Discrimination for the Sake of the Children [*Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004)]

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I. Introduction

According to the United States Court of Appeals for the Eleventh Circuit, discrimination of an entire group of citizens is permitted so long as it is pretended to be in the best interests of the children.[1] In a recent opinion from the Eleventh Circuit, the court upheld Florida's statutory ban on homosexual adoption.[2] The court found that the discriminatory statute survived both an equal protection and two due process challenges, despite weighty evidence and precedent to the contrary.[3] Passing the buck to Florida's legislature, the court declared that Florida's adoption policy and the motivation behind the statute remains an issue for the legislature, despite its constitutional infringements.[4]

Finding no fundamental rights or suspect class at issue, the court reviewed the statute using a rational basis standard.[5] Applying rational basis, the court easily justified the discrimination by relying on myths and assumptions about homosexuals and their ability to parent.[6] Had the court recognized the fundamental rights at issue in this case or recognized the gender discrimination buried in the State's purported legitimate interest, it would have been forced to review the statute on an elevated standard of review, possibly invalidating the statute.

II. Case Description

In 1988, a Florida social worker approached Steven Lofton, a pediatric nurse, and asked if he would apply to become a foster parent for Frank,[7] a child with AIDS.[8] Lofton and his long-term partner,

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1. *See* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004).
2. *Id*. at 827.
3. *Id*. at 811, 815, 817.
4. *Id*. at 827.
5. *Id*. at 818.
6. *See id*. at 819-20.
7. Frank is also known as Franke. *Compare* Appellants' Brief at 7-8, *Lofton* (No. 01-16723-DD), *with* ACLU Lesbian & Gay Rights Project, Let Him Stay, *at* http://www.lethimstay.com/loftons.html (last visited Oct. 25 2004).
8. Aff. of Steven K. Lofton at 1, Lofton v. Kearney, 157 F. Supp. 2d 1372 (S.D. Fla. 2001) (99-10058-CIV-KING); *Primetime Thursday: Rosie's Story: For the Sake of the Children* (ABC television broadcast, Mar. 14, 2002) (transcript on file with author) [hereinafter Rosie's Story].

Roger Croteau, agreed to care for the HIV-positive infant with a short life expectancy.[9] When approached a second time, the couple agreed to take in Tracy, an eight-month old, HIV-positive crack baby who had undergone twelve hospitalizations and suffered from a severe sinus infection.[10] In 1989, they agreed to care for Ginger, an HIV-positive infant who died of AIDS in 1995.[11] In 1991, Lofton and Croteau agreed to care for a nine-week old, HIV-positive crack baby named Bert who suffered from severe diarrhea and dehydration.[12] Bert was so unwanted at the hospital that the couple recalled how "they just handed him over and said take him out of here."[13]

Frank, Tracy, and Bert were sick, weak with illness, and left alone with no one to care for them when Lofton and Croteau took them in.[14] The children were all expected to die, but have grown into healthy teenagers.[15] In fact, Bert now tests negative for HIV due to the care and medication provided by Lofton and Croteau.[16]

As a result of the couples' commitment to caring for these children, Lofton gave up his job and stayed home with the children as a full-time parent.[17] The couple also reached out to the community around them, helping start a daycare for children with HIV.[18] In 1998, the Children's Home Society created the "Lofton/Croteau" award for outstanding foster parenting; Lofton and Croteau were the first recipients.[19]

In 1994, Bert became available for adoption when the parental rights of his biological parents were terminated.[20] Following the termination, the State suggested to Lofton that he adopt Bert.[21] In completing the Florida Adoptive Home Application, Lofton left blank question II G, which contains the statement, "I am a homosexual;" the applicant is to check "Yes" or "No."[22] Next to the question is the statement, "Section 63.042(3), F.S., states that 'no person eligible to

9. Aff. of Steven K. Lofton at 1, *Lofton*, (99-10058-CIV-KING); *Rosie's Story*, *supra* note 8.

10. *Rosie's Story*, *supra* note 8.

11. Aff. of Steven K. Lofton at 1, *Lofton*, (99-10058-CIV-KING).

12. *Rosie's Story*, *supra* note 8.

13. *Id.*

14. *See* Aff. of Steven K. Lofton, *Lofton*, (99-10058-CIV-KING); *Rosie's Story*, *supra* note 8.

15. *See* Aff. of Steven K. Lofton, *Lofton*, (99-10058-CIV-KING); *Rosie's Story*, *supra* note 8.

16. *See* Appellants' Brief at 8, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) (No. 01-16723-DD).

17. *See id*. at 7.

18. *Rosie's Story, supra* note 8.

19. Appellants' Brief at 7, *Lofton* (No. 01-16723-DD); *Rosie's Story*, *supra* note 8.

20. Appellants' Brief at 9, *Lofton* (No. 01-16723-DD).

21. *Id.*

22. FLORIDA DEPARTMENT OF CHILDREN & FAMILIES, ADOPTIVE HOME APPLICATION CFOP 175-54, *available at* http://www.dcf.state.fl.us/publications/eforms/fsp5071.pdf (last visited Oct. 25, 2004).

adopt under this statute may adopt if that person is a homosexual.' "[23] Lofton was disqualified because the application was incomplete.[24]

In 1995, Doug Houghton, a critical care nurse at a pediatric clinic, was approached by a father of one of Houghton's pediatric patients.[25] The father asked Houghton to take care of his son and Houghton agreed to do so.[26] Houghton soon became the child's legal guardian and the biological father agreed to give up his parental rights so Houghton could adopt the child.[27]

In 1999, Steven Lofton, Doug Houghton, and Wayne Smith and Daniel Skahen, a homosexual couple wanting to adopt, filed suit in the United States District Court for the Southern District of Florida contesting the constitutionality of the statute precluding homosexuals from adopting.[28] The district court granted summary judgment in favor of the State, dismissing the claim on all counts.[29] The families appealed the district court's decision to the Eleventh Circuit Court of Appeals.[30] The Eleventh Circuit affirmed the lower court's grant of summary judgment, deeming the statute constitutional.[31] On July 21, 2004, the Eleventh Circuit Court of Appeals denied the families' petition for rehearing *en banc*, refusing to hear the party's arguments again.[32] The families filed a Petition for Writ of Certiorari, which was denied on January 10, 2005.[33]

III. Background

A. *Florida's Adoption Statute*

The Florida statute prohibiting homosexuals from adopting dates back to 1977.[34] The "Save Our Children Campaign" was a movement fronted by Anita Bryant, popular actress and onetime spokesperson for the Florida Orange Juice industry.[35] The campaign was created in response to the actions of the Metro-Dade County Commission,

23. *Id*.
24. *Rosie's Story*, *supra* note 8.
25. Appellants' Brief at 10, *Lofton* (No. 01-16723-DD).
26. *Id*.
27. *Id*.
28. Lofton v. Butterworth, 93 F. Supp. 2d 1343, 1343-44 (S.D. Fla. 2000).
29. *Lofton*, 358 F.3d at 808-09.
30. *Id*. at 809.
31. *Id*. at 827.
32. Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275, 1275 (11th Cir. 2004) .
33. Press Release, American Civil Liberties Union, ACLU Asks U.S. Supreme Court to Hear Appeal in Challenge to Florida Gay Adoption Ban, (Oct. 1, 2004), *available at* http://www.aclu.org/court/court.cfm?id=16627&c=286; *Lofton*, No. 04-478, 2005 WL 38782 at *1 (Jan. 10, 2005).
34. Fla. Stat. ch. 63.042(3) (2004).
35. The Internet Movie Database, *Anita Bryant*, *at* http://www.imdb.com/name/nm0117039 (last visited Oct. 25, 2004) (outlining Anita Bryant's cinematic achievements); Oh No! News, *Oh No Anita Bryant Page*, *at* http://www.ohnonews.com/bryant.html (summarizing Bryant's campaign) (last visited Oct. 25, 2004).

