

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

**RECEIVED**

**JUN 29 2009**

**CASE NO. 3D08-3044**

Per \_\_\_\_\_

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FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES

Appellant,

v.

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

Appellees.

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

LOWER CASE NO. 06-033881 FC 04

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**AMICUS BRIEF OF TALBOT D'ALEMBERTE AND THE PUBLIC  
INTEREST LAW CENTER AT FSU COLLEGE OF LAW, IN  
SUPPORT OF THE POSITION OF THE APPELLEES**

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## SUMMARY OF ARGUMENT

### Fundamental Right to Adopt

In *Grissom v. Dade County*, 293 So.2d 59 (Fla. 1974), the Florida Supreme Court explicitly held that there is a fundamental right to adopt. The legal history of the State of Florida supports this fundamental right. Because the right to adopt is a fundamental right, the Court must use strict scrutiny to evaluate the constitutionality of Section 63.042(3), Florida Statutes, which bans all gay people from adopting.

### Fundamental Right to Privacy

The right to privacy in Florida is also a fundamental right found in the Florida Constitution. The Florida Supreme Court has held that there is a right to privacy in Florida regarding intimate activities. *B.B. v. State*, 659 So.2d 256 (Fla. 1995). In order to intrude upon this right the state must have a compelling state interest and use the least restrictive means. Section 63.042(3), Florida Statutes invades gay people's fundamental right to privacy by punishing gay people for their personal decisions regarding intimate relationships. The state does not have a compelling state interest. Even if it did, banning all gay people from adopting would not be the least restrictive means to further that interest.

Section 63.042(3), Florida Statutes is unconstitutional. The decision of the Circuit Court below should be affirmed.

## ARGUMENT

Section 63.042(3), Florida Statutes, which provides that persons otherwise eligible to adopt under the statute are absolutely barred if they are homosexual, unconstitutionally infringes upon two fundamental rights in Florida: the right to adopt and the right to privacy.<sup>1</sup>

- I. Based on Florida's fundamental right to adopt, the Court must use a strict scrutiny standard to evaluate the constitutionality of section 63.042(3), Florida Statutes.

In Florida, there are “inalienable rights” embodied in Article I, Section 2 of the Constitution of Florida (“All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, ...”)<sup>2</sup>

In Florida, there is a fundamental right to adopt. The Florida Supreme Court in *Grissom v. Dade County*, 293 So.2d 59, 62 (Fla. 1974) found this fundamental right to adopt in the Florida Constitution. The Court stated:

The fundamental right to have children either through procreation or adoption is so basic as to be inseparable from the rights to “enjoy and defend life and liberty, (and) to pursue happiness...”

*Id.* (quoting Florida Constitution, Article I, s 2 F.S.A. (1968)).

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<sup>1</sup> This amicus brief is based on the primacy of the Florida Constitution and the federalist principle set out in *Traylor v. State*, 596 So.2d 957 (Fla. 1992).

<sup>2</sup> The provisions of Article I, Section 1 also demonstrate that the rights of Florida citizens are protected from improper government action: “All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.”

This fundamental right flows from and is “inseparable from” the basic civil rights guaranteed to all persons in Article I, Section 2 of the Florida Constitution. The *Grissom* Court reasoned that just as marriage and divorce are fundamental rights, so is adoption. All three family experiences – marriage, divorce and adoption – are “fundamental human relationship[s],” which are protected by Article I, Section 2 of the Florida Constitution. *Grissom* at 62.

The Court argued that there was “no distinction” between adoption and marriage/divorce as a fundamental right. Adoption involves a two step process: first, extinguishing “certain rights of the natural parent” and second, establishing “such rights in the adoptive parents.” *Id.* at 62. Just as a divorce dissolves a marriage relationship, so an adoption dissolves the biological parent-child relationship. And just as a marriage creates a new family relationship, so does adoption. Adoptions create loving family relationships which are identical to the loving family relationships created by biological parents. From the perspective of the adoptive child, the adoptive parent is “Mom” or “Dad,” and from the perspective of the adoptive parent, the child is “son” or “daughter.”

