

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

Case No. 3D 08-3044
L.T. No. 06-33881 FC 04

**FLORIDA DEPARTMENT OF CHILDREN
AND FAMILIES,**

Appellant,

vs.

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

Appellees

**AMICUS BRIEF ON BEHALF OF THE CHILDREN BY:
CHILD ADVOCACY CLINIC AT HOFSTRA SCHOOL OF LAW;
CHILDREN AND FAMILY JUSTICE CENTER OF THE BLUHM
LEGAL CLINIC OF NORTHWESTERN UNIVERSITY SCHOOL OF
LAW; CIVITAS CHILD LAW CENTER, LOYOLA CHICAGO
SCHOOL OF LAW; EVAN B. DONALDSON ADOPTION
INSTITUTE; JUSTICE FOR CHILDREN PROJECT, OHIO STATE
UNIVERSITY SCHOOL OF LAW; JUVENILE LAW CENTER,
CHILDREN'S LAW CENTER OF MINNESOTA; LAWYERS FOR
CHILDREN AMERICA; ROCKY MOUNTAIN CHILDREN'S LAW
CENTER; SOUTHERN POVERTY LAW CENTER; SUPPORT
CENTER FOR CHILD ADVOCATES.**

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STATEMENT OF AMICI AND THEIR INTEREST IN CASE

Amici are non-profit organizations focused on policy and practice in adoption and dependency. Many include attorneys who practice in the dependency courts of the nation each day. This experience gives them a unique perspective. Amici know first-hand that dependency and adoption proceedings are inherently different because the court must constantly consider one vital and crucial standard—the best interests of the child.

Amici are non-profit organizations committed to the protection of children and children's rights through advocacy, academic study, policy development and collaborative efforts to improve the courts, agencies and services provided for children who are victims of abuse, neglect and abandonment. Amici are: Child Advocacy Clinic at Hofstra School of Law; Children and Family Justice Center of the Bluhm Legal Clinic of Northwestern University School of Law; Civitas Child Law Center, Loyola Chicago School of Law; Evan B. Donaldson Adoption Institute¹; Justice For Children Project, Ohio State University School Of Law; Juvenile Law Center, Children's Law Center of Minnesota; Lawyers For Children America; Rocky Mountain Children's Law Center; Southern Poverty Law

¹ The Institute is one of the pre-eminent adoption research and policy organizations in the country, examining policies and practices relating to adoption, placement of children, and foster care.

Center; Support Center For Child Advocates. Amici's collective experience can provide important perspectives and insights about policies and practices regarding court systems and securing the best interests of the children, especially through the permanent mechanism of adoption. This national perspective leads Amici to the same conclusion reached by the trial court below: that the statutory exclusion of gay people as adoptive parents unconstitutionally denies children an adoptive determination that serves their best interests.

SUMMARY OF THE ARGUMENT

Amici write to address the children's constitutional claims. Amici contend that the trial court properly struck Florida Statute section 63.042(3) as unconstitutional, which, by categorically banning adoption by gay people, violates the children's rights to equal protection of law and substantive due process, and is also a violation of the child's right to privacy and separation of powers. As Amici demonstrate, the ban unconstitutionally trammels the rights of children in foster care, a population that by age and circumstance is amongst the most vulnerable in our society. As one Florida senator opined during the legislative debate on the issue: "Is there sufficient justification to deny one child—one parent—the joy of being a family?" Florida Journal of the Senate, May 11, 1977, pg. 371. Amici contend that no, there is not.

