UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
Case No.: 01-16723-DD

STEVEN LOFTON, et al.,

Appellants,

-v-

KATHLEEN A. KEARNEY, et al.,

Appellees.

APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Laurence H. Tribe
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (617) 495-4621

Steven Robert Kozlowski
Fla. Bar No. 87890
The Kozlowski Law Firm
927 Lincoln Road, Suite 208
Miami Beach, FL 33139
Telephone: (305) 673-8988

Elizabeth Schwartz
Fla. Bar No. 114855
407 Lincoln Road, Suite 4-D
Miami Beach, FL 33139
Telephone: (305) 674-9222

Matthew A. Coles
James D. Esseks
Leslie Cooper
American Civil Liberties
Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400
Telephone: (212) 549-2627
Fax: (212) 549-2650

Randall Marshall
Fla. Bar No. 181765
American Civil Liberties Union
Foundation of Florida, Inc.
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227
Telephone: (305) 576-2337
Fax: (305) 576-1106

Attorneys for the adult plaintiffs

(counsel listing continued next page)

Thomas Wade Young
Children's First Project
Barry University
Dwayne O. Andreas School
Of Law
6441 East Colonial Drive
Orlando, FL 32807
Telephone: (407) 275-4451

Christina A. Zawisza
Fla. Bar No. 241725
University of Memphis School of Law
Child Advocacy Clinic
109 N. Main Street, 2nd Floor
Memphis, TN 38103
Telephone: (901) 523-8822 x253
Fax: (901) 543-5087

Attorneys for the child plaintiffs

Certificate of Interested Persons and Corporate Disclosure Statement

Under F.R.A.P. 26-1 and 11th Cir. R. 26-1, appellants certify that the following is a complete list of all trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal:

American Civil Liberties Union Foundation

American Civil Liberties Union Foundation of Florida, Inc.

Charles Auslander

Robin Blanton

Samuel Chavers

Children First Project of Nova Southeastern University

Matthew Coles

Leslie Cooper

John Doe (foster child of Steven Lofton)

James D. Esseks

Florida Department of Children and Families

Douglas E. Houghton, Jr.

Kathleen A. Kearney

United States District Judge James Lawrence King

Kozlowski Law Firm

Steven Robert Kozlowski

Steven Lofton

Randall Marshall

Moss, Henderson, Blanton, Lanier, Kretschmer & Murphy, P.A.

John Roe (child under guardianship of Douglas E. Houghton, Jr.)

Elizabeth F. Schwartz

Daniel Skahen

Wayne LaRue Smith

Laurence H. Tribe

Casey Walker

Christina A. Zawisza

____
Leslie Cooper

STATEMENT OF COUNSEL REGARDING BASIS FOR EN BANC REVIEW

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Lawrence v. Texas*, 123 S. Ct. 2472 (2003); *Romer v. Evans*, 517 U.S. 620 (1996), *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Does the Panel Opinion, which holds that Florida's exclusion of gay people from adoption can be sustained by a hypothetical rational basis, conflicts with the United States Supreme Court's decision in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), which requires heightened scrutiny?

2. Does the Panel Opinion, which holds that Florida's exclusion of gay people from adoption can be sustained by a rational basis premised on unsupported, biased assumptions about gay people, conflicts with the Supreme Court's decisions in *Romer v. Evans*, 517 U.S. 620 (1996), *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)?

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Matthew A. Coles
Attorney of Record for Plaintiffs-Appellants

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ISSUES FOR REHEARING/REHEARING EN BANC

1. Does the Panel Opinion, which holds that Florida's exclusion of gay people from adoption can be sustained by a hypothetical rational basis, conflict with the United States Supreme Court's decision in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), which requires heightened scrutiny?

2. Does the Panel Opinion, which holds that Florida's exclusion of gay people from adoption can be sustained by a rational basis premised on unsupported stereotypes about gay people, conflict with the Supreme Court's decisions in *Romer v. Evans*, 517 U.S. 620 (1996), *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), and *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)?

PROCEDURAL HISTORY

Plaintiffs filed a constitutional challenge to Florida's ban on adoption by lesbians and gay men, asserting that it violated their rights to equal protection and due process under the Fourteenth Amendment. The District Court granted summary judgment for the State. The Panel affirmed.