In *Grissom*, Appellant challenged the adoption publication statutes based on both the Florida Constitution and the U.S. Constitution. The *Grissom* Court cites *Skinner v. Oklahoma*, 316 U.S. 535 (1942) for the general proposition that “the right to legally have children and the right of marriage...[are] ‘basic civil rights of

man.” *Grissom* at 62. The *Grissom* Court cites to Article I, Section 2 of the Florida Constitution for the specific constitutional authority for the fundamental right to adopt.

Florida and Oklahoma take the lead in the country in recognizing a fundamental right to adopt. In *In the Matter of Juan Del Moral Rodriguez v. State of Oklahoma*, 552 P.2d 397 (1976), the Oklahoma Supreme Court considered the “identical problem” as in *Grissom*. The Oklahoma Supreme Court explicitly followed *Grissom* and stated: “The right to have children is one of the basic civil rights of man. We find no distinction between the right of procreation of children and the adoption of children.” *Rodriguez* at 399.

*Grissom*’s fundamental right to adopt is controlling in Florida. The *Grissom* decision has been cited in a Third District Court of Appeal opinion, *Bower v. Connecticut General Life Insurance*, 347 So. 2d 439, 440 (Fla. 3d DCA 1977) (“*Grissom*... presented issues involving adjustments of fundamental human relationships such as dissolution of marriage or adoption”).<sup>3</sup> Florida Jurisprudence,

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<sup>3</sup> It has also been discussed in several Florida law reviews: Robert Williams, *The Anatomy of Law Reform: Dissecting a Decade of Change in Florida in Forma Pauperis Law*, 12 STETSON L. REV. 363, 374 (1982-1983) (“Ultimately, the Florida Supreme Court reversed the lower courts in *Grissom*, and held that adoption was a fundamental right...”); Glenda Thornton, *Florida Senators Address Surrogate Motherhood*, 15 FLA. ST. U. L. REV. 887 (1987) (“The court held for the plaintiff finding the law unconstitutional as applied and noted that there exists a fundamental right to have children...”); Marsha Rydbery, *Constitutional Law: Indigents’ Adoption Petitions*, 5 STETSON INTRAMURAL L. REV. 105 (1975) (“The

Second Edition, Constitutional Law, the basic legal treatise on Florida law, cites *Grissom*'s fundamental right to adopt as the prime "illustration" of a fundamental right in Florida. FLJUR CONSTLAW § 263.

There are only two ways for *Grissom* not to be controlling in Florida: first, the Florida Constitution would have to be amended to delete the fundamental right to adopt that the court recognized is protected by Article 1, Section 2; or second, the Florida Supreme Court in an opinion subsequent to *Grissom* would have to explicitly overturn *Grissom*. Neither event has occurred.

The Florida Supreme Court has set out a jurisprudential rule that it does not overrule itself sub silentio. In *Puryear v. State*, 810 So.2d 901, 905 (Fla. 2002), the Court states:

We take this opportunity to expressly state that this Court does not intentionally overrule itself sub silentio. Where a court encounters an express holding from this Court on a specific issue and a subsequent contrary dicta statement on the same specific issue, the court is to apply our express

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court reasoned that adoption is a fundamental right under the Florida Constitution.”). *Grissom* has also been discussed by several out of state law reviews: Thomas Bradley, *Prohibiting Payment to Surrogate Mothers: Love’s Labor Lost and the Constitutional Right of Privacy*, 20 J. MARSHALL L. REV. 715 (1986-1987) (“The Supreme Courts of Oklahoma and Florida...have... recognized a ...fundamental right to adopt.”); Christopher Austin, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768 (1982) (“...some state courts have extended ‘fundamental’ status to other interests affecting the family, such as adoptions”).

holding in the former decision until such time as this Court recedes from the express holding.

In short, this court must follow *Grissom* until repealed by the constitutional amendment process or overturned by an expressed opinion of the Florida Supreme Court.

In Florida constitutional law, a fundamental right cannot be unrecognized or deleted without an explanation. Fundamental rights are too important to be deleted without explanation, because fundamental rights are inseparable parts of our constitution. To extinguish a fundamental right without discussion would be equivalent to changing our constitution without discussion.

