

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

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STEVEN LOFTON; DOUGLAS E. HOUGHTON, JR.; )  
JOHN DOE and JOHN ROE, minor children, by and )  
through their next friend, TIMOTHY ARCARO; )  
WAYNE LARUE SMITH and DANIEL SKAHEN, )  
 )  
Appellants, )  
 )  
-v- )  
 )  
KATHLEEN A. KEARNEY, Secretary of Florida’s )  
Department of Children and Families; and CHARLES )  
AUSLANDER, District Administrator of District XI of )  
Florida’s Department of Children and Families, )  
 )  
Appellees. )  
 )  

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**APPELLANTS’ REPLY BRIEF**

Docket No. 01-16723-D  
Lofton v. Kearney  
C-1 of 2

Certificate of Interested Persons and Corporate Disclosure Statement

Under F.R.A.P. 26-1 and 11<sup>th</sup> 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

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Department of Children and Families

John Doe (foster child of Steven Lofton)

James Esseks

Douglas E. Houghton, Jr.

Docket No. 01-16723-D  
Lofton v. Kearney  
C-2 of 2

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## TABLE OF CONTENTS

Table of Authorities.....	v
Introduction.....	1
I. The Posture of the Case.....	1
II. Discrimination Based on Sexual Orientation.....	2
A. Critical Facts.....	2
B. Florida did not establish that plaintiffs cannot show that the exclusion is irrational.....	4
1. Florida’s rationale makes no sense.....	4
a. The families did not concede that the law is rational.....	5
b. The families did not have to prove that there are more children than available heterosexual parents; it was for the State to show that they could not.....	7
c. Invalidating the gay exclusion will not invalidate the State’s other adoption guidelines.....	9
2. The State’s rationale does not explain why only gay people are excluded.....	10
3. The State’s rationale clearly is not what motivated the exclusion.....	15
C. There is ample evidence that the exclusion expresses Florida’s disapproval of gay people, and there is no “gay exception” to equal protection.....	20

D.	The State did discriminate against the Loftons.....	26
III.	Constitutionally Protected Families.....	26
A.	Florida did not establish that the families cannot show that the State’s refusal to recognize their relationship violates their due process and equal protection/rights.....	26
B.	The threat to the Lofton family is not self-inflicted.....	30

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, W. Va.</i> , 488 U.S. 336 (1989) .....	15
<i>Board of Trustees v. Garrett</i> , 531 U.S. 356 n.4 (2001) .....	10, 24, 25
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1972) .....	30
<i>Celotex v. Catrett</i> , 477 U.S. 317 (1986) .....	2, 7, 8
<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985) .....	10, 13, 14, 23, 24, 25
<i>City of St. Louis v. Praprotnik</i> , 485 U.S. 112 (1988) .....	18
<i>Davis v. Howard</i> , 561 F.2d 565, (5th Cir. 1977) .....	21
<i>Ex Parte Young</i> , 209 U.S. 123 (1908) .....	16
<i>Jantz v. Muci</i> , 976 F.2d 623 (10th Cir. 1992) .....	24
<i>Lofton v. Kearney</i> , 157 F. Supp. 2d 1372, 1379 .....	26, 27
<i>M.L.B. v. S.L.J.</i> , 519 U.S. 102 (1996) .....	30
<i>Miguel v. Guess</i> , 2002 WL 1578749 (Wash. App. July 18, 2002) .....	24
<i>Nabozny v. Podlesny</i> , 92 F.3d 446 (7th Cir. 1996) .....	24
<i>Palmore v. Sidoti</i> , 466 U.S. 429 (1984) .....	23
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944) .....	28
<i>Rivera v. Marcus</i> , 696 F.2d 1016 (2d Cir. 1982) .....	29
<i>Romer v. Evans</i> , 517 U.S. 620 (1996) .....	12, 14, 15, 19, 20, 24
<i>Skinner v. Oklahoma</i> , 316 U.S. 535 (1942) .....	14
<i>Smith v. Organization of Foster Families for Equality and Reform</i> , 431 U.S. 816 (1977) .....	27, 28, 29

<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972) .....	29
<i>Stemler v. City of Florence</i> , 126 F.3d 856 (6th Cir. 1997) .....	14, 24
<i>U.S. Dept. of Agriculture v. Moreno</i> , 413 U.S. 528 (1973) .....	24
<i>United States v. Carolene Products</i> , 304 U.S. 144 (1938) .....	8
<i>Vance v. Bradley</i> , 440 U.S. 93 (1979) .....	19
<i>Village of Arlington Heights v. Metro Housing</i> , 429 U.S. 252 (1977) .....	21, 22
<i>Weaver v. Nebo Sch. Dist.</i> , 29 F. Supp. 2d 1279 (D. Utah 1998) .....	24
<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1978) .....	27