ARGUMENT

I. THE CATEGORICAL EXCLUSION OF GAY PEOPLE AS ADOPTIVE PARENTS VIOLATES EQUAL PROTECTION RIGHTS OF DEPENDENT CHILDREN

The adoption ban in Florida Statute section 63.042(3) places an undue hardship on a class of children for whom the State and court have already determined that a placement with a gay foster parent by the Florida Department of Children and Families (“DCF”) is in the children’s best interest. Amici, many of whom advocate on behalf of foster children and families across the country, have found through long experience that where children have established strong familial bonds with their foster parents, severance can lead to long-term emotional and even developmental consequences from which many children do not recover.² Placing children

² Amicus the Evan B. Donaldson Adoptive Institute has published several research-based reports finding no child-centered reason to prevent gay people from becoming adoptive parents, and concluded that gay people can provide “permanent, loving homes” for children. See Jeanne Howard, *Expanding Resources for Children: Is Adoption by Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?* (March 2006) published policy brief, Evan B. Donaldson Adoption Institute.; Jeanne Howard & Madelyn Freundlich, *Expanding Resources for Waiting Children II: Eliminating Legal and Practice Barriers to Gay & Lesbian Adoption from Foster Care* (September 2008) published policy brief, Evan B. Donaldson Adoption Institute. These conclusions are consistent with the trial court’s finding that scientific research does not support the propositions set forth in *Lofton v. Sect’y of the Dep’t of Children and Family Servs.*, 358 F. 3d 804 (11th Cir. 2004) regarding the fitness of gay parents to adopt.

in the temporary care of gay foster parents, while categorically denying the same children the right to be adopted by these foster parents, violates the equal protection rights of children. The statute discriminates between children in foster homes with a parent who is gay and children in foster homes with a parent who is not gay.

The trial court applied a rational basis analysis in determining that the statute violated the equal protection rights of the prospective adoptive parent and the children. Amici agree with the trial court's conclusion that the statutory ban fails rational basis review. But recognizing the devastation a foster child experiences in the destruction of their only stable, supportive parenting relationship, Amici also contend that the standard of review applicable to the children's equal protection claim must rise to a level of heightened scrutiny.

A. Under a Rational Basis Test, the Statute is Unconstitutional.

The trial court found that section 63.042(3) "violates the Petitioner and Children's equal protection rights guaranteed by Article 1, § 2 of the Florida Constitution without satisfying a rational basis." Op. 52.³ The State maintains that the categorical ban on gay people being allowed to adopt is rationally related to its "weighty interest in structuring the adoptive

relationship.” State’s Brief at 19. However, Amici agree with the trial court that the categorical adoption ban lacks any rational basis for the statutory exclusion.⁴ Under Florida law, there must be evidence in the record to support a categorical exclusion under equal protection grounds.⁵ Here, the trial court made detailed factual findings after carefully scrutinizing every piece of evidence offered by the State and found that the statute lacks a rational basis and that only an adoption order was in the children’s best interest. The State has cited no argument to overcome the appellate presumption of correctness regarding these factual findings.

Florida law is designed to achieve permanency through adoptions. To achieve this goal, Florida allows adoption by many categories of parents, including single persons, as well as those with physical disabilities, chronic medical conditions, or HIV. Even those who have been convicted of

³ Citations to the trial court’s opinion are designated by “Op.” Unless otherwise indicated, all emphasis is supplied.

⁴ Categorical classifications of children grouped here by the homosexuality of their assigned foster parents are similar to other categorical classifications struck down on rational basis grounds for their lack of a legitimate state interest. *Romer v. Evans*, 517 U.S. 620, 632 (1996) (finding a determination otherwise “seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests”).

⁵ The State improperly asks this Court to follow the federal rational basis standard rather than the rational basis standard adopted by the Florida Supreme Court, which demands record evidence. *See Cox v. Fla. Dept. of Health and Rehabilitative Services*, 656 So. 2d 902 (Fla. 1995) (remanded to trial court to hold evidentiary hearing).

felonies are not automatically excluded. Op. at 30-31. DCF also stipulated that individuals can adopt even if they have had previous findings of abuse, neglect, or abandonment. Op. at 32, *stipulations*. However, while allowing gay individuals, like the father below, to become foster parents, Florida law nonetheless disqualifies all gay people from becoming adoptive parents.

The statutory prohibition on adoption by gay people effectively precludes enforcement of “the child’s statutory right to permanence and stability in adoptive placements.” *G.S. v. T.B.*, 985 So. 2d 978, 982 (Fla. 2008). In *G.S.* the Florida Supreme Court emphasized the need for stability through permanent family placement. By contrast, the adoption ban not only serves no rational basis, but causes harm to the children the law purports to protect by denying them a permanent adoptive home. This harm is poignantly illustrated in the instant case where two young children who have been in a the long-term, nurturing family relationship with their foster parent are deprived of the security and permanency that comes with being adopted.