The few cases addressing the statute at issue here do not belie this principle.

The Florida Supreme Court in *Cox v. Department of Health and Rehabilitative Services*, 656 So. 2d 902 (Fla. 1995) did not overturn *Grissom*. The issue in *Cox* was whether Florida's categorical exclusion of "homosexuals" to adopt is unconstitutional. There are three textual reasons that establish that the *Cox* Supreme Court did not overturn *Grissom*. First, the *Cox* Supreme Court decision never cites to the *Grissom* decision. Second, the *Cox* Supreme Court never uses the phrase "fundamental right" or any equivalent in its opinion. Third, the *Cox* Supreme Court never discusses the fundamental right to adopt.

The *Cox* Supreme Court decision "approved in part" the Second District Court of Appeals decision in *Department of Health and Rehabilitative Services v.*

*Cox*, 627 So.2d 1210 (Fla. 2d DCA 1993). The Florida Supreme Court affirmed the District Court's decision on the right to privacy, vagueness and due process (U.S. Constitution and Article I, Section 9 of the Florida Constitution) and reversed and remanded on the issue of equal protection.

The Second District Court of Appeal opinion in *Department of Health and Rehabilitative Services. v. Cox* erred in failing to address or acknowledge the controlling *Grissom* decision. This error is shown by the textual fact that the Second District Court of Appeal never cites *Grissom*.

Instead of relying on *Grissom*, the Second District Court of Appeal relied on the New Hampshire Supreme Court's interpretation of the U.S. Constitution and the New Hampshire state constitution. The Second District Court of Appeal states: "We agree with the New Hampshire Supreme Court that the opportunity to adopt an unrelated child is not a fundamental liberty." Op. of the Justices, 530 A.2d 21 (N.H. 1987). This reliance is misplaced because, as the *Cox* Court noted, the court must look at the "history" and "tradition" of the liberty interest at issue to determine a fundamental right. *D.H.R.S v. Cox* at 1217. Both Florida and New Hampshire have adopted the common law of England, but their histories and traditions are very different when it comes to adoption. § 2.01, Fla. Stat. (2008).

In *In re Palmer's Adoption*, 176 So.2d 537 (Fla. 1937) the Florida Supreme Court discusses the world history of adoption. The Court quotes:

”The right of adoption, while known to the ancients of Greece and Rome, and probably to other ancient peoples, and while practiced among many of the continental nations under the civil law from the remotest antiquity, was unknown to the common law of England, and exists in this country in those jurisdictions having that law as the basis of their jurisprudence, only by virtue of statute....”

(quoting 1 Am.Juris., at 622)

As the Court noted, adoption was not legally formalized in the common law of England. This lack of a common law endorsement does not mean that adoption did not exist in pre-modern England:

...adoption, like marriage, is grounded in ancient customs surrounding the creation of socially recognized family relationships, reduced only in relativity modern times to statutory schemes of law. I would argue that formal adoption laws, on closer inspection, should be seen not as the ‘creation’ of a new form of parent-child relationship, but as the statutory recognition of a customary relationship, which gives it formal legal status.

Barbara Bennett Woodhouse, *Waiting for Loving: the Child’s Fundamental Right to Adopt*, 34 CAP. U. L. REV. 297, 308 (2005).

Hence, the fact that adoption was not part of the common law of England does not mean that adoption lacks the pedigree to be a fundamental right. As the *Palmer* Court quotes, “adoption existed since the ‘remotest antiquity’.”

As a matter of civil law, formal adoption existed in the Spanish colony of Florida for over 200 years. Spain colonized La Florida (Florida) from 1565 to 1763, and from 1784 to 1821. In 1821, United States “purchased” the East and

West Florida colonies from Spain, and Florida was a territory of the United States until statehood in 1845. *See*, THE NEW HISTORY OF FLORIDA (Michael Gannon, ed., University Press of Florida, 1966).

