IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D02-3410

G.P., C.M., C.H., L.H.

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA
FAMILY DIVISION

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AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF FLORIDA

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STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to Florida Rule of Appellate Procedure 9.370, the American Civil Liberties Union and the ACLU of Florida (collectively, the "ACLU"), with written consent of the only appearing parties, hereby submit this *amicus curiae* brief in support of the Appellants. The ACLU is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Florida is its state affiliate. This case raises important questions about the rights of mothers and pregnant women, both adults and minors. The ACLU and its Florida affiliate have fought for these rights in numerous contexts over the years through the efforts of, among others, the ACLU's Women's Rights Project and Reproductive Freedom Project. The proper resolution of this case is therefore a matter of substantial concern to the ACLU and its members. In addition, it is respectfully submitted that the ACLU's analysis of important constitutional issues may assist this Court in resolving the issues presented.

SUMMARY OF ARGUMENT

Appellants are four mothers, each of whom seeks to place a child with a private agency for subsequent adoption. None of the mothers knows

the identity and/or location of her child's father. As a condition to finding an adoptive home for her child through private placement, the State of Florida requires that each mother publish her name and sexual history in the newspaper, in plain violation of her rights of privacy protected by the United States and Florida Constitutions.

Specifically, the new constructive notice provision of Florida's adoption statute requires each mother, including minors, to publish, once a week for four weeks in a newspaper in every city where conception may have occurred: her name and physical description; her child's name and age; the names and physical descriptions, if known, of every boy and man with whom she had sexual relations during the year preceding the child's birth (and who may therefore be father to her child); the cities in which conception may have occurred; and the dates on which it may have occurred.

This astonishing requirement has been called the "tell-almost-all adoption law," Eric Ernst, *Florida's New Tell-Almost-All Adoption Law Notice Misses the Mark*, Sarasota Herald-Trib., Aug. 20, 2002, at B1, *available* at 2002 WL 24897833 (Appendix A), the "Scarlet Letter law," John-Thor Dahlburg, *Florida Wants All the Details from Mothers in Adoption Notices Rule*, L.A. Times, Aug. 21, 2002, at A1, *available* at 2002 WL

2498105 (Appendix B) and, more colorfully, the "Hester Prynn Women's Humiliation Act," Rick Barry, *Brand the Young Mothers, End Adoptions*, Tampa Trib., Aug. 18, 2002, at 1, *available* at 2002 WL 6556935 (Appendix C). These descriptions hit the mark: the sexual history newspaper notice requirement is an outrageous privacy invasion and is patently unconstitutional.

A better alternative, used by the majority of states, has been proposed in Florida as well: a paternity registry which allows putative fathers to officially record their interest in the child, and which must be searched before the termination of the parental rights of an unknown or missing father. *See* Letter from Gov. Bush to Sec'y of State, at 2 April 17, 2001, (*available at* http://www.myflorida.com/myflorida/government/laws/2001legislation/documents/hb_141.doc) (Appendix D). This system protects the rights of putative fathers who have an interest in asserting paternal rights, while also protecting the privacy rights of the mother, the child and the man or men who the mother believes may be the father.

References will be made to "R" the record on appeal which includes the transcript of the May 28, 2002 hearing at R 177A - R 177W.

STATEMENT OF THE CASE AND FACTS

Appellants are mothers who wish to place their children for private adoptions and have challenged the requirement that they publish detailed private information about their identities and sexual histories in order to do so. Based on the Florida and United States Constitutions, Appellants challenged the notice provisions as a violation of their right to privacy before the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County. The State declined to appear or to defend the constitutionality of the challenged provisions.

On July 24, 2002, the lower court granted in part and denied in part the constitutional challenge. The Circuit Court concluded that while the notice provisions were unconstitutional with respect to victims of "forced" sexual battery, in all other instances, the State has a compelling interest in requiring the notice, and that the Court otherwise had "received no evidence that these statutes accomplish their intended goal at all," but that "[l]acking solid evidence, this Court cannot find that the existing publication requirements . . . do not accomplish their goal through the use of the least intrusive means." (R 219.) Petitioners filed a timely notice of appeal on August 22, 2002.

STANDARD OF REVIEW

The standard of review for a declaratory judgment is abuse of discretion. *Williams* v. *Gen. Insur. Co.*, 468 So. 2d 1033, 1034 (Fla. 3d DCA 1985), *rev. denied*, 476 So. 2d 673 (Fla. 1985). A trial court's decision will be accorded a "presumption of correctness" unless the decision is based on "a misapplication of the law" or is clearly erroneous. *Id.* Constitutional challenges to a statute are, however, pure issues of law to be reviewed *de novo*. *See City of Miami* v. *McGrath*, 824 So. 2d 143, 146 (Fla. 2002); *Fla. Dep't of Insur.* v. *Keys Title & Abstract Co.*, 741 So. 2d 599, 601 (Fla. 1st DCA 1999).