B. The Categorical Ban on Adoption by Gay People Must be Evaluated Under Heightened Scrutiny.

The statutory ban on adoption by gay foster parents is even more difficult to justify under the heightened scrutiny demanded when the state imposes certain types of categorical classifications affecting children, such as the one here. Historically, certain classifications of children have

demanded more exacting scrutiny than the traditional rational basis analysis.⁶ For example, in *Plyler v. Doe*, 457 U.S. 202, 230 (1982), the U.S. Supreme Court considered the constitutionality of a Texas statute that denied free public education to the children of illegal aliens. The court applied heightened scrutiny, imposing on the state the burden of showing the existence of a relationship between the objectives of the statute and the burden imposed on the affected class. While the court concluded that undocumented aliens were not a suspect class and that public education was not a fundamental liberty interest (457 U.S. at 223), it noted nonetheless that the Texas statute at issue “imposes a lifetime hardship on a discrete class of children” based solely on their parents’ illegal entry into the state, and determined that public education is an important interest for children within the state’s borders as well as the state itself. *Id.* at 221-223, 224-30. Thus, in reviewing the state’s claimed interests in excluding illegal aliens from the state and preserving the state’s limited education resources for lawful residents, the court proclaimed that “the discrimination can hardly be considered rational unless it furthers some substantial goal of the state.” *Id.* at 224. Ultimately, the Court concluded that the state had not shown the

⁶ “To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

relationship between its objectives and the statutory classification, and struck the statute. *Id.* at 230.

Statutes that place an unfair burden on “illegitimate” children also have been subjected to heightened judicial scrutiny. *See State Dept’ of Health & Rehab. Services. v. West*, 378 So. 2d 1220 (Fla. 1978); *Clark v. Jeter*, 486 U.S. 456 (1988). It is an “illogical and unjust” burden on innocent children to deny them rights simply because of the nature of the relations of their parents. *Clark*, 486 U.S. at 461.

These cases involve classification of children based on the status of their parents—marital status or immigration status. In *Plyler*, *West*, and *Clark*, the court did not apply rational basis review and declined to give the state the degree of deference associated with rational basis review, or to presume the existence of some rational relationship between the statute’s objectives and the classification that implemented that objective. Instead, the Court applied heightened scrutiny and imposed upon the state the burden of showing the existence of a substantial relationship between the statute’s objectives and the burden imposed by the statute on the affected class. *See e.g., Plyler*, 457 U.S. at 230; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). The same heightened scrutiny is warranted here.

In this case, the record is replete with evidence that gay people as a group are not unfit for parenting, a finding that was properly reached by the trial court after considering extensive evidence. It is also supported by the Florida legislature's authorization of gay people to be foster parents. In this case, the children did not choose to be placed with a gay parent; that choice was made for them by the State. There is no justification for now breaking up that family simply because their parent is gay. The adoptive parents' sexual orientation should be rejected as a basis for denying the children's right to permanence.

II. THE ADOPTION BAN VIOLATES A CHILD'S LIBERTY INTEREST IN A FAMILY RELATIONSHIP.

The trial court held that "*Fla. Stat. § 63.042(3) violates the children's rights by burdening their liberty interests by unduly restraining them in State custody on one hand and simultaneously operating to deny them a permanent adoptive placement that is in their best interests on the other.*"

Op. 43. Amici agree that the children's fundamental right to liberty is trampled when the children are forced to remain in foster care, even though a permanent placement, with a parent everyone (including DCF) agrees is suitable, is available. Amici's experience in evaluating and advocating policy on adoption and foster care lead Amici to conclude that the adoption

ban is not narrowly tailored to achieve the interests it claims to pursue: a permanent family.

Just as parents have a fundamental right to have children, so do children have a fundamental right to have parents—i.e., they have a right to a permanent family relationship. Although this right has never been explicitly recognized by a Florida court, Amici contends that this is a logical extension of existing law and is necessary to protect a fundamental right to a family relationship.