STATEMENT OF FACTS

The plaintiffs are Steven Lofton and the 12-year-old boy he has raised from infancy (the Loftons), Doug Houghton and the 12-year-old boy he has raised since he was four (the Houghtons), and a couple who want to adopt (Smith and Skahen).

Lofton, Houghton, Smith and Skahen are all gay. Record ("R")-124-Joint Pretrial Stipulation ("Stipulation") ¶¶ 26, 28, 34. The District Court found that the two fathers and their sons had a "deeply loving and interdependent relationship" and "emotional ties . . . as close as those between biological parents." *Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1379 (S.D. Fla. 2001). At about the time Florida moved for summary judgment, it began actively to try to find new parents for Lofton's son. (R-130-Adult Plaintiffs' Concise Statement of Material Facts ("Plaintiffs' Statement") ¶¶ 19-21; R-124-Stipulation ¶¶ 40-41.)

Florida evaluates on a case-by-case basis the parental fitness of all who apply to be adoptive parents. All, that is, except lesbians and gay men, who alone it conclusively deems unfit. Fla. Stat. § 63.042(3) (2002).

Florida explains that the law expresses the State's moral disapproval of homosexuality. Florida has never asserted that gay parents pose any kind of threat to children, just that married, heterosexual parents are "optimal." There is no evidence in the record that heterosexual couples are better parents than gay people. On the contrary, Florida admits that it knows of no child welfare basis for excluding gay people from its system. (R-130-Plaintiffs' Statement ¶¶ 7,8; R-145.[1]) Moreover, the state trusts gay people to take care of children long term: it

[1] At her deposition pursuant to Fed. R. Civ. Pro. 30(b)(6), Florida Department of Children and Families Adoption Specialist Carol Hutchison testified that there is no child welfare basis to exclude gay people from adopting children. R-145-

places children both in long-term foster care, which it describes as "de facto permanency," and in permanent unsupervised guardianships with gay parents. (R-124-Stipulation, ¶¶ 6, 7, 8, 9, 10, 11; R-24-Defendants' Motion to Dismiss, at 10.)

There is also no evidence that Florida's ban in fact has the effect of placing children with heterosexual couples. The undisputed facts showed that Florida has too few married heterosexuals willing to adopt, and too many children in need. So 25% of its adoption placements are with single parents, and even then, Florida still has over 3,400 children for whom no adoptive home is available. (R-124-Stipulation ¶¶ 15, 24.)

ARGUMENT

The Panel decision conflicts with governing Supreme Court precedent for at least two reasons: First, the exceedingly deferential rational basis review the Panel used does not apply here. After *Lawrence v. Texas*, the state cannot penalize gay people because they form intimate relationships with members of the same sex unless it can provide a sufficient justification that is real and not hypothetical. Second, the Panel upheld the adoption ban by relying upon unproven assumptions and stereotypes about gay people. That, in essence, is nothing more than

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Notice of Filing Original Affidavits and Exhibits in Support of Plaintiffs' Motion to Alter or Amend the Judgment, Fourth Declaration of Leslie Cooper, Exh. 1- Deposition of Carol Hutchison, at 58-59, 137-38. The State's foster care expert testified to the same effect at her Rule 30(b)(6) deposition. *Id.* Exh. 2- Deposition of Gay Frizzell, at 67-71.

discriminating on the basis of bias, in direct conflict with the Supreme Court's decisions in *Romer*, *Cleburne*, and *Moreno*. Fed. R. App. Pro. 35 (a)(1) & (2).

I. The Panel Opinion Conflicts With The Supreme Court's Ruling In *Lawrence v. Texas*

The Panel upheld Florida's ban by accepting what it called the "unprovable assumption" that heterosexuals make better parents than gay people. There was no evidence in the record to support that proposition. But after *Lawrence*, a state can no longer discriminate against gay people without providing a more substantial, real, justification.

Lawrence recognized that for gay people just as for heterosexuals, intimate adult relationships are part of the "enduring" "personal bonds" that give meaning to life. 123 S. Ct., at 2478. Thus, the Court held, lesbians and gay men have the same liberty interest in forming intimate relationships that heterosexuals have. *Id.* at 2482 ("Persons in a homosexual relationship may seek autonomy for these purposes [forming intimate relationships], just as heterosexual persons do"). The Court called this a "due process right to demand respect for conduct protected by the substantive guarantee of liberty," *id*., and held that this is a "full right" that can be engaged in "without intervention of the government," part of a "realm of personal liberty which the government may not enter," *id*. at 2484.