Florida has a long and continuous history of formal adoption. First, before statehood in 1845, La Florida had over 200 years of Spanish civil adoption law.<sup>4</sup> Second, during Florida's territorial period (1821-1845), the Governor and Legislative Council of the Territory of Florida passed four separate special laws granting individual adoptions.<sup>5</sup> Third, from statehood in 1845 to the first formal general law on adoption in 1885, the Florida Legislature passed 27 special laws granting distinct individual's adoption.<sup>6</sup> Fourth, in 1885, Florida passed its first

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<sup>4</sup> *See generally*, *Vidal v. Commagere et al.*, 13 La. Ann. 516; 1858 La. LEXIS 269 (1858), and *Fuselier v. Masse et al.*, 4 La. 423; 1832 La. LEXIS 260 (1832), for a discussion on Spanish adoption law.

<sup>5</sup> *See*, Ch. 928 Laws of Fla. Territory (1836). (providing for the adoption of G.W. Carter by James Bradley).; Ch. 919 Laws of Fla. Territory (1836). (providing for the adoption of Esther, George W. and Riley Crews by Joseph Howell).; Ch. 877 Laws of Fla. Territory (1835). (providing for the adoption of Elizabeth Underwood by William Murrhee).; Ch. 886 Laws of Fla. Territory (1835). (providing for the adoption of William Hicks by Benj Brown).; Ch. 796 Laws of Fla. Territory (1834). (providing for the adoption of Martha Higginbotham by William Crozier).

<sup>6</sup> *See*, Ch. 586 Laws of Fla. (1852). (providing for the adoption of Augustus, Joseph, Elizabeth, and Margaret Whitmire by Samuel Keyser).; Ch. 588 Laws of Fla. (1852). (providing for the adoption of Victoria Baty by Henry Bellows).; Ch. 589 Laws of Fla. (1852). (providing for the adoption of Oliver Price by William Delk).; Ch. 591 Laws of Fla. (1852). (providing for the adoption of Terrence Levy by Isaac Wimberly).; Ch. 751 Laws of Fla. (1855). (providing for the adoption of Seaborn E. Rawls by Seaborn Rawls).; Ch. 1530 Laws of Fla. (1865). (providing for the adoption of Irving and Margaret Gillis by Joseph and Sarah Askew).; Ch.

general law on adoption. Ch. 3594, Laws of Fla. (1885). This law is titled: “An Act to Provide a General Law for the Adoption of Children.” Section 1 reads:

That from and after the passage of this act the Judges of the Circuit Courts of the several Circuits of the State, on the application of any person or persons, shall have full power and authority to legalize the adoption of any person or persons who

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1843 Laws of Fla. (1871). (providing for the adoption of James La Fayette and William Register by Abijah Hall and his wife).; Ch. 2002 Laws of Fla. (1874). (providing for the adoption of Joseph Holland by Andrew Roberts and his wife).; Ch. 3086 Laws of Fla. (1877). (providing for the adoption of a child by Andrew and Julia Enochs).; Ch. 3215 Laws of Fla. (1879). (providing for the adoption of John Osteen by Daniel and Emma Thomas).; Ch. 3216 Laws of Fla. (1879). (providing for the adoption of Annie Cox by James and Georgia Morrow).; Ch. 3389 Laws of Fla. (1881). (providing for the adoption of Martha Haddock by Martin and Martha Douglass).; Ch. 3543 Laws of Fla. (1883). (providing for the adoption of Anna Stone and Elizabeth MacLeod by Robert and Anna VanValkenburgh).; Ch. 3544 Laws of Fla. (1883). (providing for the adoption of Katie Manzina and Frederick Lee Messer by James and Barbara Thomas).; Ch. 3545 Laws of Fla. (1883). (providing for the adoption of Oscar Keep by William and Pauline Keep).; Ch. 3546 Laws of Fla. (1883). (providing for the adoption of Edwin Snow by Henry Benjamin).; Ch. 3547 Laws of Fla. (1883). (providing for the adoption of George Core by Robert Mobley).; Ch. 3548 Laws of Fla. (1883). (providing for the adoption of Ida Barber by William and Amy Turner).; Ch. 3549 Laws of Fla. (1883). (providing for the adoption of Eliza Pittman by James and Susan Bellamy).; Ch. 3550 Laws of Fla. (1883). (providing for the adoption of Ritta Gillen by Emanuel and Ritta Smith).; Ch. 3551 Laws of Fla. (1883). (providing for the adoption of Samantha and Raymond Sears by Raymon and Samantha Starling).; Ch. 3552 Laws of Fla. (1883). (providing for the adoption of Luella Pippins and John Widley by Andrew and Frances Roberts).; Ch. 3553 Laws of Fla. (1883). (providing for the adoption of Annie Roberts by John Roberts).; Ch. 3554 Laws of Fla. (1883). (providing for the adoption of Lydia DeCoursey by Henry and Nancy Harmon).; Ch. 3555 Laws of Fla. (1883). (providing for the adoption of Nancy Edwards by Lemuel and Phettama Patterson).; Ch. 3679 Laws of Fla. (1885). (providing for the adoption of Maria de los Santos by Nicholas Prieto).; Ch. 3580 Laws of Fla. (1885). (providing for the adoption of Rufina and Francisco Dolores by Francisco and Henrietta Marrero).