Although outside of the due process context, very recent Florida case law supports the proposition that adoptive children have a statutory right to a permanent family. *See G.S. v. T.B.*, 985 So. 2d 978, 984 (Fla. 2008) (recognizing that the legislature has found that “[a]doptive children have the right to permanence and stability in adoptive placements”). When someone who is deemed suitable to adopt is available to a child, the state cannot deny that child the right to form a permanent family relationship through adoption.

In *G.S.*, the trial court established a shared custody/guardianship arrangement between the child’s grandparents, even when just one set of grandparents had moved to adopt. *Id.* The Supreme Court reversed, finding it was an abuse of discretion not to order an adoption when one was

available. *Id.* at 984. This finding by Florida's highest court should encourage this Court to recognize that failing to embrace adoption when it is available and in the best interest of the child is an abuse of a court's discretion. *Id.* The rationale of *G.S.* is consistent with, and should inform, this Court's consideration of the rights of children to be free from state restrictions on their liberty interest.

In this case of first impression, Amici contend that a child, like an adult,⁷ has a right to a relationship in the family context.⁸ Family relationships, by their very nature, involve deep attachments and commitments which are the lifeblood of liberty and happiness. *See Moore v. City of East Cleveland*, 431 U.S. 494, 504-506 (1977) (protection of a family member's choice of her family structure upheld in striking down an ordinance excluding a benefit to a single mother with a son and two unrelated grandsons).⁹ The U.S. Supreme Court has broadly defined a

⁷ Children have constitutional rights and fundamental protections just as adults do. *In re Gault*, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults only").

⁸ For example, the freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

⁹ Specifically, a child's right to a permanent familial bond with an adoptive parent or parents is an intimate human relationship of the sort that is protected by the liberty interests of both the Florida and U.S. constitutions. *See Santosky v. Kramer*, 455 U.S. 745 (1982) (recognizing that there is a liberty interest in foster-parent relationships); *compare with Roberts v.*

liberty interest to include, among other things, the right “to enjoy those privileges long recognized...as essential to the orderly pursuit of happiness by free men.” *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

At least one federal court has gone further. The U.S. Western District Court of Missouri held that a law that would have resulted in children staying in foster care for six months longer than they would have otherwise, violated “their fundamental rights to be free from unnecessarily prolonged confinement.” *E.C. v. Sherman*, 2006 U.S. Dist. LEXIS 25119 (W.D. Mo. 2006)(overturning a Missouri statute because, *inter alia*, in the context of an equal protection analysis it was not narrowly tailored to achieve a compelling state interest). Florida should follow this lead in determining that liberty, in the foster care context, includes freedom from unnecessary foster care when a permanent family is available.

A permanent family relationship is a fundamental liberty interest that the state may not infringe upon, absent a sufficient state interest that is closely tailored to effectuate only that interest. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). The categorical ban on gay people as adoptive parents is not narrowly tailored to the State’s interest in preserving best

United States Jaycees, 468 U.S. 609, 618 (1984)(citing *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925) (holding a relationship with a civic

interest of the child. That can only be done through permanency. In fact, the ban denies permanency and is counterproductive to the best interest analysis. The legislation does not just preclude unfit gay people from adopting; it is a categorical ban on all adoptions by gay people, regardless of their fitness, which is over-inclusive and thus unconstitutional. *Stanley v. Illinois*, 405 U.S. 645 (1972). The parties stipulated below that the prospective adoptive parent met every criteria for adoption, and his petition would have been granted but for his homosexuality. Op. 35.¹⁰ The over-inclusive ban infringes on the children's liberty interest in a permanent family relationship. Amici agree that if a person is not fit to adopt, the legislature can regulate to preclude the adoption. However, Amici also agree with the trial court's finding that gay people are not, and should not, be categorically deemed unfit to be adoptive parents.

III. THE ADOPTION BAN VIOLATES THE BROAD PRIVACY RIGHT AFFORDED BY FLORIDA'S CONSTITUTION.

organization to be distinguishable from the intimacy of a protected relationship)).