Florida's ban on adoption by "homosexuals," defined as "applicants who are known to engage in current, voluntary homosexual activity" (Slip Op. at 3), creates

specific negative consequences when gay people exercise the right to form intimate relationships that was identified in *Lawrence*. Florida's adoption ban thus places an *unequal* burden on that constitutional right for gay people, in violation of the equal protection clause. Now that this constitutional right is recognized, the State cannot penalize gay people for exercising it—as the challenged adoption law does—absent an important and tailored justification for doing so. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *see also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Speiser v. Randall*, 357 U.S. 513, 518 (1958).[2]

The Panel dismissed plaintiffs' argument for heightened scrutiny by concluding that *Lawrence* itself used deferential rational basis review. (Slip Op. at 25.) But *Lawrence* did not rule that no reasonable legislator could think that the classification in Texas' law would achieve a proper purpose—which is what a rational basis holding would have said. *See, e.g. Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955)(rejecting due process challenge under rational basis test, noting that the "legislature might have concluded" that the challenged statute furthered various legitimate interests). Instead, the Court held that the Texas statute "furthers no legitimate state interest *which can justify its intrusion into the personal and private life of the individual*," *id.* at 2484 (emphasis

[2] Where, as here, a challenged classification impinges upon a fundamental right, equal protection requires heightened scrutiny. *Romer*, 517 U.S. at 631. The Panel apparently understood plaintiffs' argument to be based on the due process clause, rather than the equal protection clause. (Slip Op. at 22.)

added). Rational basis analysis involves no assessment of whether the government's interest is sufficient to "justify" its "intrusion" into the life of the individual. A conceivable connection to *any* legitimate interest will do. The *balancing* of the state's interest against the individual's interest used in *Lawrence*, on the other hand, is a hallmark of heightened scrutiny. *See, e.g.*, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990)("[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'").

Moreover, the Court's explanation for its ruling was grounded squarely in case law about heightened scrutiny, not rational basis. Same-sex intimacy, the Court explained, is protected by the same right to autonomy recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); and *Carey v. Population Services Int'l*, 431 U.S. 678 (1977). Indeed, the Court characterized the *Griswold* line of cases, in which it applied heightened scrutiny, as "the most pertinent beginning" for its analysis, *Lawrence*, 123 S. Ct. at 2476. Further, the Court adopted the *Griswold*/*Carey* due process analysis used by Justice Stevens in dissent in *Bowers v. Hardwick*, saying it "should control here." *Id.* at 2484.

Lawrence could not have been a heightened scrutiny case, the Panel opined, because it did not announce a "new fundamental right" to engage in private sexual conduct, and did not perform the analysis crucial to finding a "new" right. (Slip Op. at 23 (citing Scalia, J., dissenting).) But that misses the point of the opinion. The Court did not identify a *new* fundamental right in *Lawrence* because it held the Texas law was invalid under a pre-existing right. The Court held that the right to make personal decisions about intimate relationships—a long-established liberty for heterosexuals—applies to gay people as well. 123 S. Ct. at 2478, 2481-82. That was why the Court relied on its existing cases—*Griswold, Carey* and *Casey*—and Justice Stevens' *Bowers* dissent instead of turning to the "new right" analysis.

The Panel observes that the *Lawrence* Court does not use the most familiar language of strict scrutiny analysis, which is true enough. Of course, it also doesn't use the terminology of rational basis, other than the use of the word "legitimate," which the Court uses in heightened scrutiny cases as well.[3] It may be that the Court is moving away from "strict scrutiny" terminology, as some of its most important due process cases before *Lawrence* suggest. *See, e.g.*, *Troxel v.*

[3] The term "legitimate" is not a marker of the rational basis test but has relevance to all levels of equal protection scrutiny, since the government interest advanced by the classification must always be legitimate. *See, e.g., Roe*, 410 U.S. at 155 ("Where certain 'fundamental rights' are involved, the Court has held that regulations limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (internal citations omitted).