which joined a number of counties in passing a gay rights ordinance.[36] The "Save Our Children" campaign was an organized movement opposed to gay rights, which eventually touched all corners of the nation as the beginning of what is now referred to as the religious right.[37] Anita Bryant vowed, "'What these people really want, hidden behind obscure legal phrases, is the legal right to propose to our children that there is an acceptable alternate way of life. . . . I will lead such a crusade to stop it as this country has not seen before.'"[38] The campaign was successful in persuading voters to overturn the ordinance and ultimately moved the state legislature to pass chapter 63.042(3) of the Florida Statutes.[39] The statute reads "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."[40] State Senator Curtis Peterson, who sponsored the bill, told local media representatives that the law was intended to send a clear message to homosexuals: "We are really tired of you. We wish you'd go back in the closet."[41]

Since the passage of this law, several legislators have introduced bills that would repeal the statute.[42] In 2002, eight former supporters of the law signed a written statement stating that "[i]n 1977, we were among the state legislators who helped pass Florida's law prohibiting gay people from adopting children. We now realize that we were wrong. This discriminatory law prevents children from being adopted into loving, supportive homes—and we hope it will be overturned."[43] Prior to 1999, three lawsuits had been filed to challenge the law.[44] In *Department of Health and Rehabilitative Services v. Cox*,[45] the Circuit Court for Sarasota County held that the Florida statute that prohibits adoptions by homosexuals was unconstitutional.[46] On appeal, the

36. Dudley Clendinen, *Anita Bryant, b. 1940, Singer and Crusader*, ST. PETERSBURG TIMES ONLINE FLORIDIAN (Nov. 28, 1999), http://www.sptimes.com/News/112899/news_pf/Floridian/Anita_Bryant__b_1940_.shtml.

37. *Id*.

38. *Id*.

39. *Id.*

40. FLA. STAT. ch. 63.042(3) (2004).

41. Pet. for Writ of Cert. at 7, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) (04-478).

42. *Lofton*, 358 F.3d at 807.

43. PRESS RELEASE, AMERICAN CIVIL LIBERTIES UNION, 'WE WERE WRONG,' SAY FORMER LEGISLATORS WHO VOTED FOR FLORIDA GAY ADOPTION BAN NEARLY 25 YEARS AGO, (Mar. 7, 2002), *available at* http://www.aclu.org/news/NewsPrint.cfm?ID=9723&c+104. The written statement was signed by former Senate President and former U.S. Congressman Harry Johnston, former House Speaker Tom Gustafson, former Senators Sherrill "Pete" Skinner, Paul Steinberg and Sherman Winn, and former Representatives Tony Fontana, Barry Kutun, and Elaine Bloom. *Id.* Representative Bloom stated: "The hysteria of the times led us to do the wrong thing." *Id*.

44. *Lofton*, 358 F.3d at 807 (citing Dept. of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993); Amer v. Johnson, 4 Fla. L. Weekly Supp. 854b (Fla. Cir. Ct. 1997); Seebol v. Farie, 16 Fla. L. Weekly C52 (Fla. Cir. Ct. 1991)).

45. 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993).

46. *Cox*, 627 So. 2d at 1212.

Florida Court of Appeals reversed the circuit court's decision, holding that the statute did not fail on the prospective adopters' claims of right of privacy, substantive due process, and equal protection.[47] In 1995, the Supreme Court of Florida affirmed the appellate court's decision, upholding the constitutionality of the statute.[48] Despite these efforts, no attempt to change the law has been successful.[49]

Florida is the only state to have such a restrictive adoptive scheme.[50] While Mississippi bans same-sex couples from adopting[51] and Utah bans unmarried couples from adopting,[52] Florida is the only state to specifically deny potential adoptive parents the right to adopt based exclusively on their sexual orientation.[53] Twenty-three states specifically permit adoptions by homosexuals, either statutorily or by court ruling.[54]

B. *Constitutional Issues*

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states "No State shall . . . deny to any person . . . the equal protection of the laws."[55] The Equal Protection Clause ensures in most cases that classes of people, "who are in all relevant respects alike," will be treated equally and not discriminated against.[56] Legislation often requires classification, or discrimination, in affording benefits to some but not others and despite the Equal Protection Clause, classifications can be justified in some instances.[57] When reviewing an equal protection challenge, the court must first determine the basis for the classification.[58] If the classification targets a suspect class, the legislation will be reviewed with strict scrutiny.[59]

47. *Id*. at 1212.
48. Cox v. State Dep't of Health & Rehabilitative Servs., 656 So. 2d 902, 903 (Fla. 1995).
49. *See* FLA. STAT. ch. 63.042 (2004).
50. Dan Gilgoff, *The Rise of the Gay Family*, U.S. NEWS & WORLD REPORT, May 24, 2004, at 45.
51. MISS. CODE ANN. § 93-17-3(2) (2004) ("Adoption by couples of the same gender is prohibited.").
52. UTAH CODE ANN. § 78-30-1(3)(b) (2002) ("A child may not be adopted by a [single] person . . . residing with another person and being involved in a sexual relationship with that person.").
53. PRESS RELEASE, AMERICAN CIVIL LIBERTIES UNION, ACLU CHALLENGES FLORIDA BAN ON LESBIAN AND GAY ADOPTION, (May 26, 1999), *available at* http://aclu.org/news/NewsPrint.cfm?ID=8549&c=104.
54. Gilgoff, *supra* note 50, at 42. Alabama, Alaska, Delaware, Hawaii, Indiana, Iowa, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Oregon, and Texas by lower court ruling and California, Connecticut, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Washington by statute or high-level court ruling. *Id.* at 42.
55. U.S. CONST. amend. XIV, § 1.
56. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004) (quoting Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)).
57. *Id*. at 817.
58. Nancy G. Maxwell, *An Overview of Constitutional Law Analyses Applied to U.S. Family Law Cases*, *in* SPECIAL ISSUES IN U.S. – EUROPEAN COMPARATIVE FAMILY LAW 9 (compiled by Nancy G. Maxwell, Ian Sumner, & Scott Curry 2004).
59. *Id*.

The United States Supreme Court has declared those discriminated against because of their race, alienage, or national origin are suspect classes.[60] Under strict scrutiny, the highest standard of review, the government's burden is to justify the discrimination with a compelling state interest.[61] Most classifications fail strict scrutiny review.[62] If the classification is not targeted at a suspect class, the classification is reviewed on a rational basis test, the lowest standard of review, and the burden is on the challenger to show that the classification is not rationally related to the government's legitimate interest.[63] Classifications reviewed under a rational basis test generally are upheld, so long as there is any conceivable rational basis for the classification.[64] Discriminatory classifications that target the quasi-suspect classes of gender and illegitimacy can elevate the standard of review from a rational basis to an intermediate or heightened scrutiny requiring a showing of "reasoned judgment consistent with the ideal of equal protection [and the] further[ance] of substantial interest[s] of the State."[65]

The Fourteenth Amendment also contains the Due Process Clause, which guarantees an individual's right to pursue life with limited governmental intrusion.[66] The government cannot deny an individual a fundamental right: those rights long recognized as fundamental to the exercise of freedom.[67] When legislation denies an individual a fundamental right, it is unconstitutional.[68] Unlike an equal protection challenge, a due process challenge must simply show the denial of a fundamental right to prove the legislation unconstitutional.[69]

IV. Analysis

Lofton, Houghton, Smith, and Skahen challenged the Florida statute disqualifying homosexuals from adopting on both equal protection and due process bases.[70] Represented by the American Civil Liberties Union and the Children First Project, the families challenged Florida's discriminatory statute, but in the end, failed to overcome the State's arguments in favor of upholding the statute.[71]

60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*.
65. *Id*.
66. U.S. Const. amend. XIV, § 1.
67. Maxwell, *supra* note 58.
68. *Id*.
69. *Id*.
70. Appellants' Brief at 15-17, Lofton v. Kearney, 358 F.3d 804 (11th Cir. 2004) (No. 01-16723-DD).
71. *Lofton*, 358 F.3d at 827.