may apply to the said Judges of the Circuit Court  
of the several Circuits of this State.

(emphasis added)

The intent of the Florida Legislature was “to legalize the adoption of any person...” As discussed earlier, informal adoptions existed in Florida prior to the general formal adoption law of 1885. This law “legalize[d]” the informal practice of adoption already existing in Florida.

In addition, in 1885, the Florida Constitution was amended to prohibit special laws on adoptions. Hence from 1885 to the present, it is unconstitutional to enact a special law on adoption.<sup>7</sup> As shown, Florida has a deep history of formal adoption, which supports a fundamental right to adopt.

In addition to the *Cox* decisions, the other leading case to address Florida’s categorical exclusion of homosexuals from adopting is *Lofton v. Department of Children and Families*, 358 F.3d 804 (11th Cir. 2004). The *Lofton* Court found that there was no fundamental right to adopt under the U.S. Constitution. *Id.* at 811. There are three reasons why *Lofton* is not dispositive as to the legal status of *Grissom*. First, the parties in *Lofton* stipulated to the issue that there was no fundamental right. *Id.* Second, *Lofton* is based directly on the U.S. Constitution,

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<sup>7</sup> Art. III, § 20, Fla. Const. of 1885. *See also*, Answer Brief of Appellee, F.M.G., where Appellee argues that section 63.042(3), Florida Statutes is an unconstitutional special law. Answer Brief of Appellee at pg. 48.

not on the Florida Constitution. Third, the *Lofton* Court followed the *Cox* decisions and failed to cite *Grissom*.

In conclusion, in Florida, the fundamental right to adopt requires the Court to use a strict scrutiny standard to evaluate the constitutionality of section 63.042(3), the categorical exclusion of “homosexuals” as adoptive parents.

II. Florida Statutes section 63.042(3) unconstitutionally invades Petitioner’s fundamental right to privacy under the Florida Constitution.

A) Right to Privacy

Section 63.042(3), Florida Statutes, invades Petitioner’s fundamental right to privacy without having a compelling state interest to justify the invasion and without using the least intrusive means to do so. For this reason, section 63.042(3) is unconstitutional.

The Declaration of Rights section of the Florida Constitution contains an explicit right to privacy provision. Article I, Section 23 says:

Right of privacy--Every 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. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

The right to privacy is a fundamental right in Florida, which may be intruded upon by the government only if the regulation at issue serves a compelling state interest

and accomplishes its goal through the least intrusive means. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985).

Under the Florida Constitution, even more so than under the Federal Constitution, individuals have a broad range of issues in which they have a reasonable expectation of privacy. “[The Florida privacy] amendment embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution.” *North Florida Women’s Health and Counseling Services, Inc. v. State*, 866 So.2d 612, 619 (Fla. 2003).

The right to privacy in Florida means more than the right to be free from public disclosure of private facts.

