptions). As the Court explained in *Shapiro*, "any classification which serves to penalize the exercise of [a constitutional right], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Shapiro*, 394 U.S. at 634.

Here, Florida is penalizing Petitioner's exercise of his right to maintain his intimate relationship with his partner by barring him from consideration as an adoptive parent.[46] The Court need not find that there is a separate right to adopt to apply strict scrutiny. There is no right to receive government benefits (*Shapiro*, 394 U.S. at 634) or work as a teacher (*LeFleur*, 414 U.S. at 647-48), but unequal treatment in these contexts as penalties for exercising fundamental rights triggered

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[46] The affected right happens to be the right to form intimate relationships. But the same standard would apply regardless of the fundamental right affected. For example, if the State barred Jewish people from fostering, such policies would not prohibit Jews from practicing their faith but nevertheless, could only stand if supported by a compelling government interest and if narrowly tailored to achieve that interest. *See, e.g., McDaniel v. Paty*, 435 U.S. 618, 627-28 (1978)(applying strict scrutiny to law barring ministers from serving as delegates).

strict scrutiny. Similarly, because Florida penalizes applicants who exercise their right to form intimate relationships, the law must be judged under strict scrutiny.

The *Lofton* court's rejection of the intimate association claim in that case has no bearing here. There, the court deemed *Lawrence* to apply mere rational basis review to laws that burden intimate relationships. *Lofton*, 358 F.3d at 815-17. Other federal circuit courts have rejected and criticized this interpretation. *See Cook v. Gates*, 528 F.3d 42, 48-55 (1st Cir. 2008)(*Lawrence* mandates heightened scrutiny for laws that burden same-sex relationships); *Witt v. Dep't of Air Force*, 527 F.3d 806, 813-19 (9th Cir. 2008)(same). More importantly, *Lofton* interpreted the federal Constitution. The Florida Constitution "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." *In re T.W.*, 551 So.2d 1186, 1192 (Fla. 1989).[47]

Heightened scrutiny also applies because sexual orientation classifications

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[47] Whether the Florida Constitution provides greater substantive due process protection in the area of intimate relationships than its federal counterpart is an open question, *see M.W. v. Davis*, 756 So.2d 90, 100 n. 23 (Fla. 2000), but the Florida Supreme Court has provided greater protection applying Florida's due process clause than the federal courts provide when reviewing federal due process claims. *Compare In the Interest of E.H.*, 609 So. 2d 1289, 1290 (Fla. 1992)(due process right to appointed counsel arises whenever proceedings can result in permanent loss of parental custody), *with Lassiter v. Dep't of Soc. Servs. of Durham County*, 452 U.S. 18, 31-32 (1981)(parents in proceedings that can result in termination of parental rights are not necessarily entitled to counsel; determination made on case-by-case basis); *see M.E.K. v. R.L.K.*, 921 So. 2d 787, 790 (Fla. 5th DCA 2006)(discussing this difference).

are suspect because gay people have traditionally been targets of irrational discrimination. *North Fla Women's Health and Couns. Servs., Inc. v. State*, 866 So.2d 612, 646 n. 73 (Fla. 2003)(standard for suspect classification); *see, e.g., In re Marriage Cases*, 183 P.3d 384, 442(Cal. 2008) (sexual orientation classification suspect because it "bears no relation to a person's ability to perform or contribute to society" and "is associated with a stigma of inferiority and second-class citizenship, manifested by the group's history of legal and social disabilities"). Petitioner understands this Court may feel constrained by *Cox* on this question but raises the argument to preserve it for the Florida Supreme Court.

Because the statute lacks even a rational relationship to a legitimate government interest, it necessarily fails strict scrutiny. And because strict scrutiny requires tailoring, the statute could not possibly be upheld given DCF's admission that it places children in the permanent unsupervised care of gay people through guardianships, and its admission that it would have approved Petitioner's application to adopt John and James but for the statute.

III. The exclusion is an unconstitutional special law.

Another alternative ground for affirmance is that section 63.042(3) is an unconstitutional special law pertaining to the adoption of persons. *Adoption of*

Doe, 2008 WL 5070056 (Fla.Cir.Ct. Aug. 29, 2008).[48]

The Florida Constitution distinguishes between the Legislature's authority to enact general laws and its more circumscribed authority to enact "special laws." Art. III, §§ 6, 10, Fla. Const. Section 11(a)(16), Art. III, Fla. Const., explicitly prohibits special laws "pertaining to . . . adoption of persons." A law relating to certain persons as a class is a valid general law if the classification bears a reasonable relationship to a legitimate state objective and is "based upon proper differences which are inherent in or peculiar to the class." *Schrader v. Fla. Keys Aqueduct Auth.*, 840 So.2d 1050, 1055 (Fla.2003).

For all the reasons discussed above, the court's factual findings make clear that the classification at issue here does not bear a reasonable relationship to DCF's asserted interest in protecting children and that none of DCF's asserted justifications for the classification is based on differences "inherent in or peculiar to" gay people. Take, for example, DCF's assertion that the exclusion is justified by elevated rates of psychiatric disorders among gay people as compared to heterosexuals. As the findings showed, psychiatric disorders are hardly inherent in

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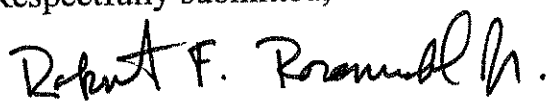
[48] The court dismissed this argument after DCF's objection on the ground that it was asserted two weeks before trial. However, under the tipsy coachman doctrine, a trial court's ruling will be upheld "if there is any basis which would support the judgment in the record." *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla. 1999). As discussed below, the court's findings based on the record demonstrate that the statute is an invalid special law.

gay people, as the majority do not have such disorders, R.673-74; nor are they peculiar to gay people, as evidenced by the court's findings that psychiatric disorders occur in every demographic group and, indeed, elevated rates of psychiatric disorders are found in a number of other demographic groups. *Id.* This is a more stringent standard than rational basis review. Because none of the asserted justifications constitutes a difference that is found in all gay people and only in gay people, Fla. Stat. § 63.042(3) is an invalid special law.

CONCLUSION

For the foregoing reasons, the statutory exclusion of gay people from adopting is unconstitutional and the decision below should be affirmed.

Respectfully submitted,



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