**STATE CASES**

<i>Amer v. Johnson</i> , 4 Fla. L. Wkly. Supp. 854b (Fla. 17 <sup>th</sup> Cir. 1997) .....	6
<i>Berhow v. Crow</i> , 423 So.2d 371 (Fla. 1st Dist. Ct. App. 1982) .....	28, 29
<i>Bottoms v. Bottoms</i> , 457 S.E.2d 102 (Va. 1995) .....	23
<i>Conkel v. Conkel</i> , 509 N.E.2d 983 (Ohio App. 1987) .....	23
<i>Gaylord v. Tacoma Sch. Dist.</i> , 88 Wash. 2d 286 (1977) .....	23
<i>Murgia v. Municipal Ct.</i> , 15 Cal. 3d 286, 540 P.2d 44 (1975) .....	14
<i>Opinion of the Justices</i> , 530 A.2d 21 (N.H. 1987) .....	6
<i>In Re Pearlman</i> , 15 Fam. L.R. 1355 (Cir. Ct. Broward Cty. 1989) .....	29
<i>V.C. v. M.J.B.</i> , 748 A.2d 539 (N.J. 2000) .....	29

**STATE STATUTES**

Fla. Stats. 39.001(3)(b) .....	26
Miss. Code § 93-17-3(2) .....	20

N.H. Rev. Stat. § 170-B:4 (2002), *amended by* HB90, Chapter 18:2 (1999) ..... 6  
Utah Code § 78-30-1(3)(b) ..... 6

**STATE REGULATIONS**

Fla. Admin. Code 65C-16.002(4) ..... 20  
Fla. Admin. Code 65C-16.005(6)(f)(2) ..... 6, 20

## **Introduction.**

The State of Florida does its best never to explain what legitimate goal it achieves by excluding gay people from the system it uses to evaluate adoption applications. Again and again, it insists that explanations are waived, or conceded, or not required. At this late date, the problem is that there is no explanation other than its desire to discriminate against gay people, which is impermissible under the equal protection clause.

The fundamental rights part of the case is virtually resolved. The only real dispute is over whether the Constitution protects parents and children like those involved in this case. The State's arguments against protection do not even apply to one of the families.

### **I. The Posture of the Case.**

This case is before the Court because the State of Florida successfully sought summary judgment below. The State insists the judgment must be upheld unless plaintiff families can persuade the court that the rationales the State has offered for its exclusion are not "rationally plausible." Defendants' brief, at 15. But on a defendant's motion for summary judgment, it is not the plaintiff's burden to prove the case. Instead, it is the defendant's job to show the District Court that

the plaintiff will be unable to prove some crucial element. *Celotex v. Catrett*, 477 U.S. 317, 323, 325 (1986). If Florida did not show that, the judgment must be reversed.

## **II. Discrimination Based on Sexual Orientation.**

The families make essentially two points. First, no one could rationally think the State excluded gay people from its adoption process to advance the “best interests of children.” Second, the other purpose offered, the only purpose which explains the classification—disapproval of gay people—is not legitimate.

### **A. Critical Facts.**

Several facts, either stipulated or undisputed here, are central to resolution of this appeal. They are:

- 1 25% of adoptions out of foster care are to single people. Tab A, R-124-Stipulation, V, ¶24.
  - 2 Despite the State’s efforts to place children with married couples or single heterosexuals, there are 3,400 children ready and waiting to be adopted in Florida. Tab A, R-124-Stipulation, V, ¶15.
- 79% of foster children in Florida stay in foster care for more than two

years; 54% for more than three; 36 percent for more than four. Tab A, R-124-Stipulation, V, ¶16.

3 The State entrusts children to the care of gay people, in long-term foster care, and in guardianships which DCF does not supervise. Tab A, R-124-Stipulation, V, ¶¶8, 11.

4 DCF knows of no children who are in foster care because of the sexual orientation of those who raise them. Tab A, R-124-Stipulation, V, ¶5.

5 The only DCF official whose testimony is before the court says there is no child welfare basis for the gay exclusion; he is unaware of any harms associated with having lesbian or gay parents. Tab B, R-130-Plaintiffs' Statement, ¶¶7, 8.

6 Substance abuse and domestic violence pose serious dangers to children. They play a role in over half the cases where children are removed from families; substance abuse alone is a factor in over 57%. Tab B, R-130-Plaintiffs' Statement, ¶¶1, 2.

7 Gay people are categorically prohibited from adopting. Substance abusers and child abusers are not. Tab A, R-124-Stipulation, V, ¶¶1, 3, 12.

**B. Florida did not establish that plaintiffs cannot show that the exclusion is irrational.**

Florida's exclusion fails three distinct aspects of rational basis analysis. It fails first because it is not possible to think excluding gay people from adoption will advance the interests of children by getting them married heterosexual parents. It also fails because the State cannot explain why, to promote the interests of children, it categorically excludes gay people but not others who actually pose a serious threat to children. And finally, given the State's use of gay people to parent, its lack of any reason to think gay people are a threat, and its treatment of those who pose a real threat, it is simply impossible to believe the exclusion was adopted to advance children's interests.

**1. Florida's rationale makes no sense.**

Florida says it is at least possible to think that excluding gay people from adopting promotes the interests of children. It is at least possible to think that, the State insists, because it is possible to think that children develop "optimally" if they have a married mother and a father, and possible to think the exclusion will make that happen.

Florida says it should get summary judgment on this point for three reasons. First, it says, by not presenting evidence that it is not better for children to have married moms and dads, the families conceded that the law is rational. Second, it says, the families did not prove that there are more children eligible for adoption than married couples willing to adopt, thus, the families did not prove that the exclusion cannot work. Finally, it says, even if the families are right that the exclusion does not get children married heterosexual parents, accepting that would have the unacceptable effect of invalidating any rule that limits the pool of prospective parents.