A. *Parties Arguments*

1. The Families

The families offered the court two avenues by which it could invalidate the statute.[72] First, they argued that the statute's discrimination against homosexuals violated the Equal Protection Clause because the discrimination existed only to express the State's disapproval of homosexuals and failed to advance the State's purported objective of serving the best interests of children.[73] They next argued that the statute violated the Due Process Clause by preventing the families from exercising their fundamental right to familial privacy, intimate association, and family integrity,[74] as well as their fundamental right to private sexual intimacy recognized in *Lawrence v. Texas*.[75]

a. *Equal Protection*

The families argued that the Florida statute discriminating against homosexuals violated the Equal Protection Clause of the Fourteenth Amendment for two reasons. First, the law was passed in order to express the State's disapproval of homosexuals, and second, excluding homosexuals from applying to adopt does not serve the best interests of the children.[76]

The Equal Protection Clause prohibits statutory discrimination against a group of citizens "to express dislike or disapproval of them."[77] Florida admitted that the statute banning homosexuals from adopting was enacted to express disapproval of homosexuals, which the legislative history supported.[78] The families argued that in case after case, in which the legislative history revealed that a discriminatory law was enacted simply to express dislike for a group, the United States Supreme Court has invalidated the law.[79] The Court stated in *United States Department of Agriculture v. Moreno*,[80] that the Equal Protection Clause, at the least, prohibits congressional intent to harm a certain group from being a legitimate governmental interest, which is a justification for discrimination.[81] Moreover, morality does not

72. Appellants' Brief at 15-17, *Lofton* (No. 01-16723-DD).
73. *Id*. at 15-16.
74. *Id*. at 16-17.
75. Lawrence v. Texas, 539 U.S. 559 (2003); Appellants' Supplemental Brief at 7, *Lofton* (No. 01-16723-DD).
76. Appellants' Brief at 17-39, *Lofton* (No. 01-16723-DD).
77. *Id*. at 18.
78. *Id*. at 17.
79. *Id*. at 18 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985) (negative attitudes); Palmore v. Sidoti, 466 U.S. 429, 433 (1982) (bias); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1972) (unpopularity)).
80. 413 U.S. 528 (1972).
81. Appellants' Brief at 18, *Lofton* (No. 01-16723-DD) (citing *Moreno*, 413 U.S. at 534).

constitute a legitimate governmental interest.[82] The Court has denounced the use of morality to justify laws that discriminate against interracial relationships, women working outside the home, unrelated persons living together, and the mentally disabled.[83]

The families also argued that excluding homosexuals from applying to adopt does not serve the best interests of the children.[84] First, the statutory exclusion cannot rationally be thought to increase a child's chances of being raised by a mother and a father.[85] Florida allows single persons to adopt without inquiry into the person's plans or hopes to marry in the future, so placement of children with married men and women is not a rational basis for the discrimination.[86] Even after married and single heterosexuals are allowed to adopt, more than three thousand children remain in the care of the State.[87] Preventing lesbians and gay men from consideration as prospective parents does not create more married couples or heterosexual singles willing to adopt.[88] Because the classification does nothing to advance the State's interest in placing children with married, heterosexual couples, the classification is invalid.[89]

Second, the families asserted that the discrimination does nothing to further the State's purported interest in promoting the well-being of children.[90] The State failed to produce any evidence that foster children in the care of homosexuals have suffered harm.[91] In fact, State welfare officials admitted that no reason existed to exclude homosexuals from adoption.[92] Florida contradicted its own purported justification by willingly placing its most fragile children in the care of homosexuals as long-term foster parents and/or legal guardians for what often amounts to a child's entire childhood.[93] Furthermore, the State allowed persons known to pose a threat to children, those involved in substance abuse and violence, to apply for adoption.[94] Florida's own statements and actions indicated that the State did not believe homosexuals posed a threat to children.[95]

82. *Id*. at 19.
83. *Id*. at 19-20. A "law cannot be upheld on the basis of 'negative attitudes' about mental disability." *Id.* (citing *Cleburne*, 473 U.S. at 448). The Court "invalidat[ed] [the] statute because it was based on disapproval of hippies." *Id.* (citing *Moreno*, 413 U.S. at 534-35). *See also id.* (citing Loving v. Virginia, 388 U.S. 1, 3 (1967); Bradwell v. Illinois, 83 U.S. 130, 141 (1872)).
84. *See id*. at 26.
85. *Id*. at 27.
86. *Id*. at 28.
87. *Id*. at 29.
88. *Id*.
89. *Id*. at 30.
90. *Id.*
91. *Id*.
92. *Id*. at 31.
93. *Id*.
94. *Id*. at 32.
95. *Id*. at 31.

Finally, the families argued that for the statutory prohibition to be constitutional, Florida must explain its rationale for different treatment of prospective homosexual parents.[96] Florida's willingness to review all other potential adoptive parents on a case-by-case basis, even those engaged in substance abuse and violence, verified the State's disparate treatment of homosexuals as a class, in violation of the Equal Protection Clause.[97]

In *Romer v. Evans,*[98] the United States Supreme Court invalidated a state constitutional amendment that prohibited passage of any laws that would prevent discrimination of homosexuals and bisexuals.[99] The Court found the state constitutional amendment overinclusive and too sweeping to give credit to the State's purported justifications.[100] The Court concluded that the amendment served only to make homosexuals an unequal class and was clearly forbidden by the Equal Protection Clause.[101]

Furthermore, in *City of Cleburne v. Cleburne Living Center, Inc.*,[102] the Court struck down the city's special permit requirements for the mentally disabled as unconstitutional because other groups posing the same potential problems were not subjected to the same special permit requirements.[103] Contrary to the rulings of both *Romer* and *Cleburne*, the State of Florida violated the Equal Protection Clause by prohibiting homosexuals from applying to adopt, but allowed a more harmful group, substance abusers and those prone to violence, to apply to become adoptive parents.[104]

b. *Substantive Due Process*

i. Fundamental Right to Familial Privacy, Intimate Association, and Family Integrity

The families argued that the relationship established between them over the years equated to a parent-child relationship, one of "the oldest of the fundamental liberty interests," and deserved constitutional protection.[105] Recognizing no biological connection existed between the prospective parents and children, the families pointed to

96. *Id*. at 35.
97. *Id*.
98. 517 U.S. 620 (1996).
99. Appellants' Brief at 33, *Lofton* (No. 01-16723-DD) (citing Romer v. Evans, 517 U.S. 620, 623 (1996)).
100. *Id*. at 34 (citing *Romer*, 517 U.S. at 635-36).
101. *Id*.
102. 473 U.S. 432 (1985).
103. Appellants' Brief at 37, *Lofton* (No. 01-16723-DD) (citing City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 449-50 (1985)).
104. *Id*. at 37. "[V]iolation of equal protection to arrest lesbian for intoxication but not 'far drunker' heterosexual because of sexual orientation." *Id.* (citing Stemler v. City of Florence, 126 F.3d 856, 873 (6th Cir. 1997)).
105. *Id*. at 40.

United States Supreme Court decisions extending constitutional protections to familial relationships based on emotional bonds developed from operating as a family unit.[106] The families claimed that they should have been given the opportunity to present the nature of their relationships, making summary judgment improper.[107]

Even if the families could have established a constitutionally protected familial relationship, Florida's statute banning homosexuals from adopting prevented them from gaining the constitutional protections.[108] First, Florida provided statutory safeguards against governmental intrusion into parent-child relationships.[109] Then, Florida provided statutorily that any parent and child "not biologically related" must complete the adoption process to enjoy the safeguards against governmental intrusion.[110] Finally, through the statutory ban, even if there was a familial relationship that merited constitutional protections, the protections would not be extended if the adult in the parent-child relationship was homosexual.[111] The families argued that the State created a system for gaining constitutional rights, and then denied access to an entire group of people who may have been entitled to assert those rights.[112]

When the government creates a classification that interferes with the exercise of a fundamental right, the classification must be "narrowly tailored to achieve a substantial governmental interest."[113] Ac-

106. *Id.* (citing Lehr v. Robertson, 463 U.S. 248, 261 (1983)).

107. *Id.* at 42. In *Smith v. Organization of Foster Families for Equality and Reform*, the United States Supreme Court held that when a child is placed with a foster parent at a young age and has never established a relationship with her natural parent, the child has established an emotional bond with the foster parent that should be recognized as a constitutionally protected familial relationship. *Id.* (citing *Smith*, 431 U.S. 816, 844 (1977)). Accordingly, the families urged the court to conduct an examination of the nature of their relationship to determine whether, and to what extent, their particular foster families had a constitutionally protected interest in family integrity. *Lofton*, 358 F.3d at 812. The court, however, refused to review the evidence submitted by the families and conduct an examination of the nature of the familial relationship and ruled that no foster family or guardianship could ever enjoy constitutional protections. *Id.* at 814-15.