¹⁰ Significantly, the parties also stipulated that the placement of the children with the Respondent in his capacity as a foster parent was in the children's best interests. Op. 35. As the trial court noted, this adoption ban goes further than just failing to meet a compelling state interest, it can force the removal of children from a loving foster home in order to adopt and "*imposes on the court the burden of taking action harmful to the child.*" Op. 40.

The adoption ban interferes with children's enjoyment of their right to privacy in violation of Florida's constitution as it does not satisfy strict scrutiny analysis. Once a child has been adopted to live within a permanent family, then Florida constitution protects the minor's right to privacy in his intimate life decisions from state intrusion. The ban on adoption by gay parents unconstitutionally interferes with this right.

Florida's unique constitutional right of privacy provides that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." *Fla. Const. Art. I, § 23*. The Supreme Court of Florida has repeatedly observed that this right explicitly affords Florida citizens greater protection in the area of privacy than does the federal constitution. As the Florida Supreme Court held in *North Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612, 635 (Fla. 2003):

[I]t is settled in Florida that each of the personal liberties enumerated in the Declaration of Rights is a fundamental right. Legislation intruding on a fundamental right is presumptively invalid and, where the right of privacy is concerned, must meet the "strict" scrutiny standard. Florida courts consistently have applied the "strict" scrutiny standard whenever the Right of Privacy Clause was implicated, regardless of the nature of the activity.¹¹

¹¹ The Florida Supreme Court cataloged the pervasiveness of Florida's right to privacy in *North Fla. Women's Health & Counseling Servs.*, 866 So. 2d at

Florida's constitutional right to privacy applies to children and is protected by strict scrutiny. In analyzing claims based on the right of privacy, courts consider the unique attributes of children in determining whether the government has an interest sufficiently compelling to justify restricting their freedom. *State v. J.P.*, 907 So. 2d 1101, 1115-16 (Fla. 2004).

A child needs his family in order to meaningfully exercise his privacy right to make intimate life decisions without state intrusion. The types of decision that will be protected by the right to privacy once an adoption has occurred include where to live, what to do with one's body, with whom to associate, etc. Following an adoption order, an adopted child is free to make these decisions with their parent; they need not consult nor give information to the state. Only their newly adopted parent should be privy to this personal and private information.

Florida's statutory ban on adoption by gay people cannot survive strict scrutiny because it is not narrowly tailored to further any compelling state interest in the categorical exclusion. As discussed above, the statute does not withstand a rational basis, heightened scrutiny, and certainly not a strict scrutiny analysis.

635 n. 53, citing at least eleven cases where Florida courts have applied the strict scrutiny analysis in privacy case.

IV. IN ENACTING FLORIDA STATUTE § 63.042(3), THE LEGISLATURE IMPROPERLY STRIPPED THE JUDICIARY OF ITS POWER TO DETERMINE THE BEST INTEREST OF THE CHILD IN VIOLATION OF THE FLORIDA CONSTITUTION'S SEPARATION OF POWERS.

The responsibility to determine what lies in the best interest of a child in foster care is, by its essential nature, a judicial function. The adoption ban violates separation of powers because it is a broad categorical act by the legislature that impermissibly infringes upon this judicial power. As Amici well know, adoptions out of foster care occur in a specialized court designed solely to identify and secure the best interests of abused, neglected and abandoned children. Therefore, the legislature's adoption ban is uniquely impactful on the role of the judiciary.

The power of the court in adoption cases is broadly defined by Florida statute section 63.022 which states:

It is the intent of the Legislature that in every adoption, the best interest of the child should govern and be of foremost concern in the court's determination. The *court* shall make a specific finding as to the best interest of the child in accordance with the provisions of this chapter.