**a. The families did not concede that the law is rational.**

The families agree that the overall goals the State says it is trying to promote are legitimate. They agree that promoting the interests of children is worthy, that Florida should do whatever it can to ensure the psychological health of children, and that stable homes are good. None of that means the families “conceded” the State’s line of argument.

To begin with, it is not true the families offered no evidence about whether married heterosexuals always make better parents. They offered no experts. Instead, they offered the State’s regulations, which say that sometimes placement

with a single parent is best. Fla. Admin. Code 65C-16.005(6)(f)(2). They offered DCF's officials, who say they know of no child welfare basis for the exclusion. Critical Facts, above, p.2. They offered the State's practice of placing children in long-term care with gay people. *Id.*

That evidence was principally aimed at a different point: *i.e.*, that given what the State says and does, no one could believe the exclusion was adopted to help children. The families' point that the exclusion does not make sense was focused not at the State's assumption that married heterosexuals are advantageous, but rather at the assumption that the exclusion could get children such parents. Not offering evidence to dispute the first point is hardly a concession on the second.

The decisions in *Amer v. Johnson*, 4 Fla. L. Wkly. Supp. 854b (Fla. 17<sup>th</sup> Cir. 1997), and *Opinion of the Justices*, 530 A.2d 21 (N.H. 1987), may say having heterosexual parents is good. They say nothing about whether the exclusion in Florida could be thought to get them. And that is the issue.<sup>1</sup>

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<sup>1</sup>The New Hampshire law against gay adoption was repealed. N.H. Rev. Stat. § 170-B:4 (2002), *amended by* HB 90, Chapter 18:2 (1999). Utah forbids adoption by unmarried cohabitants, straight or gay. Utah Code § 78-30-1(3)(b). Mississippi bans adoption by gay couples, not gay individuals. Miss. Code § 93-17-3(2).

- b. The families did not have to prove that there are more children than available heterosexual parents; it was for the State to show that they could not.**

*Celotex* requires that to get summary judgment, a defendant must either offer evidence which demonstrates that plaintiffs will be unable to prove an essential element of their case, or show the District Court that there is no evidence to support an element of the plaintiffs' case. *Celotex v. Catrett* 477 U.S. 317, 323-325 (1986).

The State could have provided evidence that there are enough heterosexuals willing to adopt to take all the children who are ready, so that if gay people were permitted to adopt, children who might otherwise go to heterosexuals would not—or at least, so one could think. Or, it could have argued that plaintiffs would be unable to show that there are many more children ready to be adopted than heterosexuals willing to take them in. *Celotex*, 477 U.S. at 323.

The State does neither. It does not point to evidence that there are enough heterosexual parents; it does not say the families cannot show a shortage; it does not even allege that there are enough heterosexual parents. As below, it simply relies on its own regulations and decisions of other courts, none of which deal with the dire shortage of available heterosexuals. Critical Facts, above, p.2.

Moreover, the evidence in the record supports the families. The State of

Florida does everything it can to recruit married couples, but it places children with all who are willing to adopt and has thousands of children left over. It then recruits heterosexual single parents, and places children with all of them who are willing to adopt. And it still has thousands—3,400—of children left over, who remain in institutions or bounce among foster homes. Tab A-124-Stipulation, V, ¶¶15-17, 24, 25.

The State complains the families did not show that the number of children awaiting adoption in 1977 was “anywhere near as high as it is now.” While the State has been asked for the 1977 numbers, it would not provide numbers other than those in the stipulation. In any event, rationality (as opposed to purpose) is determined on the basis of the world today, not in 1977. *United States v. Carolene Products*, 304 U.S. 144, 153 (1938).

Most important, even now the State does not claim that it has *ever* had enough heterosexual married couples willing to adopt. By failing even to claim that, the State has not carried its burden under *Celotex* of demonstrating the families cannot prove their case. *Celotex*, 477 U.S. at 323-325.

c. **Invalidating the gay exclusion will not invalidate the State's other adoption guidelines.**

In an argument by analogy that effectively concedes the gay exclusion is not rational, the State “freely admits” the exclusion does not get more children adopted by heterosexual couples. That is no objection, Florida says; its new ban on some adoptions by convicted felony child abusers does not produce more non-abusing parents. None of the exclusions produce more parents, the State says, so all will fail if this one does.

The flaw in the comparison is this: Florida now keeps some child abusers from adopting because it thinks they harm children. Tab A, R-124-Stipulation, V, ¶¶2, 4; Tab B, R-130-Plaintiffs’ Statement, ¶¶1, 2. The State’s aim is achieved as long as children are not placed with dangerous abusers, even if they are not placed at all.

But the *only* reason Florida gives for not placing children with gay parents is to have them placed instead with married couples, its “optimal” placement. Defendants’ brief, at 15-16. That end is not achieved if the exclusion does not place children with married couples, as the State “freely admits” it does not. *Id.*, at 27.

This is not a subtle difference. Florida does not place children in long-term

care with the substance abusers it eliminates from the system. Indeed, it removes the children of dangerous abusers from their parents and puts them in foster care, some doubtless with gay parents. Tab B, R-130-Plaintiffs' Statement, ¶¶1, 2; Tab A, R-124-Stipulation, V, ¶8.