108. Appellants' Brief at 52-57, *Lofton* (No. 01-16723-DD).

109. *Id.* at 52 (citing FLA. STAT. chs. 39.806, 39.809, 39.401(b), 39.402). The families argued that "a parent-child relationship cannot be ended without a full evidentiary hearing before a judge, applying all the civil rules of evidence." *Id.* (citing FLA. STAT. ch. 39.809). Further, a "parent-child relationship cannot be ended unless it threatens the life, safety or well-being of the child, or the parent has abandoned the child or, under certain circumstances, is incarcerated." *Id.* (citing FLA. STAT. ch. 39.806). The families also argued that "temporary removal from a parent's custody requires probable cause to believe the child has been abused, neglected or abandoned" and that "immediate notice to the parents and a prompt hearing is required." *Id.* (citing FLA. STAT. ch. 39.401(b); FLA. STAT. ch. 39.402).

110. Appellants' Brief at 53, *Lofton* (No. 01-16723-DD) (citing FLA. STAT. ch. 63.172(c)).

111. *See id.* (citing FLA. STAT. ch. 63.042(3) (1997)).

112. *Id.* at 54 (citing Boddie v. Connecticut, 401 U.S. 371, 375-76 (1972)). The families interpreted *Boddie* to mean that "even though there is no general right of access to civil courts, since a civil action is the only way to end a marriage, and marriage is a fundamental interest, Connecticut could not effectively keep poor people from obtaining divorces by charging filing and service fees." *Id.* (citing *Boddie*, 401 U.S. at 375-76).

113. Appellants' Brief at 55, *Lofton* (No. 01-16723-DD) (citing Police Dep't. of Chicago v. Mosley, 408 U.S. 92, 101-02 (1972)).

cording to the families, in Florida, two groups, heterosexuals and homosexuals, both entitled to the fundamental right of constitutionally protected familial relationships, were treated differently.[114] Heterosexuals were allowed to adopt and homosexuals were not.[115] The families argued that Florida's creation of differential access to a fundamental right was unjustifiable.[116]

ii. Fundamental Right to Sexual Privacy

After the United States Supreme Court's decision in *Lawrence v. Texas*,[117] the families again argued in a supplemental brief that moral disapproval of homosexuals was not a legitimate state interest that could justify the statutory discrimination, and thus the Florida statute should be reviewed under heightened scrutiny.[118] The Court in *Lawrence*, in striking down a Texas statute that criminalized homosexual sodomy, overturned the *Bowers v. Hardwick*[119] decision, which determined that a general sodomy law was valid under the Due Process Clause.[120] *Bowers* had come to justify discrimination against homosexuals using morality as a legitimate state interest, not only in criminal sodomy laws, but also in other facets of life, including domestic and employment law.[121] The families argued that *Lawrence* expressly rejected the State's reliance on moral disapproval of homosexuals as a legitimate basis for discriminating against gays and lesbians.[122]

As the Court overturned *Bowers* it stated, "'Its continuance as precedent demeans the lives of homosexual persons,'"[123] and the families argued that *Lawrence* now required a heightened scrutiny review of the statute.[124] The Court in *Lawrence* recognized that homosexuals and heterosexuals shared the same liberty interests and constitutional rights of forming intimate, personal relationships.[125] The State cannot discriminate by allowing one group, and not the other, to exercise this constitutional right.[126] The families argued that the statute should be

114. *Id*. at 56 (citing *Mosley*, 408 U.S. at 101-02).
115. *Id*.
116. *Id*.
117. 539 U.S. 558 (2003).
118. Appellants' Supplemental Brief at 17, *Lofton* (No. 01-16723-DD).
119. 478 U.S. 186 (1986).
120. Lawrence v. Texas, 539 U.S. 558, 578 (2004); Bowers v. Hardwick, 478 U.S. 186, 196 (1986).
121. Appellants' Supplemental Brief at 1-2, *Lofton* (No. 01-16723-DD).
122. *Id*. at 5.
123. *Id*. at 2 (quoting *Lawrence*, 539 U.S. at 575).
124. *See id*. at 17.
125. *See* Appellants' Supplemental Brief at 3, *Lofton* (No. 01-16723-DD) (citing *Lawrence*, 539 U.S. at 574).
126. *Id*. at 7-8 (citing Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 & 647-48 (1974) (mandatory unpaid maternity leave placed too heavy of a burden on a teachers' freedom to make decisions regarding family matters and failed to further the State's purported interest of educational continuity); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (striking down a state residency requirement as interfering with a right to interstate travel); Speiser v. Randall, 357

reviewed with heightened scrutiny because the statute penalizes the exercise of the protected right of forming intimate, personal relationships by excluding homosexuals, but not heterosexuals, from adopting.[127] The exclusion harmed adults by preventing them from ever enjoying the parent-child bond central to American values.[128] Furthermore, the exclusion harmed children by denying them legal recognition of either a potential or existing relationship.[129] The State penalized one group for exercising a constitutionally protected fundamental right and not the other; because the harm was grave, the courts could not give deference under a rational basis review, so a heightened scrutiny review was warranted.[130] As explained in the families equal protection argument, the statute did not even meet a rational basis review and would certainly fail a heightened scrutiny review.[131]

2. State of Florida

The State maintained that the statute did not fail on an equal protection basis because the statute was rationally related to the State's legitimate interest of placing children in homes with both a mother and a father.[132] Furthermore, the families should not receive protection based on the fundamental right to familial privacy, intimate association, and family integrity because they were not legally recognizable families due to the nature of the foster/guardianship relationship.[133] Additionally, the State argued that no new fundamental right to sexual privacy was announced in *Lawrence*.[134]

a. *Equal Protection*

The State argued that chapter 63.042(3) of the Florida Statutes did not fail under the Equal Protection Clause of the Fourteenth Amendment because the law was rationally related to a legitimate governmental interest.[135] The placement of children in homes with married mothers and fathers has long been recognized as a legitimate state interest in state-governed adoption schemes.[136] It is considered

U.S. 513, 518 (1958) (striking down a California law that provided veterans with tax benefits only if they agreed to take an oath of loyalty as unconstitutional).

127. *See id.* at 17.
128. *Id.* at 15.
129. *Id.* (citing Plyler v. Doe, 457 U.S. 202, 219-20 (1982)). "The Constitution ordinarily does not allow the government to penalize children because it believes that their parents have done something wrong." *Id.*
130. *See id.* at 17.
131. *Id.* at 17-20.
132. Brief of Appellees at 15-18, *Lofton* (No. 01-16723-DD).
133. *Id.* at 18-19.
134. Appellees' Supplemental Brief at 3, *Lofton* (No. 01-16723-DD).
135. Brief of Appellees at 19, *Lofton* (No. 01-16723-DD).
136. *Id.* at 20-21, *Lofton* (No. 01-16723-DD) "[C]hildren need both male and female influences to develop appropriately, and that sexual and gender identity is shaped through years of interaction with parents of both sexes." *Id.* (citing Amer v. Johnson, 4 Fla. L. Wkly. Supp. 854b

best for the children because the traditional nuclear family is socially acceptable to the masses and encourages a child's balanced growth and development.[137] The statute furthers this interest in a number of ways.[138] The State places a multitude of restrictions on who may adopt in order to ensure the best placement for the child.[139]

Additionally, the State argued that simply because state welfare officials are not aware of any child in the Florida foster care system harmed by the sexual orientation of a gay parent or caregiver it did not automatically mean that gay parents or caregivers meet the optimal placement goals.[140] Furthermore, foster care is considered short term and is closely monitored by the State.[141] This temporary placement with homosexual foster parents did not discount the State's goal in furthering the best interests of the child.[142]

The State also argued that under the rational basis test, the statute did not fail for being overinclusive.[143] The State maintained that its classification of homosexuals was justified by its legitimate state interests.[144] The statute was narrowly tailored to serve the State's interest and was not overly broad or unduly sweeping as was the case in *Romer v. Evans*.[145] Florida's equal treatment of homosexuals in other legislative measures proves that the adoption ban is not overly sweeping like that in *Romer*, and therefore, does not violate the Equal Protection Clause.[146] Furthermore, the decision by the Court in *Cleburne* was inapplicable because homosexuals are not similarly situated with any other class, even drug and child abusers, so the State was not required to justify its classification.[147]

Finally, the State asserted that chapter 63.042 of the Florida Statutes was constitutional on the basis of public morality because states are allowed to use morality as a guide in the context of raising children and legally recognizing a family.[148] Because "the State of Florida acts in *loco parentis*" for foster children in Florida, the State was justi-

(Fla. Cir. Ct. 1997)); "[L]egitimate governmental interest in requiring heterosexual adoptions to ensure the provision of heterosexual role modeling for children." *Id.* (citing In re: Opinion of the Justices, 530 A.2d 21, 24-25 (N.H. 1987)).