Granville, 530 U.S. 57, 67-75 (2000) (striking down law burdening right to parental autonomy without using either traditional strict scrutiny or rational basis language); *Cruzan*, 497 U.S. at 279 (whether substantive due process right is violated requires "balancing [the individual's] liberty interests against the relevant state interests.").

In any event, what matters is what the *Lawrence* Court did, which is review the Texas law as a substantive matter, balancing the state interests against the liberty at stake. That is not rational basis review.

To read Lawrence as narrowly confined to its facts, as the panel also did, is to miss both its text and its tone. Concern about discrimination in civil as well as criminal contexts is in part what drove the Court to analyze the Texas law under the due process clause. The Court worried that if it simply invalidated criminal sodomy laws on equal protection grounds, states would do exactly what Florida is trying to do here: "subject homosexual persons to discrimination both in the public and the private spheres." *Id.* at 2482.

Lawrence is no narrow piece of legal craftsmanship; it brings gay people within the right to form intimate relationships and declares that burdens on that right impermissibly "demean[] the lives of homosexual persons." 123 S. Ct. at 2482. After *Lawrence*, no state can penalize gay people for exercising that right without offering a substantial justification. Because the Panel required no real

justification at all, it gave appropriate weight neither to *Lawrence* nor to the plaintiffs' challenge.

II. The Panel Opinion Conflicts With The Supreme Court's Decisions in *Romer*, *Cleburne*, and *Moreno*

The most basic principle of equal protection is that the government may not adopt a classification for the purpose of disadvantaging the group that is burdened by it. *U.S. Dept. of Agric. v. Moreno,* 413 U.S. 528, 534 (1973); *see also Romer v. Evans,* 517 U.S. 620, 633, 635 (1996). It follows from that basic principle that a legitimate purpose must be "independent" of the classification itself; a classification justified by a purpose that embodies its distinction would be "a classification of persons undertaken for its own sake, something the Equal Protection clause does not permit." *Romer,* 517 U.S. at 635.

The Panel thus erred when it upheld Florida's law as a rational way of promoting what it called its "interest in promoting adoption by marital families," or "its legitimate interest" in "seeking to place children in homes that have both a mother and a father." (Slip Op. at 30, 31.) This purpose *embodies* the classification. It is not a neutral purpose independent of the classification, so it can not be used to justify the classification. *Romer*, 517 U.S. at 633, 635.[4]

[4] The Panel also overlooked the fact that Florida recently removed any preference for adoption by married couples from its own regulations, Fl. Admin. Code § 65C-16.005(3)(C), belying the state's claim in this litigation that such placements are "optimal."

Nor could the Panel have escaped this difficulty by rearranging its holding a bit to say that Florida's purpose was promoting the best interests of children (it is this purpose that plaintiffs have always agreed is legitimate), and then saying the classification promotes that interest by assuming that heterosexual parents will do this better than lesbian or gay parents. Explaining a classification with, as the Panel called it, an "unprovable assumption" that the advantaged group is better at parenting than the disadvantaged group is still simply using the classification to justify itself. *Id.* at 633.[5] Indeed, it is precisely when government tries to justify discrimination with the assumption that "millennia of experience" recommends it that courts should be most on their guard. Too often, the assumptions of millennia prove to be little more than prejudice. *See, e.g.*, *Bradwell v. Illinois,* 83 U.S. 130, 141 (1872) (Bradley, J., joined by Field and Swayne, JJ, concurring) (Upholding refusal to allow women to practice law because it has long been recognized that women are naturally suited to the offices of wife and mother); *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (upholding law mandating racially segregated train

[5] Plaintiffs must protest the Panel's claim that they offered no "competent" evidence that this assumption is wrong. Plaintiffs offered the testimony of Department of Children and Family officials, who say they know of no child welfare basis for the exclusion, and the State's practice of placing children in what it described as *de facto* permanent placement, unsupervised in the case of guardians, with gay people. *See* Plaintiffs' Opening Brief at 34-35; Reply Brief at 2-3. Defendants never questioned the "competency" of this evidence.

accommodations because the legislature was "at liberty to act with reference to the established usages, customs, and traditions of the people").