Because the word ‘privacy’ generally has been used in common parlance in its informational or disclosural sense, its broader meaning has been somewhat ignored. However, the concept of privacy encompasses much more than the right to control the disclosure of information about oneself. ‘Privacy’ has been used interchangeably with the common understanding of the notion of ‘liberty,’ and both imply a fundamental right of self-determination subject only to the state’s compelling and overriding interest.

*In re Browning*, 568 So.2d 4, 9 – 10 (Fla. 1990).

To trigger the right to privacy, an individual must have a reasonable expectation of privacy regarding the issue in question. *Winfield* at 547. The first step in a right to privacy analysis is for the court to ask whether the government is intruding into an aspect of the individual’s life in which he or she has a reasonable

or legitimate expectation of privacy. *City of North Miami v. Kurtz*, 653 So.2d 1025, 1028 (Fla. 1995). “Determining whether an *individual* has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation.” *Kurtz* at 1028.

In Florida individuals have a legitimate expectation of privacy in their family relationships and intimate activities. *B.B. v. State*, 659 So.2d 256 (Fla. 1995).

#### B) Florida’s Definition of “Homosexual”

The state of Florida categorically excludes all “homosexual” people from adopting. Section 63.042(3), Fla. Stat. In *Department of Health & Rehabilitative Services v. Cox*, 627 So.2d 1210, 1214 (Fla. 2d DCA 1993), the Court construed the term “homosexual” in section 63.042(3), Florida Statutes (1991) only to apply to applicants for adoption who are “known to engage in current, voluntary homosexual activity.”<sup>8</sup> The statute at issue in the current case is the very same. Based on *Cox*, the statute bans from adopting only those individuals who engage in “current, voluntary homosexual activity.”

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<sup>8</sup> The Florida Supreme Court in *Cox v. Florida Department of Health & Rehabilitative Services*, 656 So.2d 902 (Fla. 1995), affirmed the 2nd District Court of Appeal’s decision that the term “homosexual” was not unconstitutionally vague. The Court did not discuss this particular definition. This definition was adopted by the United States Court of Appeals for the 11th Circuit in, *Lofton v. Secretary of the Department of Children and Families*, 358 F.3d 804 (11th Cir. 2004).

### C. Legitimate Expectation of Privacy: Intimate Acts

The Florida Supreme Court has recognized that certain intimate personal activities fall within the privacy interest recognized by the United States Constitution and the Florida Constitution. In *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633 (Fla. 1980), the Florida Supreme Court explained that the U.S. Supreme Court has

clearly established that an individual may make a decision relating to intimate personal activities and relationships such as marriage, *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. 438, 453-54, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), without unjustified governmental interference. ... Unwarranted governmental intrusion on decisions in these “fundamental” areas is a deprivation of the “liberty” secured by the due process clause of the fourteenth amendment.

The Florida Supreme Court has explicitly held that there is also a legitimate expectation of privacy in engaging in the “intimate act” of sexual activity. *B.B. v. State*, 659 So.2d 256 (Fla. 1995).

In *B.B.*, the Court addressed whether Florida's right to privacy rendered section 794.05, Florida Statutes (1991) unconstitutional as it pertained to a minor's consensual sexual activity. Section 794.05 made it illegal to have unlawful carnal intercourse with an unmarried person of previous chaste character who was under age 18. The Court held "... Florida's clear constitutional mandate in favor of privacy is implicated in *B.B.*, a sixteen-year-old, engaging in carnal intercourse." *B.B.* at 259. In *B.B.*, the Court did not distinguish between sexual activity engaged in by heterosexuals or homosexuals. The Court focused on the sexual activity and found that there was an expectation of privacy about such matters in society.

Because there is a legitimate expectation of privacy between two consenting minors, it would be absurd to believe that two consenting adults would not have the same expectation of privacy. By banning people who are "known to engage in current, voluntary homosexual activity" from adopting, the state is invading an explicitly defined privacy interest. Section 63.042(3), Florida Statutes punishes individuals for their personal decisions regarding intimate acts by denying them even the possibility of becoming adoptive parents.