137. *Id*. at 21-22 (citing Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995)).
138. *Id*. at 26.
139. *Id*. at 28.
140. *See id*. at 30.
141. *Id*. at 32.
142. *Id*. at 33.
143. *Id*. at 34.
144. *Id*. at 36.
145. *Id*. at 35-41.
146. *Id*. at 38. While other classes of persons are also deemed unfit for parenting, they are not categorically prohibited as are *homosexuals.* The State argued that all unfit parents are eliminated from the pool of prospective parents eventually making the point of exclusion irrelevant. *Id.* at 40.
147. *Id*. at 40-41.
148. *Id*. at 43.

fied in relying on a variety of moral considerations when choosing adoptive parents.[149] In fact, laws in twelve states discourage the exposure of children to homosexuality by stating that sexual orientation non-discrimination laws are not to be construed to acknowledge homosexuality or encourage the acceptance of homosexuality to children.[150] This adoption statute was constitutional because it advances public morality in childrearing.[151] Furthermore, the Florida adoption law operated the same as marriage laws that provide legal recognition of marriages between a man and a woman.[152] Both federal and state statutes restrict the gender of people who can be recognized as married under the law.[153] Because the State of Florida restricted marriage to one man and one woman, Florida's adoption law was in line with the public's moral views against homosexual marriage, adoption, and legal recognition of homosexual families.[154]

b. *Substantive Due Process*

i. Fundamental Right to Familial Privacy, Intimate Association, and Family Integrity

The State asserted that there was "no fundamental right to adopt or be adopted."[155] The families agreed that no fundamental right existed to adopt or be adopted; therefore, the families had no fundamental due process right to assert.[156] Further, the fundamental right to family integrity asserted by the families would never extend to these families due to the nature of their relationships.[157] Because the State of Florida established the relationships, the families could never have expected them to continue permanently.[158] The families understood from the beginning that foster families were temporary and governed by the State.[159] They also understood that as homosexuals, they would never be able to adopt.[160] Because the families admitted that

149. *Id*. Consideration was given to how the prospective parent will "value, respect, appreciate, and educate" the child about the "religious heritage" of the child and allow the child to "practice that religion," and whether the prospective parents will "actively promote the child's cultural and moral heritage." *Id.* (quoting FLA. ADMIN. CODE ANN. 65C-16.005(6)(d) & (p)).

150. *Id*. at 44. "[D]ismissal of a gay teacher was upheld where the disclosure of sexual orientation impaired the school's ability to teach morality and created a danger of approval and imitation by students." *Id.* (citing Gaylord v. Tacoma Sch. Dist., 559 P.2d 1340 (Wash. 1977)). Statutes exist in Connecticut, Arizona, District of Columbia, Louisiana, Maine, Minnesota, New Hampshire, North Carolina, Rhode Island, South Carolina, and Texas. *Id.*

151. *Id*. at 45.

152. *Id*.

153. *Id*. (citing the Defense of Marriage Acts, 28 U.S.C. § 1728C; FLA. STAT. ch. 741.212).

154. *Id.* at 46.

155. *Id*. at 48.

156. *Id*. at 49.

157. *Id*. at 53.

158. *Id*.

159. *Id*.

160. *Id*. at 53-54.

no fundamental right existed to adopt, and because they never could have expected their foster relationships to continue permanently, they could not ask the court to hold that Florida's ban on homosexual adoption violated their fundamental rights.[161]

ii. Fundamental Right To Sexual Privacy

First, the State argued that *Lawrence* did not eliminate public morality as a legitimate state interest for homosexual discrimination.[162] Even though *Lawrence* admonished the use of moral disapproval as a legitimate state interest in criminal laws, it did not admonish the use of moral disapproval when a statutory privilege was sought.[163] In the adoption context, an applicant parent's "personal and private" conduct was always considered and was not "personal and private" at all.[164] The State argued that the statute was not to impose moral disapproval of homosexuals on society, but rather, to make the moral choices necessary when rearing children.[165] Furthermore, the Court in *Lawrence* specifically stated that its decision did not involve children or the formal recognition of homosexual relationships.[166]

Next, "the State argued that *Lawrence* did not recognize a fundamental liberty interest."[167] The United States Supreme Court could not have announced a fundamental right to forming intimate, personal relationships because it failed to follow the traditional approach used when announcing a fundamental right.[168] Fundamental rights are traditionally those "deeply rooted in this Nation's history and tradition and which are implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed."[169] Furthermore, a "careful description" of any announced fundamental right is always required.[170] The term "fundamental right," however, never appeared in the *Lawrence* decision.[171] Additionally, had the Court announced a fundamental right, it would have subjected the statute to a strict scrutiny review.[172] Instead, the Court invalidated the statute using a rational basis review, finding that the criminal statute failed to further a legitimate state interest.[173] *Lawrence* did not announce a

161. *Id*. at 59.
162. Appellees' Supplemental Brief at 1, *Lofton* (No. 01-16723-DD).
163. *Id*.
164. *Id*.
165. *Id*. at 1-2.
166. *Id*. at 2.
167. *Id*. at 3.
168. *Id*. at 4.
169. *Id*. (citing Washington v. Glucksburg, 521 U.S. 702 (1997)) (internal citations omitted).
170. *Id*.
171. *Id*. at 4.
172. *Id*.
173. *Id*.

fundamental right, and therefore, did not necessitate a heightened scrutiny review.[174]

Finally, the State argued that even if *Lawrence* was read to have announced a fundamental right, the Florida statute did not burden that right.[175] All homosexuals in the State of Florida are free to engage in homosexual relations without the "fear of criminal prosecution" for their decisions relating to personal relationships.[176] The Court in *Lawrence* was clear that its holding did not extend to cases involving children or to formal recognition of homosexual relationships.[177] The Florida statute did not criminalize homosexual relationships; it only placed restrictions on a statutory privilege that necessitated intrusion into a prospective parent's private choices.[178]

B. *Court's Holding*

The Eleventh Circuit Court of Appeals accepted every argument set forth by the State of Florida.[179] The court concluded that because the State acted in *loco parentis* for children who were wards of the state, the State could do whatever it wanted in its adoption scheme, so long as it served the best interests of the children.[180] Any intrusions the State made into a prospective parent's home and personal life were allowed because the parent sought adoption and chose to open his or her life to close examination.[181]

1. Equal Protection

The court began its equal protection analysis by recognizing that legislative classifications are not forbidden.[182] A legislative classification is suspect and deserving of heightened scrutiny review when a fundamental right is at issue or a suspect class is targeted.[183] A classification must be justified by a legitimate state interest.[184] The court determined that no fundamental rights were at issue, and no circuit has recognized homosexuals as a suspect class; therefore, the rational basis standard was the appropriate standard of review for the Florida statute.[185] Under the rational basis test, the statute must be rationally

174. *Id*.
175. *Id*. at 6.
176. *Id*. at 6-7.
177. *Id*. at 6.
178. *Id*. at 7.
179. *See Lofton*, 358 F.3d 804.
180. *Id*. at 809-11.
181. *Id*. at 810-11.
182. *Id*. at 817-18 (citing Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)).
183. *Id*. at 818 (citing Romer v. Evans, 517 U.S. 620, 631 (1996)).
184. *Id*.
185. *Id*.

related to the State's purported interests.[186] The rational basis standard of review allows the court to presume that the legislative classification is valid and will be upheld so long as there is any conceivable basis for the classification.[187] The burden to prove the legislative classification is unconstitutional falls on the challenging party and requires the party to negate every conceivable basis presented by the State.[188]