By its own directive, the legislature recognizes a specific finding is required to satisfy the best interest requirement and it cannot limit the trial court's ability to perform its mandated responsibility of making that individualized determination. In other contexts, Florida courts have found a violation of

the Florida constitution's separation of powers when the legislature has encroached upon the inherent role of the judiciary. See *Walker v. Bentley*, 660 So. 2d 313 (Fla. 2nd DCA 1995); *Johnson v. State*, 336 So. 2d 93 (Fla. 1976) and *Burk v. Washington*, 713 So. 2d 988 (Fla. 1998).¹²

The judge in an adoption case is the center of court's activity, the source to whom all are accountable, the manager of all resources, and the ultimate decision-maker in the quest to determine best interest. In few other courts does one concern pervade each and every act of every agency, attorney, worker, court employee and advocate within its purview. Time and resource allocation, directives between court dates, and even the language used by personnel of the court is shaped in order to preserve and ensure that the best interests of each child are served. To infringe upon that determination in any way cripples the court and renders the judge--the court's accountable leader--unable to perform her task.

Where the legislature slices a class of people out of the potential candidates that could serve the best interest of children before the court, it

¹² See *Walker* 660 So. 2d at 317 (finding the legislature to violate separation of powers in its attempt to limit the judiciary's civil contempt authority in domestic violence injunctions because of the "mandatory effect" of the limitation "on a court's inherent power ...to carry out [a] judicial function."); *Burk* 713 So. 2d at 988 (following *Walker*, to prevent the legislature from using speedy trial restrictions to limit a court's enforcement of contempt proceedings).

prevents a judge from determining best interest. It effectively redefines best interest to mean “best among limited options” but not truly the best interest. This is especially true where the legislature allows that same class of individuals to be considered as the best interest option as foster parents, but later eliminates that same “best interest” option when a court is tasked with the ultimate and more permanent question of adoption.

Florida’s strict application of the separation of powers doctrine, although never addressed in this specific context, prevents any branch from encroaching on another.¹³ It is not just the designated actions of each branch that must be distinct and respected, but the allocation of power to each. *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 268-9 (Fla. 1991)(“The judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power,” and “the legislature cannot ... reallocate the balance of power expressly delineated in the constitution among the three coequal branches”); see also *Office of State Attorney v. Parrotino*, 628 So. 2d 1097, 1099 (Fla. 1993) (“[T]he legislature cannot take actions that would undermine the independence of Florida's

¹³ “Branches of government. The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers pertaining to either of the

judicial . . . offices.”); *State ex rel. Harrington v. Gemung*, 300 So. 2d 271, 276 (Fla. 2nd DCA 1974) (“...to safeguard this system the preservation of the inherent powers of the three branches must be free from encroachment or infringement by one upon the other”).

While the traditional separation of powers analysis has focused on the division of responsibilities as between legislative power to enact substantive law and judicial power to enforce substantive law¹⁴, Amici contend that the analysis of checks and balances between the legislature and the judiciary should also take into account inherent powers of the judiciary which include powers that are essential to the court's existence. *See also Walker v. Bentley*, 660 So. 2d 313, 326, dissent of Judge Altenbernd, citing *In re Robinson*, 23 S.E. 453 (N.C. 1895); *Ex parte Wetzel*, 8 So. 2d 824 (Ala. 1942); 21 C.J.S. Courts § 31 (1990).

We trust judges, elected in Florida, to make adoption determinations, as Judge Lederman has, based on sound information, individualized assessment of the facts and circumstances of the child's life, and defensible social science. Paramount focus is on a timely and permanent resolution of the unstable circumstance of a child without a permanent family. The

other branches unless expressly provided herein.” Florida constitution, Article II, § 3.

¹⁴ See *Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976).

Legislature improperly restrains the Court from making the individualized determinations necessary by limiting the Court's power to place children in permanent families. This is an impermissible infringement by the Legislature of Judiciary authority of the dependency court.

CONCLUSION

For the reasons argued, the Amici respectfully submit that the Final Judgment of Adoption on appeal should be affirmed and that Florida Statute section 63.042(3) be declared unconstitutional.

Respectfully submitted,

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WE HEREBY certify that the Brief was prepared using 14 Point Times New Roman.

WE HEREBY certify that a true and correct copy of the foregoing was mailed this 22nd day of June, 2009 to the attached Certificate of Service list.

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