It's not that any adoption is always better than none. It's that the State does not claim long-term placement with lesbians and gay men is harmful, or that children are better left bouncing around between institutions and foster care than with gay parents. Florida could hardly make that claim with a straight face. It says Steve Lofton's son is in foster care only because Mr. Lofton will not accept an unsupervised guardianship. Defendants' brief, at 10-11. And it actively places children, long-term, with gay parents. Critical Facts, above, p.2.

**2. The State's rationale does not explain why only gay people are excluded.**

The fundamental requirement of equal protection (as opposed to due process) rational basis is that it explain not the end a law should achieve, but what it accomplishes by treating the group it singles out differently. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); see also *Board of Trustees v. Garrett*, 531 U.S. 356, 366 n.4 (2001).

The State stipulates that individuals who are substance abusers or who commit domestic violence may apply to adopt. Tab A, R-124-Stipulation, V, ¶¶1, 3. It refuses to offer any reason why they may apply but gay people may not. It says it need not explain because: 1) the apparent disparity in treatment is not real, and 2) the groups are not comparable.

The disparity is not real, Florida says, because both abusers and gay people are excluded, the abusers via case-by-case evaluation, the gay people from the start. Defendants' brief, at 33.

But Florida admits elsewhere that the disparity is quite real. The very stipulation on which it relies says not that *all* abusers are excluded, but that abusers are excluded only if the State determines they threaten a child. Tab A, R-124-Stipulation, V, ¶¶1-4. Thus, abusers get an individual evaluation, which gay people do not, and only those who are dangerous are excluded. All gay people are excluded.

What makes that disparity incredible is the State's assessment of how the two characteristics impact child welfare. Substance abuse and domestic violence pose a serious threat to children. Being gay poses none. Critical Facts, above, p.2. Thus, the State uses a case-by-case evaluation for those who pose the greatest threat to children, and only excludes some of them, while excluding all of a group

who pose no threat. That is a very real disparity in treatment.

Still refusing even to hint at any rational basis for that disparity, the State insists it need not justify what it has done because, its says, the families did not show that gay people are similarly situated “with regard to all of the legitimate governmental interests” the State claims. Defendants’ brief, at 40-41.

Although the State occasionally suggests that getting heterosexual parents is its goal, when pressed, it recognizes that the classification cannot be its own justification; the State cannot exclude gays just because it would prefer heterosexuals. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

Florida’s description of the interests it seeks to promote changes, but the themes are stability and psychological health (“growth and development”), specifically proper “gender identity” and “sexual identity,” catch phrases the State resolutely refuses to explain. Defendants’ brief, at 24, 41.

But the families showed that abusers are a much greater threat to stable homes than gay people. 57 percent of the children in State care are there at least in part because of substance abuse and there are *no* children in foster care because of a parent’s sexual orientation. Critical Facts, above, p.2.

As for psychological health, Florida’s actions speak well. Surely, it is a fair inference from the fact that Florida places children in long-term care, including

unsupervised care, with gay people, that the State does not consider sexual orientation intrinsically harmful, no matter what it means by its allusions to “gender identity.” Critical Facts, above, p.2.

The State’s point seems to be that because healthy development is not affected in exactly the same way by sexual orientation and substance abuse, the two are incomparable. Defendants’ brief, at 40-41.

But the Constitution does not parse things that finely. The permit system in *Cleburne* fell because the city offered no plausible reason why the need to evacuate in a flood made it rational to require permits for homes for the mentally disabled, but not for convalescent hospitals, old age homes, or hospitals. *Cleburne*, 473 U.S. at 449. That interest in safety was not implicated in exactly the same way by all these facilities. Emergency evacuation of a home for the mentally disabled might pose understanding problems while evacuation of a hospital would have the challenge of moving bed-ridden people.

That some individuals posed mobility problems and others comprehension problems did not make the groups incomparable. *Id.* The classification could not be upheld if there were no rational explanation of why facilities for only one group of many whose safety might be imperiled had to get a permit. *Id.*

Plaintiffs agree with the State that lesbians and gay men are not similarly

situated to abusers. Abusers represent a serious threat to children and gay people do not. Critical Facts, above, p.2. But the need for an explanation is hardly eliminated if the group the State treats more drastically poses no threat while the group treated more favorably poses a threat of serious harm. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942) (law struck down would have sterilized thief who stole \$20 three times, but not embezzling employee no matter how great the amount or how often the theft); *Stemler v. City of Florence*, 126 F.3d 856, 873 (6<sup>th</sup> Cir. 1997) (arrest of lesbian for drunk driving while letting go a “far drunker” heterosexual stated an equal protection claim for selective prosecution); *Murgia v. Municipal Ct.*, 15 Cal. 3d 286, 540 P.2d 44 (1975) (failure to arrest agents who violently assaulted farmworkers, while arresting workers for misdemeanors like driving without a license, stated claim for discriminatory prosecution).

The Constitution’s demand—a plausible explanation of why one group is treated differently, *see Cleburne*, 473 U.S. at 449, *Romer*, 517 U.S. at 632—is hardly exacting. Yet from the start, Florida has dodged it, never suggesting a reason why gay people, who pose no threat to children, should be excluded while others who threaten serious harm are allowed to apply and are individually evaluated. It should be obvious that the problem is that this simple requirement cannot be met.