The Panel Opinion observes that Florida explained its assumption that heterosexuals make better parents than gay people do by hypothesizing that heterosexuals will do a better job at helping children develop "sexual identity" and "gender identity" through "heterosexual role-modeling." (Slip Op. at 29.)[6] This at least is the beginning of a rationale. But while hypothesizing may be sufficient most of the time under rational basis review, a hypothesis that is nothing more than an unsubstantiated negative stereotype about the group burdened by the law is not. *See, e.g.*, *Cleburne*, 473 U.S. at 448-50 (rejecting the "unsubstantiated" claim that the mentally disabled would pose a greater evacuation problem in floods, or would cause greater parking congestion); *Moreno*, 413 U.S. at 536-539 (rejecting the "unsubstantiated" charge that hippies are more likely to commit fraud).

[6] The Panel attempted to give meaning to this asserted rationale by further hypothesizing that single heterosexuals, even if they never marry, may better guide children in adolescence by telling them stories about their own dating experiences. (Slip Op. at 37.) The Panel assumed, without any basis, that there is something so fundamentally different about gay people and same-sex relationships that gay and heterosexual people can't even relate to one another's experiences. To the extent the Court is suggesting that the gender of the potential dates has to be the same for parent and child in order for the child to relate to the parent's stories, then single heterosexuals would face the same deficit—they could only relate to their sons or daughters but not both. And if one believes that this story-telling benefit means that kids need to be parented by parents who share their sexual orientation, then excluding gay people takes away the only people who would be suitable to raise the gay teens waiting to be adopted.

The general principle that a classification can not be justified with unsubstantiated negative stereotypes applies with special force "[w]hen a law exhibits such a desire to harm a politically unpopular group . . .." *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring). This is certainly that kind of case. Florida's principal defense of the law has been that it expresses the state's moral disapproval of gay people and gay families. (Def. Opp. Br. at 41-42.) And in fact, the only direct evidence of the real intent of the law is the statement of its sponsor that the purpose of the law was to send a message to lesbians and gay men: "We are really tired of you. We wish you'd go back into the closet." (R-130-Plaintiffs' Statement ¶ 13.)

Near the close of its Opinion, the Panel attempts to ground its assumption that gay people are worse parents by offering a "study," not part of the record, that purports to show that children of gay parents "fare differently on a number of measures, doing worse on some of them . . . ." (Slip Op. at 43.) But as the Panel knew, that "study" is the creation of a disreputable charlatan whose work is universally rejected by real scientists.[7] It could never pass the standards for

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[7] As the *amicus curiae* brief of the Child Welfare League of America, *et al.* explained, Paul Cameron, who authored the only article published in a peer-reviewed journal to suggest that children raised by gay parents fare worse than those raised by heterosexuals, has been widely discredited by the scientific community:

> Cameron resigned from the American Psychological Association to avoid an investigation into charges of unethical conduct as a psychologist, was

admissibility in a federal court, which is doubtless why even the state was unwilling to refer to it for support. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow*

> expelled by the Nebraska Psychological Association and was officially censured by the American Sociological Association for consistently misrepresenting and misinterpreting sociological research on sexuality, homosexuality and lesbianism. *See* Stacey & Biblarz, [(How) Does the Sexual Orientation of Parents Matter, 66 Am. Soc. Rev. 159, 161 (2001)]; . . . . *Baker v. Wade*, 106 F.R.D. 526, 536-37 n.31 (N.D. Tex. 1985). A federal district court described Cameron's work concerning the effects of parental sexual orientation on children's development as "total distortion" of the data. *See Baker*, 106 F.R.D. at 536. . . . Cameron's work is unquestionably unscientific and unreliable because, among other things, he employs such informal methods as the analysis of obituaries of gay newspapers and consistently misrepresents the underlying data. *See Baker*, 106 F.R.D. at 536; *Gay Student Servs. v. Texas A&M University*, 737 F.2d 1317, 1330 (5th Cir. 1984) (dismissing Cameron's conclusions and holding there "was no historical or empirical basis" for his "speculative evidence.").

CWLA Brief, at 28-29, n.31.