The court accepted the State's assertion that providing children with homes with both a mother and a father was a legitimate state interest.[189] The court agreed that preference for households with both a mother and a father would provide stability that other household arrangements could not.[190] While acknowledging the families' argument that public morality cannot serve as a legitimate state interest, the court declined to address the issue as part of its opinion.[191] The court found it unnecessary to address this argument because Florida's interest in furthering the best interests of the children by placing them in homes with both a mother and a father was a legitimate state interest and withstood a rational basis review on its own.[192] Regardless, the court went on to state that furthering public morality was indeed a legitimate state interest and would pass constitutional review.[193]

The court next addressed whether the Florida statute was rationally related to its interest in placing children in homes with both a mother and a father.[194] The court considered the families' arguments against the statute by asking "whether the Florida legislature *could* have reasonably believed that prohibiting adoption into homosexual environments would further its interest in placing adoptive children in homes that will provide them with optimal developmental conditions."[195] The court concluded that Florida's disparate treatment of homosexuals was rationally related to the State's legitimate interest because homosexuals would never be able to form marital relation-

186. *Id.* (citing Heller v. Doe, 509 U.S. 312, 320 (1993)).
187. *Id*.
188. *Id*. (quoting *Heller*, 509 U.S. at 320-21).
189. *Id.* at 820.
190. *Id*.
191. *Id*. at 819, n.17.
192. *Id*.
193. *Id*. There is a "substantial government interest in protecting order and morality." *Id.* (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991)). "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 175 (1976) (plurality opinion)). "The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny." *Id.* (citing Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001)).
194. *Id.* at 819-20.
195. *Id.* at 820 (quoting Panama City Med. Diagnostic Ltd. v. Williams, 13 F.3d 1541, 1545 (11th Cir. 1994) ("The task is to determine if any set of facts may be reasonably conceived of to justify the legislation.")).

ships, the home environment sought by the State for its children.[196] Homosexuals and unmarried heterosexuals are not similarly situated classes because there is no potential for a homosexual to form the marital relationship sought by the State.[197] The legislature could have rationally believed that prohibiting homosexuals from adopting would mean that the children would be placed in homes with married mothers and fathers, thereby justifying the statute under rational basis review.[198]

The court further found Florida's utilization of homosexuals as foster parents and guardians inapplicable to the rational bases of the statute.[199] Because foster care and guardianship relationships are temporary, the State's use of homosexuals in these temporary capacities did not defeat the rationality of the statute.[200] The court also gave little weight to the families' evidence of social science research stating homosexuals presented no harm to children and in fact, were good parents.[201] The court concluded that the research was too new to justify invalidating the statute.[202] Finally, the court distinguished *Romer* because the Florida classification was narrow enough to be rationally related to the legitimate state interest.[203]

2. Substantive Due Process

a. *Fundamental Right to Familial Privacy, Intimate Association, and Family Integrity*

The court held that the families did not have a fundamental right to family integrity.[204] After an examination of the decisions in *Smith v. Organization of Foster Families for Equality and Reform*[205] and *Drummond v. Fulton County Department of Family & Children's Services*,[206] the court acknowledged that in special situations a foster family may be extended some constitutional protection if, because of state law, the family believed that their family unit was permanent.[207] The court concluded, however, that the Florida adoption scheme could never create a justifiable expectation of permanency, since the relationship would always be within the control of the state, which created

196. *Id*. at 822.
197. *Id*.
198. *Id*. at 822.
199. *Id*. at 824.
200. *Id*.
201. *Id*. at 824-25.
202. *Id*. at 826.
203. *Id*.
204. *Id*. at 815-16.
205. Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816 (1977).
206. Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200 (5th Cir. 1977).
207. *Lofton*, 358 F.3d at 814.

it.[208] Furthermore, the families knew that the Florida statute prevented homosexuals from applying to adopt.[209] Even if the families somehow were able to develop a justifiable expectation of a permanent relationship, the only resulting liberty interest would be that of procedural due process protections if the State attempted to separate a family.[210]

b. *Fundamental Right To Sexual Privacy*

The court next addressed the families' reliance on the United States Supreme Court's decision in *Lawrence.*[211] Relying entirely on Justice Antonin Scalia's dissenting opinion,[212] the court ruled that *Lawrence* did not create a new fundamental right.[213] It adopted the arguments of the State that in *Lawrence*, the Court failed to utilize the traditional features of a fundamental rights analysis and therefore, could not have intended to announce a new fundamental right.[214] Additionally, the United States Supreme Court struck down the Texas statute using a rational basis review rather than a strict scrutiny review, which would have been used had fundamental rights been implicated.[215]

Because the court determined that the *Lawrence* decision did not announce a new fundamental right, it refused to address whether the Florida statute burdened the exercise of the alleged right.[216] The court distinguished the present case from *Lawrence* by pointing out that *Lawrence* explicitly stated that its decision did not "involve minors" nor did it "involve . . . government[al] . . . recognition [of] . . . homosexual [relationships]."[217] The court held that because the present case involved minors and addressed a state statute granting statutory privilege rather than criminal prohibition, the *Lawrence* decision was not controlling.[218]

C. *Commentary*

In its conclusion in *Lofton*, the Eleventh Circuit stated, "We exercise great caution when asked to take sides in an ongoing public policy

208. *Id*.
209. *Id*.
210. *Id*.
211. *Id*. at 815-17.
212. *Id*. at 816 (citing Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a fundamental right under the *Due Process Clause.*")).
213. *Id*. at 815-16.
214. *Id*. at 817 (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).
215. *Id*. (citing *Lawrence*, 539 U.S. at 586 (2003)).
216. *Id*.
217. *Id*. (quoting *Lawrence*, 539 U.S. at 578 (2003)).
218. *Id*.

debate, such as the current one over the compatibility of homosexual conduct with the duties of adoptive parenthood."[219] This statement suggests what may have motivated the court in upholding the statute. A decision against the Florida statute would have forever changed the course of homosexual rights, and the Eleventh Circuit seemed unprepared to take that step.

Even under the lowest possible standard of review, rational basis, the statute proves unconstitutional. The families established that the statutory ban on homosexual adoption is not rationally related to the purported legitimate state interest and serves only to express disapproval of homosexuals.[220] Banning homosexuals from adopting does nothing to increase a child's chances of being adopted and raised by both a mother and a father, Florida's alleged rational basis.[221] Eliminating one class of prospective parents does nothing to increase the number of children adopted by another class of prospective parents.[222] Neither the Florida legislature, nor the Florida Department of Children and Families, expressly prefer married to single applicants.[223] In addition, the State evaluates prospective parents on their present ability to care for children, not on future considerations.[224] Furthermore, the statute bans homosexuals from applying to adopt, yet allows other groups such as drug abusers and domestic abusers to apply and be considered for adoption.[225] The statute bans an entire group that in some situations may be the best parents for a child, yet allows those known to be harmful to children to apply.[226] Finally, the State itself contradicts its claims that homosexuals are presumptively unfit parents by allowing homosexuals to serve as foster parents.[227] Florida strives to place each foster child in a foster home that will provide "care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody; and to promote the health and wellbeing of all children."[228] The State cannot believe that homosexuals are capable of serving the best interests of the child in foster care, but not as adoptive parents.[229]

Florida's classification does nothing to serve the best interests of the children. Florida's adoption scheme already contains review crite-

219. *Id.* at 827.
220. Appellants' Brief at 17-38, *Lofton* (No. 01-16723-DD).
221. *Id.* at 27-30.
222. *Id.*
223. Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275, 1297 (11th Cir. 2004) (Anderson, J., dissenting).
224. *Id.*
225. Appellants' Brief at 35-38, *Lofton* (No. 01-16723-DD).
226. *Id.*
227. *Id.* at 30-35.
228. FLA. STAT. ch. 39.001(1)(a) (2003).
229. Appellants' Brief at 30-35, *Lofton* (No. 01-16723-DD).

ria that ensures placement of children into homes that serve their best interests.[230] The statutory classification does nothing to address the State's purported concerns, but instead serves to express disapproval of homosexuals.[231] Because the State's classification is not rationally related to the asserted justification, the court can infer that the only reason for the classification is a dislike of homosexuals.[232] A long line of precedent holds that animus and a "bare . . . desire to harm a politically unpopular group" is not a legitimate governmental interest and cannot justify a classification.[233] Yet, the Eleventh Circuit upheld the statute, finding a rational connection between the classification and the State's purported interest.[234] The following explores four arguments not already advanced by the families that may lead the court closer to finding the statute unconstitutional in future challenges.