**3. The State's rationale clearly is not what motivated the exclusion.**

A rationale for discrimination, even if superficially logical, will not meet the rational basis test if, examined in context, it is simply not possible to believe that is why the state discriminates. *Romer*, 517 U.S. at 635; accord *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, W. Va.*, 488 U.S. 336 (1989).

The only legitimate goal offered for the gay exclusion—promoting the interests of children and, in particular, stable homes and healthy psychological development—is not, in light of the facts, logically connected to the exclusion; further, the rationale does not explain why gays are treated differently. Unsurprisingly, it is also not credible.

The credibility of Florida's explanation for the exclusion is undermined by what it says, *i.e.*, that it does not believe being gay poses any danger to children. It is even more compellingly undermined by what it does, *i.e.*, place children in long-term care, including care that DCF does not supervise, with gay parents. And finally, it is fatally undermined by the State's use of case-by-case evaluation for people whom it knows are threatening but a total exclusion for gay people, who

are not. Critical Facts, above, p.2.

The State tries to argue with the evidence. It says the families overstate it by saying that the State, not just DCF, does not know of one child in foster care because a parent or caregiver was gay.<sup>2</sup> But if DCF, which runs foster care, doesn't know what the State knows about foster care, Florida gives not a clue about who does. And while *Ex Parte Young*, 209 U.S. 123 (1908), may require this lawsuit to name State officials, it does not require this court to ignore the State's defense of it.

Pointedly, while questioning DCF's competence to speak for it, the State (which ought to know) does not say that any child has ever been placed in foster care because of the sexual orientation of a caregiver.

Florida says John Perry's view that there is no child welfare basis for the gay exclusion is "of no moment." Mr. Perry, it says, is just someone with a "personal opinion." Defendants' brief, at 31.

If Mr. Perry's views on child welfare are "of no moment," the State has a lot to answer for. For eight years, John Perry was the Chief of Child Welfare for the State of Florida's DCF, supervising the entire central office, including

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<sup>2</sup> The State implies the families said the stipulation went beyond foster care. The opening brief shows this is wrong. Plaintiffs' opening brief, at 30 (last sentence).

investigations, protective supervision, foster care and adoptions. Deposition of John Perdue Perry, at 8. *See* Stipulated Joint Motion to Correct and Modify the Record, filed with this Court.

The State complains that it did not identify Mr. Perry as knowledgeable about adoption. But it did identify Carol Hutchison as knowledgeable in response to a Fed. R. Civ. P. 30(b)(6) notice. The State does not claim that Hutchison disagrees. (Her deposition arrived too late for plaintiffs' response to the State's motion, but it is in the record and the State could offer it. R-171-Notice of Filing in Compliance with Eleventh Circuit's May 31, 2002 Order.)

More pointedly, the State does not say that *anyone* in DCF disagrees with Perry, or that in fact *anyone* in a responsible position thinks there is a child welfare basis for the exclusion.

The State insists that admitting that it places children in long-term foster care and guardianships with gay people does not undermine its argument that kids need to have married heterosexual parents. First, the State says, it could only find one gay foster parent who was not a plaintiff here. What Florida fails to mention is that its foster care application does not ask about sexual orientation, so it simply does not know. However, it did stipulate that it has placed *children* with gay foster *parents*, and *children* with gay *guardians*. Critical Facts, above, p.2.

Placement with foster parents and guardians, Florida says, is different because they are supervised, either by DCF or the courts. But that supervision does nothing to get kids married adoptive parents, or even heterosexual role models, so it doesn't diminish the significance here of the State's use of gay people as long-term parents.

Entrusting children to gay foster parents says nothing about the State's view of them, the State insists, since foster parenting is temporary, and long-term placements a failure of the system. But over three quarters of the children in Florida's system stay in foster care over two years, over half stay over three years, and more than a third for more than four years. Critical Facts, above, p.2. At some point, a system's failures describe it far better than its aspirations. *See, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112, 131 (1988) ("Refusals to carry out stated policies could obviously help to show that a municipality's actual policies were different from the ones that had been announced"). Moreover, the State stipulates that it *places* children in long-term foster care with gay parents, not that they wind up there because of system failure. It also stipulates that it places them in guardianship, which is not short-term. Critical Facts, above, p.2.

The State says its exclusion of all gay people from the process, and individual evaluation of abusers, is simply underinclusion (presumably allowing

abusers to be evaluated) and overinclusion (excluding gay people based on sexual orientation since it poses no threat). It is true that, on rational basis, the fact that a classification is imprecise—overinclusive or underinclusive—is not necessarily fatal. *See Vance v. Bradley*, 440 U.S. 93, 108 (1979). But the Supreme Court also says that if the evidence shows the classification is so ill-suited to the purpose it supposedly advances that one cannot believe it would have been adopted for that reason, mere logical connection will not save it. *Romer*, 517 U.S. at 635-36.

Florida says *Romer* was about “unprecedented,” “sweeping” measures, which deny equal protection “in the most literal sense.” Defendants’ brief, at 35–36. And that was one reason the Court struck down Amendment 2. *Romer*, 517 U.S. at 632-34.