In *Department of Health and Rehabilitative Services v. Cox*, the Second District Court of Appeal held that Florida Statutes section 63.042(3) does not implicate Florida's fundamental right to privacy (this portion affirmed by the Florida Supreme Court in *Cox v. Department of Health and Rehabilitative*

Services, 656 So.2d 902 (Fla. 1995)). At the time of the Second District Court of Appeal's decision and the Florida Supreme Court's affirmation in *Cox*, the Court had not yet decided *B.B. v. State*. The Court had not yet declared that there is a legitimate expectation of privacy regarding sexual activity.

The Second District Court of Appeal stated in *Cox*, “[m]any private decisions indirectly limit one’s ability to obtain statutory privileges. Such indirect limitations do not render statutory privileges unconstitutional under the right of privacy.” *D.H.R.S. v. Cox* at 1216. First, as discussed in Part I, the right to adopt is not a privilege, but is a fundamental right. Second, by analogizing a choice to engage in an intimate relationship with a same-sex partner with other “private decisions,” the *Cox* Court acknowledged that engaging in such relationships is a private decision. Private decisions regarding intimate activities are protected by the right to privacy.

The Second District Court of Appeal did not follow the appropriate standard in deciding that the right to privacy was not implicated by section 63.042(3). Once the Court in *Cox* construed the term “homosexual” in section 63.042(3) to mean a person who engages in “homosexual activity,” it implicated the right to privacy, because a sexual relationship with a same-sex partner is an intimate act. The *Cox* Court failed to focus on the fact that the state penalizes those who engage in certain intimate acts by excluding them from consideration as adoptive parents.

#### D) Compelling State Interest

In order to intrude on one's privacy the state must show that the statute furthers a compelling state interest. In the case of adoption the state has an interest in providing for the best interests or well-being of the child available for adoption. Excluding all gay people from adopting children in the state of Florida does not further the state's interest in providing for the best interests of the children. In the present case, the Circuit Court found, with overwhelming evidentiary support, that "...the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption." *In the Matter of the Adoption of John Doe and James Doe*, 2008 WL 5006172 at pg. 20 (Fla. 11th Cir. Ct. 2008). Because the best interests of children are not served by prohibiting gay people from adopting, section 63.042(3) does not further a compelling state interest and thus is unconstitutional.

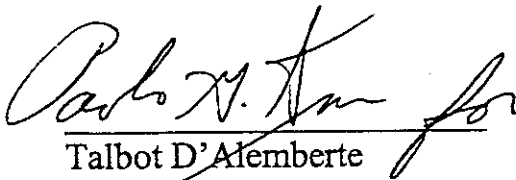
"Although the state does have an interest in protecting minors, 'the selective approach employed by the legislature evidences the limited nature of the ... interest being furthered by these provisions.'" *In re T.W.*, 551 So.2d 1186, 1195 (Fla. 1989) (quoting *Ivey v. Bacardi Imports Co.*, 541 So.2d 1129, 1139 (Fla.1989)). In both *North Florida Women's Health and Counseling Services, Inc. v. State* and *In re T.W.* the Florida Supreme Court found that because of the inconsistencies in the Florida Legislature's treatment of minors in access to

prospective adoptive parents. Banning all gay people from adopting is not the least intrusive means to further the best interests of the child.

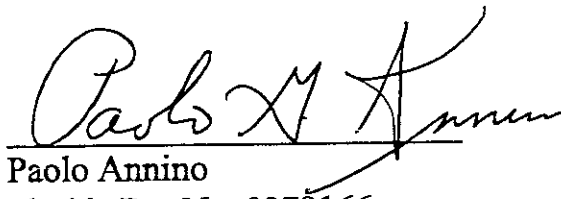
### CONCLUSION

For these reasons, section 63.042(3) of the Florida Statutes is unconstitutional. The decision of the Circuit Court should be affirmed.<sup>9</sup>

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 22<sup>nd</sup> day of June, 2009 to:

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief is being submitted in Times New Roman 14-point font and is, therefore, in compliance with Fla. R. App. P. 9.210(a)(2).

  
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