1. Equal Protection

The State of Florida asserted that the best interests of the children are served when the child is raised in a household that contains both a mother and a father, and that this objective justifies the statutory classification.[235] The families presented evidence to prove that the classification was not rationally related to the State's purported interest, but never argued that placing children in a home with a mother and a father was not a rational basis to begin with.[236] The court, therefore, found that the State's interest in placing the children in households with both a mother and a father was a legitimate state interest and reviewed the statute with that assumption in mind.[237] A successful challenge to the State's premise may eliminate the very justification for the classification.

Claiming that only one man and one woman can together provide the optimal family environment is gender discrimination and violates the Equal Protection Clause of the United States Constitution and the Florida Civil Rights Act of 1992, which forbid discrimination based on sex.[238] The United States Supreme Court has held that gender cannot be the basis of discrimination because gender alone cannot determine

230. Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275, 1293 (Anderson, J. dissenting).
231. Appellants' Brief at 17-25, *Lofton*, 358 F.3d 804 (No. 01-16723-DD).
232. Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275, 1295-96 (Anderson, J. dissenting).
233. *Id.* at 1296 (citing Eisenstadt v. Baird, 450 U.S. 438 (1972) (unmarried users of birth control); United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) ("hippies"); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (the mentally disabled); Romer v. Evans, 517 U.S. 620 (1996) (homosexuals); Lawrence v. Texas, 539 U.S. 558 (2003) (homosexuals)).
234. *Lofton*, 358 F.3d at 827.
235. Brief of Appellees at 20, *Lofton* (No. 01-16723-DD).
236. *See Lofton*, 358 F.3d at 820-27.
237. *Id.* at 819-20.
238. *See* U.S. CONST. amend. XIV, § 1; FLA. STAT. ch. 760.01(2) (2004).

an individual's ability or the value of his societal contributions.[239] Classifications based on sex are usually supported by outdated beliefs of the capabilities of the sexes,[240] and the Court has clearly ruled that gender based classifications "must not rely on overbroad generalizations about the different talents, capabilities, or preferences of males and females."[241] Florida's assumption that only one man and one woman together can provide the best family environment for a child is blatant sex stereotyping.[242] The State cannot rationally believe that the sex of a parent is more determinative of a person's child-rearing capabilities than all other personality traits and life experiences. Not only is it irrational, it is also forbidden.[243] Florida's assertion that the best interests of the child are served by placing children in a home with both a mother and a father is based on assumptions about the capabilities of men and women, which are not allowed.[244]

The State offered two interests for justifying the discriminatory classification: morality and furthering the best interests of the children by placing them in homes with both a mother and a father.[245] The United States Supreme Court's overruling of *Bowers v. Hardwick* eliminated morality as a legitimate state interest.[246] If the remaining state interest was sufficiently challenged and found illegitimate, the statutory classification would have no bases and would therefore fail under an equal protection challenge.

2. Substantive Due Process

a. *Fundamental Right to Sexual Intimacy*

The Court ruled in *Lawrence v. Texas* that all persons have a fundamental right to determine their personal relationships and the nature of those relationships.[247] While some believe *Lawrence* announced a new fundamental right to sexual privacy,[248] and others believe that *Lawrence* simply reiterated an already existing fundamental right to private sexual conduct,[249] the result is that homosexuals

239. Baker v. State, 744 A.2d 864, 907 (Vt. 1999) (citing Frontiero v. Richardson, 411 U.S. 677, 686 (1973)).
240. *Id*. (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985)).
241. *Id.* (quoting United States v. Virginia, 518 U.S. 515, 533 (1996) (Johnson, J., dissenting)).
242. *Id*.
243. *See* U.S. CONST. amend. XIV; § 1; FLA. STAT. ch. 760.01(2) (2004).
244. *See Baker*, 744 A.2d at 911 (Johnson, J., dissenting).
245. *Lofton*, 358 F.3d at 818-20.
246. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
247. *Id*.
248. Laurence H. Tribe, *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).
249. Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275 (11th Cir. 2004) (Anderson, J. dissenting).

are entitled to exercise that fundamental right.[250] The court in *Lofton*, however, distinguished the fundamental right implicated in *Lawrence* and refused to extend it to the families.[251] It did so by looking to Justice Scalia's dissenting opinion, which faulted the majority in *Lawrence* for failing to adhere to the traditional fundamental rights analysis.[252] The traditional analysis is one formalized in *Washington v. Glucksberg*,[253] which examines whether the asserted fundamental right is one "deeply rooted in this Nation's history and tradition," and includes a "careful description" of the fundamental right.[254] Although *Glucksberg* established this traditional fundamental rights language, many cases have recognized or announced the fundamental rights of individuals without the rigidity proscribed by *Glucksberg.*[255] *Glucksberg* relied on recognizing specific acts traditionally believed to garner constitutional protection.[256] However, the search for specific acts ignores developments and changes in what society sees as right and wrong.[257] History tells us that many acts traditionally believed wrong are now accepted and constitutionally protected.[258] Over time, these once admonished acts were eventually accepted by turning the focus away from the act, and instead focusing on the traditional treatment of the individual and the government's involvement in the individual's personal decisions.[259] Instead of asking whether our country has a history and tradition of regulating contraceptives or abortion, we ask whether our country has a history and tradition of protecting an individual's private decisions about family and sex without governmental intrusion.[260] Fundamental rights have proven an evolving continuum,

250. *See Lawrence*, 539 U.S. 558.

251. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004).

252. *Id*.

253. 521 U.S. 702 (1997).

254. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

255. Nan D. Hunter, *Living With* Lawrence, 88 MINN. L. REV. 1103, 1114 (2004) (citing Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973)).

256. *Glucksberg*, 521 U.S. at 720.

257. Tribe, *supra* note 248, at 1924.

258. *Id*. at 1937, 1943. Constitutionally protected rights include the "right to become a parent." *Id.* (citing Skinner v. Oklahoma, 316 U.S. 535 (1942)). The "rights of parents to direct the upbringing of their children" are also protected. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Troxel v. Granville, 530 U.S. 57 (2000)). Additionally, "the right to transmit one's views of morality" is guaranteed. *Id.* (citing Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)). Married couples have the right to "sexual intercourse without risking pregnancy and parenthood." *Id.* (citing *Griswold*, 381 U.S. 479). Individuals, whether married or unmarried, have the right "not to risk unwanted pregnancy or sexually transmitted disease." *Id.* (citing *Eisenstadt*, 405 U.S. 438; Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)). Further, pregnant women have the right "to end their pregnancies." *Id.* (citing *Roe*, 410 U.S. 113). Finally, straight couples are free "to marry without restrictions based on race [or] poverty." *Id.* (citing Loving v. Virginia, 388 U.S. 1 (1996); Zablocki v. Redhail, 434 U.S. 374 (1978)).

259. Tribe, *supra* note 248, at 1932.

260. *See generally Griswold*, 381 U.S. 479 (contraception); *Roe*, 410 U.S. 113 (abortion).

allowing for the change of ideas over time.[261] Even Justice Scalia agreed in *R.A.V. v. City of St. Paul*[262] that the First Amendment does not serve to protect specific communications, but rather includes principles about the government's role in regulating an individual's ideas.[263] *Lawrence* stands for the proposition that

> those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment . . . might have been more specific had they known the components of liberty in its manifold possibilities, but, having the wisdom not to presume to have this insight and knowing that times can blind us to certain truths, they bequeathed us a text open to the recognition by later generations that certain laws once thought necessary and proper in fact serve only to oppress.[264]

Lawrence clearly implicated a fundamental right.[265] In *Lofton*, the court said that because *Lawrence* never asked "whether there has been a deeply rooted tradition and history of protecting the right to homosexual sodomy," the Court announced no fundamental rights.[266] Instead, *Lawrence* examined whether there has been a deeply rooted tradition and history of protecting an individual's private decisions with respect to personal, sexual relationships and ruled that, indeed, there is such a tradition and history.[267]