But the Court also said its decision was independently based on “conventional and venerable” principles of rational basis. *Id.*, at 634. It was possible to think the classification in *Romer*—unlike the exclusion here—could achieve the goal the State offered. Banning laws giving gay people civil rights in housing, real estate transactions, employment and public accommodation would be one way to accommodate landlords and employers who have philosophical objections to gay people. *See Id.*, at 635.

The *Romer* Court struck Amendment 2 down not just because of its

“overinclusion” of civil rights laws covering all real estates transactions, public accommodations and government activities as well as rental and employment. The problem was the ban covered so many things that did not implicate the State’s interest that it was impossible to believe that it could have been adopted to vindicate that interest. *Id.*, at 629, 635.

While rational basis review may not demand fine tuning, it does demand that the explanations go beyond mere formalism and be believable. *Id.* There simply is no credible explanation for the exclusion of gay people and the inclusion of others, including abusers.

The regulations in which the State places so much faith reinforce this conclusion. The State thinks that a permanent home is generally best. Fla. Stats. 39.001(3)(b). It thinks foster parents are the adoptive parents of choice. Fla. Admin. Code 65C-16.002(4). It thinks some children’s needs can best be met by a single parent. Fla. Admin. Code 65C-16.005(6)(f)(2).

To all that Florida says and does, add the fact that it puts kids like Doe in long-term foster care with gay parents, and the message is clear. This isn’t about child welfare. Something else is going on. This is about disapproval.

**C. There is ample evidence that the exclusion expresses Florida’s disapproval of gay people, and there is no “gay exception” to equal protection.**

Florida says there is no competent evidence the exclusion was adopted to express negative attitudes about gay people.

According to the Supreme Court, finding a discriminatory purpose requires a “sensitive” inquiry into “such circumstantial and direct evidence of intent as may be available.” *Village of Arlington Heights v. Metro Housing*, 429 U.S. 252, 266 (1977).

Primary on the Court’s list of potential sources is “contemporary statements by members of the decisionmaking body.” *Id.*, at 268. Here, the families offered the assurance of the gay exclusion’s sponsor that it was adopted to tell gay people “we’re really tired of you. We wish you’d go back into the closet.” Tab A, R-130-Plaintiffs’ Statement, ¶13. The State complains the statement is hearsay. But having failed to object in District Court, it cannot object now. *See, e.g., Davis v. Howard*, 561 F.2d 565, 569-70 (5<sup>th</sup> Cir. 1977).

The sequence of events leading to the decision may shed light on the “decisionmaker’s purposes,” *Arlington Heights* tells us, “particularly if it reveals a series of official actions taken for invidious purposes.” 429 U.S. at 267. Florida tells us its enactment of the gay exclusion “immediately followed” adoption of a

bill banning same-sex marriage. Given there has never been same-sex marriage in Florida, a trier of fact certainly could see that as gratuitous and part of an emphatic “we are tired of you” message.

Moreover, the sequence is very suspicious. Florida first says same-sex couples may not marry, then adopts the exclusion, and now seeks to justify the exclusion by saying gay people can’t provide the stability that comes with marriage. Defendants’ brief, at 16, 45. This seems awfully convenient.

“Sometimes,” *Arlington Heights* says, “a clear pattern, unexplainable on grounds other than race emerges . . . .” 429 U.S. at 266. And since the exclusion cannot do the one thing the State offers it for—get more children heterosexual married parents—and since Florida trusts gay people as long-term caregivers, a trier could surely find the exclusion is explicable only in terms of disapproval.

The most compelling evidence that the exclusion was passed not for children but to express disapproval is the State’s invocation of that purpose, both in the District Court and here. Defendants’ brief, at 42-43.

Florida appears now to accept the general proposition that equal protection does not permit government to discriminate against a group of people to express disapproval. But it should be different, Florida says, with “community disapproval of homosexuality in child rearing” or to “exclude homosexuals” from

family. *See* Defendants' brief, at 44-47.

There is no exception for child rearing, or gay people involved in child rearing. *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Conkel v. Conkel*, 509 N.E.2d 983, 987 (Ohio App. 1987) (relying on *Palmore*, court held in custody case that it “cannot take into consideration the unpopularity of homosexuals in society”).

Statutes which, for the most part, do not discriminate and have never been challenged, and a case (*Gaylord v. Tacoma Sch. Dist.*, 88 Wash. 2d 286 (1977)), which never mentions equal protection, establish nothing to the contrary.

Florida acknowledges it may no longer discriminate in child placement because it thinks others will disapprove of the race of a parent's partner. Defendants' brief, at 21. It cannot deny that the rule against discrimination to accommodate prejudice applies to groups protected by rational basis. *Cleburne*,, 473 U.S. at 449. But, Florida says, “such considerations have been upheld against equal protection challenges as to sexual orientation,” pointing to *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995). The *Bottoms* opinion never mentions the federal constitution at all, much less a special exception to the rules of equal protection. *Bottoms*, 457 S.E.2d 102.