The Panel also cited J. Stacey & T. Biblarz, (How) Does the Sexual Orientation of Parents Matter, 66 Am. Soc. Rev. 159 (2001), as an example of a study showing that the children of gay parents do not fare as well as children of heterosexual parents. But this article concluded that "[b]ecause every relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent child relationships or on children's mental health or social adjustment, there is no evidentiary basis for considering parental sexual orientation in decisions about children's 'best interest.'" *Id.* at 176. The authors note that while the majority of children of gay parents identify as heterosexual, they might be more open to the possibility of having same-sex relationships than children of heterosexual parents. *Id.*, at 178. But they emphasize that this is "just a difference," and "cannot be considered [a] deficit[] from any legitimate pubic policy perspective." *Id.*, at 177-78. Of course, the state never suggested that it has a legitimate interest in attempting to minimize the possibility that children, who are otherwise not measurably different in terms of mental health and social adjustment, will be lesbian or gay. That proposition would raise the gravest constitutional concerns. *See Palmore v. Sidoti*, 466 U.S. 429 (1985); *Lawrence*, 123 S. Ct. 2472.

Pharmaceuticals, Inc., 509 U.S. 579, 593-94 (1993); *Allison v. McGhan Medical Corp*., 184 F.3d 1300, 1312 (11th Cir. 1999).

In the end, negative stereotypes were also all the Panel could find to explain why, purposes and rationales apart, anyone could think this regulation could possibly achieve the aim of placing children with heterosexual couples. There is no dispute that Florida has a huge excess of adoptable children—well over three thousand at the time this case came to summary judgment—and that many spend years in multiple foster care placement. Florida may hope, the Panel speculated, that someday these children will be adopted by heterosexuals, and that the wait in temporary placements would be better than life with gay parents. But that hope rests ultimately on the same unsubstantiated assumption that gay people are less competent as parents.

Rational basis review gives government considerable deference. It does not give the government license to discriminate because it would like to, or to indulge whatever conjectures it has about the character flaws of unpopular minorities. *Moreno*, 413 U.S. at 534; *Cleburne*, 473 U.S. at 448-50. But in the end, that is all that the Panel could find to uphold this law.

CONCLUSION

That there is no real support for Florida's categorical ban on adoptions by gay people should come as no surprise. This ban has never been about child

welfare. It was passed not to protect children, but as an "expression of public morality" (Def. Opp. Br. at 42), more particularly to express the wish of the Florida legislature that gay people would go back into the closet.

Regardless of whether morality may generally speaking be a sufficient basis for legislation, as the Panel believed, "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" *Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring) (quoting *Romer,* 517 U.S. at 633). The Panel could find no legitimate basis for this law because there never has been one. The use of the legislative power to condemn a group of citizens is a rank offense against the equal protection clause.

The Panel decision should be vacated and the case should be reheard. On rehearing, the District Court's decision should be reversed and the case should be remanded for trial.

Dated: February 17, 2004

Respectfully submitted,

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Matthew A. Coles
James D. Esseks
Leslie Cooper
American Civil Liberties
Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004-2400
Telephone: (212) 549-2627
Fax: (212) 549-2650

Randall Marshall
Fla. Bar No. 181765
American Civil Liberties Union
Foundation of Florida, Inc.
4500 Biscayne Boulevard, Suite 340
Miami, FL 33137-3227
Telephone: (305) 576-2337
Fax: (305) 576-1106

Laurence H. Tribe
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
Telephone: (617) 495-4621

Steven Robert Kozlowski
Fla. Bar No. 87890
The Kozlowski Law Firm
927 Lincoln Road, Suite 208
Miami Beach, FL 33139
Telephone: (305) 673-8988

Elizabeth Schwartz
Fla. Bar No. 114855
407 Lincoln Road, Suite 4-D
Miami Beach, FL 33139
Telephone: (305) 674-9222

Attorneys for the adult plaintiffs

Thomas Wade Young
Children's First Project
Barry University
Dwayne O. Andreas School
Of Law
6441 East Colonial Drive
Orlando, FL 32807
Telephone: (407) 275-4451

Christina A. Zawisza
Fla. Bar No. 241725
University of Memphis School of Law
Child Advocacy Clinic
109 N. Main Street, 2nd Floor
Memphis, TN 38103
Telephone: (901) 523-8822 x253
Fax: (901) 543-5087

Attorneys for the child plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by federal express this 17th day of February, 2004, to:

Casey Walker, Esq.
MOSS HENDERSON BLANTON & LANIER, P.A.
817 Beachland Boulevard
P.O. Box 346
Vero Beach, FL 32964-3406

Counsel for defendants.

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Leslie Cooper