The court in *Lofton* erred in dismissing *Lawrence* as quickly as it did and in failing to recognize the fundamental right implicated in the *Lawrence* decision. In light of the holding in *Lawrence*, the court should have applied a strict scrutiny review of the statute. Had the court reviewed the statute under strict scrutiny, the State would have had the burden of showing that the classification was necessary to achieve a compelling state interest and that the means used were the least intrusive.[268]

Applying a strict scrutiny review, the statute would have been presumed unconstitutional and the State would have had to justify the discrimination to overcome the presumption.[269] Under strict scrutiny, the classification unnecessarily harms homosexuals by denying them the fundamental right to enter into legal sexual relationships and harms the children by denying them the legal protections and benefits that result from adoption.[270] As evidenced by the Lofton-Croteau

261. Tribe, *supra* note 248, at 1924.
262. 505 U.S. 377 (1992) (crossburning case from Minnesota in which the Court held that the First Amendment did not allow the prohibition of speech on disfavored subjects).
263. Tribe, *supra* note 248, at 1932.
264. *Id*. at 1943 (citing Lawrence v. Texas, 539 U.S. 558 (2003) (internal quotations omitted).
265. *See* Tribe, *supra* note 248.
266. Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 817 n.15 (11th Cir. 2004) (emphasis omitted).
267. Tribe, *supra* note 248, at 1943.
268. Maxwell, *supra* note 58, at 9.
269. *Id*.
270. Appellants' Supplemental Brief at 15, *Lofton* (No. 01-16723-DD).

family, not all children's best interests are served by denying homosexuals the right to adopt. The State of Florida has an obligation to the children in its care to review prospective adoptive parents and find an ideal match for each child. Florida's justification of serving the best interests of the children, however, makes little sense in light of the fact that the State reviews other applicants on a case-by-case basis.

b. *Fundamental Right to Raise Children*

In analyzing the families' fundamental rights claims, Florida stated that there is no fundamental right to adopt.[271] The families agreed that such a fundamental right did not exist and focused their argument on the nature of their relationships as a result of the foster family.[272] Had the families argued that the right to adopt is fundamental, and had the court recognized that right, the statute would have been reviewed with strict scrutiny and would have been found unconstitutional.

The United States Supreme Court has stated in case after case that the Fourteenth Amendment guarantees a fundamental right to "marry, establish a home and *bring up children* . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[273] No individual can be categorically denied the exercise of any of these freedoms.[274] The question before the court should be whether our country has a long history of respecting an individual's personal decision of how to participate in childrearing. The court should ask whether this country allows laws that interfere with these personal decisions, such as mandating a certain number of children be born to a marriage, preventing couples capable of naturally conceiving from bringing children into their home by other means, or deciding not to bring children into their home at all. These types of laws would not be allowed.

The Court has stated that "it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[275] If this is the reasoning behind

271. Brief of Appellees at 48, *Lofton* (No. 01-16723-DD).
272. *See id*. at 49-50.
273. Meyer v. State of Nebraska, 262 U.S. 390, 399 (1923) (emphasis added).
274. *See id*. (citing Slaughter-House Cases, 83 U.S. 36 (1872); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Minnesota v. Barber, 136 U.S. 313 (1890); Allgeyer v. Louisiana, 165 U.S. 578 (1897); Lochner v. New York, 198 U.S. 45 (1905); Twining v. New Jersey, 211 U.S. 78 (1908); Truax v. Raich, 239 U.S. 33 (1915); Adams v. Tanner, 244 U.S. 590 (1917); New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918); Truax v. Corrigan, 257 U.S. 312 (1921); Adkins v. Children's Hosp., 216 U.S. 525 (1923)).
275. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (citing Stanley v. Georgia, 394 U.S. 557 (1969); Skinner v. Oklahoma, 316 U.S. 535 (1942); Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

the decision of whether to conceive a child, the same reasoning should support an individual's decision in all other ways available to bring children into their lives. All United States citizens should be free to decide for themselves, without governmental interference, how they want to engage in childrearing, whether by conceiving children naturally, conceiving children artificially, terminating a pregnancy, practicing birth control, or *adopting*. While adoption is a state-conferred privilege, it is nonetheless a parenting option available and denial of adoption to one class of persons and not another offends this country's notions of fundamental fairness and substantive due process.[276]

The Florida statute eliminates adoption from a homosexual's list of childrearing options by precluding them from even applying.[277] No other class of persons is eliminated by the government from any other childrearing choices.[278] The Due Process Clause guarantees the right of all individuals to raise children, and the Florida statute takes that right away from homosexuals by denying them the right to be considered as potential adoptive parents.[279]

c. *Child's Fundamental Right to Familial Continuity*

The United States Supreme Court has also recognized that *children* have liberty interests under the Fourteenth Amendment's Due Process Clause.[280] A child has the same liberty interests as adults against governmental interference in the parent-child relationship.[281] In fact, a New York family court ruled in *Webster v. Ryan*[282] that a child had a constitutionally protected right to continue contact with a foster parent that was superior to the child's biological father's fundamental right to freedom in childrearing.[283] Despite Florida's claim that the statute barring homosexuals from adopting serves the best interests of the child, the statute focuses entirely on the homosexual orientation of the adults, never contemplating that placement with a homosexual family may indeed serve the child's best interests.[284]

By refusing to examine all prospective parents and categorically denying one entire class of parents, the State of Florida does not serve the best interests of the child, but instead, limits the pool of available,

276. Lofton v. Sec'y of the Dep't of Children & Family Servs., 377 F.3d 1275, 1310 (11th Cir. 2004) (Anderson, J., dissenting) (citing Shapiro v. Thompson, 394 U.S. 618 (1969)).
277. FLA. STAT. ch. 63.042 (2004).
278. *See id*.
279. *Id*.
280. Stephanie Moes, *Being Seen and Heard:* Webster v. Ryan*'s Constitutional Protection for Children's Right to Maintain Contact with Foster Parents*, 71 U. CIN. L. REV. 331, 337 (2002) (citing *In re* Gault, 387 U.S. 1, 13 (1967); Belloti v. Baird, 443 U.S. 622, 647-48 (1979)).
281. Carlos A. Ball & Janice Farrell Pea, *Warring With Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 335.
282. 189 Misc. 2d 86 (N.Y. 2001).
283. Moes, *supra* note 280, at 333 (citing Webster v. Ryan, 189 Misc. 2d 86 (N.Y. 2001)).
284. *See id*. at 340-41.

permanent homes. In families like the Lofton-Croteau family, refusal to allow the homosexual foster parents to adopt the children placed with them as infants harms the children in several ways. By preventing the adoption, the statute denies children such benefits as tax advantages, inheritance rights, the right to sue for wrongful death, and the eligibility for health and welfare benefits.[285] Furthermore, studies show that removal of a child from the longtime and continuous care of an adult with whom the child has developed a close and significant relationship with is no less painful or harmful to a child than separation from biological parents.[286]

Refusing to consider the homosexual foster parents of Florida's foster children for adoption harms the children by denying them the psychological well-being of continuing a relationship with parents they have come to love.[287] It also forces them to remain in the foster care system rather than reap the rewards of the legal recognition of a family unit. Florida's refusal to consider homosexuals as prospective adoptive parents violates the children's due process right to familial continuity.

V. Conclusion

The United States Court of Appeals for the Eleventh Circuit incorrectly concluded that the Florida statute banning homosexuals from adopting was rationally related to the State's legitimate interest of ensuring placement of children in homes with both a mother and a father. Furthermore, the court failed to recognize the impact and applicability of *Lawrence* and its announcement of a fundamental right to sexual privacy. The court's original opinion and the opinions expressed in the recent Order on the Petition for Rehearing En Banc suggest that the court believed in the families' cause, but was hesitant to make a statement on the issue of homosexual rights in the adoption forum.[288] The United States Supreme Court will eventually have to address this country's discrimination of homosexuals in non-criminal contexts, as a result of inevitable future challenges to similar laws. Hopefully, for the children of Florida, the discrimination will end soon.

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285. Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 Ariz. J. Int'l. & Comp. L. 141, 179 (2001); News Release, American Academy of Pediatrics, AAP Says Children of Same-Sex Couples Deserve Two Legally Recognized Parents (Feb. 4, 2002), http://www.aap.org/advocacy/archives/feb samesex.htm.

286. Moes, *supra* note 280, at 339.

287. *Id*.

288. *See* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004).