Gay people are protected by the federal constitution. As state and federal courts all over this nation, from Ohio to Utah to Washington have recently held,

there is no gay exception to the equal protection clause. Its prohibition on discrimination to express disapproval applies to gay students (*Nabozny v. Podlesny*, 92 F.3d 446 (7<sup>th</sup> Cir. 1996)), gay teachers (*Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998)), gay medical technicians (*Miguel v. Guess*, 2002 WL 1578749 (Wash. App. July 18, 2002)), and enforcement of the law generally (*Stemler v. City of Florence*, 126 F.3d 856 (6<sup>th</sup> Cir. 1997)). The day of the gay exception to the Constitution (*see, e.g., Jantz v. Muci*, 976 F.2d 623 (10<sup>th</sup> Cir. 1992)) has passed.

Finally, Florida says that it doesn't matter if it did adopt the exclusion to express disapproval of gay people, because under *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), even if a classification were in fact adopted to harm a group of Americans, it would still be upheld if someone could think of a hypothetical legitimate basis for it.

If *Garrett* held that, it would be a startling change in the Court's equal protection analysis. Just six years ago, the Court said again that the purpose of its analytic approach is "to ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. The Court has made the point again and again over the years. *See U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973); *Cleburne*, 473 U.S. at 448-49.

*Garrett* probably changes nothing. The part of *Garrett* on which the State relies quotes a passage from *Cleburne* which says negative attitudes alone will invalidate a statute if it is not *substantiated* by legitimate factors, language which suggests that only an actual legitimate purpose could save a fear-based classification. *Garrett*, 531 U.S. at 367, quoting *Cleburne*, 473 U.S. at 448. That seems to be the view of Justices Kennedy and O'Connor, two of the five who joined the majority. Their concurring opinion says that hostility is the touchstone of unconstitutionality on rational basis. The ADA went beyond Congress' powers under section 5 of the 14<sup>th</sup> Amendment, they said, because the record showed only that the state has failed to remedy problems, not that they acted out of hostility. *Garrett*, 531 U.S. at 375 (Kennedy J, concurring). That is a far cry from this case.

In any event, there is no need for this Court to decide if *Garrett* means the Supreme Court has abandoned the traditional understanding of equal protection. For, as the *Garrett* court observed, evidence of hostility often accompanies irrational classifications. *Garrett* 531 U.S. at 367. That certainly is the case here, where the classification cannot be thought to advance the purpose offered for it, and where the rationale does not explain why it classifies. There is no legitimate basis, hypothetical or real.

#### **D. The State did discriminate against the Loftons.**

At the outset of its brief, the State suggests it did not reject Mr. Lofton's application because he was gay. Florida complains that the District Court unfairly held it to some careless "phrasing" in its Answer, foreclosing this argument. This is what the District Court said:

Defendants have conceded that Lofton's application had been rejected because he is a homosexual. The correspondences between Defendants and Lofton clearly indicate that Defendants were well aware of Lofton's sexuality. (*See* Dep. of Steven Lofton, Ex. 1 to Defs.' Concise Statement at 151.) Furthermore, Defendants answered the Amended Complaint by stating that Lofton's application was denied "in the course of enforcing Fla. Stat. sec 63.042(3)." (Answer to Am. Compl. at ¶¶ 11.) Defendants' claim that Lofton was rejected because his application was incomplete and not because he is a gay man is disingenuous in light of the explicit language of their Answer and evidence in the record.

157 F. Supp. 2d at 1375 n.3.

### **III. Constitutionally Protected Families.**

#### **A. Florida did not establish that the families cannot show that the State's refusal to recognize their relationship violates their due process and equal protection protection/rights.**

The Lofton and Houghton families' claims to constitutionally protected relationships are virtually resolved, and the judgment should be reversed.

First, the families agree there is no fundamental right to adopt. They always have.

Second, Florida accepts the District Court finding that Lofton/Doe, and Houghton/Roe have “deeply loving and interdependent relationship[s]” that are “as close as those between biological parents.” 157 F. Supp. 2d 1372, 1379.

Third, Florida no longer argues that it has a compelling interest which, under equal protection, would justify allowing heterosexuals who have constitutionally protected relationships with children they raise to adopt, while forbidding gay people who have similar relationships from adopting.

Thus, the primary question left is whether the Constitution protects these relationships. If so, equal protection does not permit them to be selectively denied access to the State’s system for recognizing parent/child relationships because of the parents’ sexual orientation. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 383-390 (1978); *see also* plaintiffs’ opening brief, at 55-57.

The State says parent/child relationships are “circumscribed” by statutes which authorize their creation. Defendants’ brief, at 53-54. Plaintiffs say that argument is inconsistent with *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), and that the State’s entire course of

dealing is relevant and can establish a legitimate expectation of permanency no matter what a statute says. Plaintiffs' opening brief, at 42-47. Those arguments speak for themselves.

But they don't apply to Doug Houghton's relationship with his son, John Roe. Florida was not a "partner" in the creation of this relationship. The State of Florida had nothing to do with it. Doug Houghton's relationship with his son was created by John's father who put him in Houghton's hands and asked Doug to raise him because he could not. R-112/113-Houghton Deposition, at 21-22. *See Berhow v. Crow*, 423 So.2d 371, 373 (Fla. 1<sup>st</sup> Dist. Ct. App. 1982) (finding liberty interest in family relationship where "the child was placed by the natural mother – not the state" in the petitioners' care).

Houghton later got a guardianship, which enabled him to put John in school. R-114-Defendants' Statement, at 7. But that did not diminish Houghton's relationship to his son any more than the guardianship in *Prince v. Massachusetts* diminished the relationship of Sara Prince and Betty Simons. *Prince v. Massachusetts*, 321 U.S. 158, 159, 169 (1944).

*Smith* established the principle that the emotional bonds that arise out of daily living are the touchstone of the fundamental relationship the Constitution

protects. Courts in Florida and elsewhere have acknowledged that one who raises a child as a parent is a parent and has that protected relationship, even if she or he is not a parent by birth. *See, e.g., Berhow*, 423 So.2d 371; *In Re Pearlman*, 15 Fam. L.R. 1355, 1356 (Cir. Ct., Broward Cty. 1989) (copy attached); *V.C. v. M.J.B.*, 748 A.2d 539, 548-49, 554 (N.J. 2000); *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982). Nothing in *Smith* or any other case says that State laws can somehow “circumscribe” a constitutionally fundamental relationship the State did not create.

Florida says that even if the families have constitutionally protected relationships, they have only “procedural protection” against State interference. Defendants’ brief, at 55. If the source of the right lies in emotional bonds (*Smith*), it makes little sense to say it is but a process right. A right to be heard means little if there is no right to remain together. *See Stanley v. Illinois*, 405 U.S. 645 (1972); *Berhow*, 423 So.2d at 372-73 (because foster parents of six years had liberty interest in preserving their relationship with child, they not only had right to notice and opportunity to be heard regarding child’s adoption by others, but the adoption could not be entered without foster parents’ consent). A process-only right makes even less sense if the State did not create the relationship. But Florida denies these families even the process rights the Constitution gives them. *See* plaintiffs’

opening brief, at 52-53. Florida will relent only if they adopt, which it will not allow.

As explained in the opening brief, the State cannot create an exclusive system for regulating fundamental relationships, and then deny those who have them access to it. *Boddie v. Connecticut*, 401 U.S. 371 (1972). That holding certainly applies to state systems that regulate relationships between parents and children. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996). And the State doesn't even claim any justification for allowing heterosexuals in protected relationships access to adoption, while denying it to gay people in similar relationships.

**B. The threat to the Lofton family is not self-inflicted.**

Both here and below, the State has done its best to intimate that Steve Lofton spurned an easy resolution to this case, turning down an unsupervised guardianship which would give him the secure relationship he wants. *See* Defendants' brief, at 8-10, 56.

In District Court, the State suggested Mr. Lofton wouldn't adopt his son because he was making money as a foster parent. *See* R-114-Defendants' Concise Statement, at 4-5. Now the State insinuates instead that Mr. Lofton wanted to be a

test plaintiff, and spurned guardianship because it would somehow hurt his chances. Defendants' brief, at 9-10, 56.

What the State does not tell the Court is that its guardianship offer would put John Doe's health in peril, and DCF's own case worker thought it a bad idea.

Steve Lofton does not work outside the home. The State believes children with AIDS are so needy that it insists on full-time parents. Tab A, R-124-Stipulation, V, ¶30. So Lofton has no group health care plan which could cover John. Roger Croteau does have a job and a group plan. But, as the State points out with mind-numbing frequency, it forbids same sex marriage. So Mr. Croteau cannot marry Mr. Lofton, his partner of 17 years, adopt Mr. Lofton's son, and put him on his plan.

Right now, John gets medical coverage from the State. If Mr. Lofton accepts the guardianship option, he loses it. Tab B, R-130-Plaintiffs' Statement, ¶22.

John was a sick baby when the State placed him in Steve Lofton's hands. He is a healthy, irrepressible adolescent today. But his health will always be in question. Tab B, R-130-Plaintiffs' Statement, at 9.

Mr. Lofton doesn't want to take chances with it. That's why he rejected the

State’s “deal.” And that’s why DCF’s caseworker agreed it was a bad idea. Tab B, R-130-Plaintiffs’ Statement, ¶23.

The State’s brief is full of other snide attacks—suggesting Mr. Croteau doesn’t care enough about the children to adopt them, calling Mr. Houghton negligent since he doesn’t file guardianship reports, and on and on and on. *See, e.g.*, Defendants’ brief, at 8-12.

While the State of Florida spills plenty of ink on pious platitudes about family, it knows full well that these three gay men who so offend its sense of morality have given that most precious gift—a loving family—to four defenseless babies whom no one wanted, four children who were abandoned but whose lives now matter to somebody.

The State may want to defend this insane law, but it has no call to attack these three decent men, who have given love beyond the capacity of many, perhaps most of us, and in the process saved these children who would have been lost.

These families are entitled to a little respect. The State of Florida should be ashamed of itself, and so should those who speak for it.

Dated: July 29, 2002

Respectfully Submitted,

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## **CERTIFICATE OF COMPLIANCE**

Plaintiffs' brief is in compliance with the type-volume limitation of F.R.App.P. 32(a)(7)(B)(1). It contains 6901 words, excluding the materials referred to in 11<sup>th</sup> Cir. Rule 28-1(a), (b), (c), (d), (e), (f), (g), (m), and (n), according to the word count program in Word Perfect word processing system, which was used to prepare the brief.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by federal express this 29th day of July, 2002, to:

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