ARGUMENT

I. THE FLORIDA CONSTITUTION EXPLICITLY PROTECTS EVERY INDIVIDUAL'S RIGHT TO PRIVACY.

In 1980, Florida amended its Constitution to secure personal privacy as a fundamental right of the highest order. *See Beagle* v. *Beagle*, 678 So. 2d 1271, 1275-76 (Fla. 1996):

> 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.

Art. I, § 23, Fla. Const.

As this Court has declared, "few policies in the state are more paramount than enforcement of an exercise of a recognized constitutional right to privacy." *M.S.* v. *D.C.*, 763 So. 2d 1051, 1055 (Fla. 4th DCA 1999); *see also Singletary* v. *Costello*, 665 So. 2d 1099, 1104 (Fla. 4th DCA 1996) (noting that the constitutional right to privacy has been given an "expansive interpretation" by Florida courts). "Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution." *Beagle*, 678 So. 2d at 1276 (citation omitted).

A. Florida's Constitution Protects Fundamental Privacy Rights of Both Information Confidentiality and Decisional Autonomy.

Florida courts recognize at least two fundamental spheres of personal privacy protected by the State Constitution: (1) freedom from compelled "public disclosure of personal matters," and (2) freedom of

"personal decisionmaking." *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989) (plurality opinion) (citing cases).[1]

(1) Disclosural privacy "protect[s] the right to determine whether or not sensitive information about oneself will be disclosed to others." *Rasmussen* v. *S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 536 (Fla. 1987); see also, e.g., *Alterra Health Care Corp.* v. *Estate of Shelley*, No. SC01-709, 2002 WL 31026990, at *2 (Fla. Sept. 12, 2002) ("[Article I, Section 23] ensures that individuals are able to determine for themselves when, how and to what extent information about them is communicated to others.") (citation omitted). Among the core rights of disclosural privacy is the right to decide if and to what extent one's sexual relations are disclosed to others.

(2) Decisionmaking privacy entails the right to make fundamental choices about one's life without interference by the state. A

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[1] *See also, e.g.*, *In re Guardianship of Browning*, 568 So. 2d 4, 9-10 (Fla. 1990) (describing the right to privacy as protecting "informational or disclosural" privacy as well as "an individual's 'control over . . . the intimacies of personal identity'" and "his or her person") (citation omitted); *Winfield* v. *Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 546 (Fla. 1985) (recognizing the "decision-making or autonomy zone of privacy interests of the individual" and "one's interest in avoiding the public disclosure of personal matters").

mother's decisions concerning whether to have a family—including adoption decisions—are among the most fundamental life decisions that can be made. See *Y.H.* v. *F.L.H.*, 784 So. 2d 565, 571-72 (Fla. 1st DCA 2001) (mother's fundamental rights regarding child rearing include the right to place child for adoption). Mothers have a reasonable expectation of decisional privacy in making uncoerced choices about whether to have a family. See *Von Eiff* v. *Azicri*, 720 So. 2d 510, 514 (Fla. 1998) (holding that state constitution grants fundamental right to raise children as parents see fit); see also *Padgett* v. *Dep't of Health & Rehabilitative Servs.*, 577 So. 2d 565, 570 (Fla. 1991) (finding "a longstanding and fundamental liberty interest of parents in determining the care and upbringing of their children free from the heavy hand of government paternalism"); *In re T.W.*, 551 So. 2d at 1192 ("Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy."); *K.C.C.* v. *State*, 750 So. 2d 38, 40 (Fla. 2d DCA 1999) ("Termination of parental rights affects the fundamental liberty interests of parents in the care and custody of their children.").[2]

[2] A parent's right to make parenting decisions free from government intrusion has also been given vigorous protection in a series of cases (continued ...)

B. The Stringent and Protective "Compelling Interest" Test Applies to Claims Arising Under the Privacy Amendment.

Because the privacy amendment was "intentionally phrased in strong terms," an intrusion upon the "fundamental" right it embodies "demands [the application of] the compelling state interest standard" to pass constitutional muster. *Winfield* v. *Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 547-48 (Fla. 1985). "[T]his is a highly stringent standard," *T.W.*, 551 So. 2d at 1192, which subjects statutes to "the highest level of scrutiny." *Von Eiff*, 720 So. 2d at 514 (applying strict test to infringement on parents' right to make decisions about their children); *see also State* v. *Johnson*, 814 So. 2d 390, 393 (Fla. 2002) (applying strict test to forced disclosure of private medical records).

The "compelling interest" test has three parts. First, the Court must determine whether the challenged statute "implicates" the individual's protected zone of privacy. *See Von Eiff*, 720 So. 2d at 514; *see also Winfield*, 477 So. 2d at 547 ("[B]efore the right of privacy is attached . . . a

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(... continued)
involving grandparent visitation and custody. *See Troxel* v. *Granville*, 530 U.S. 57 (2000); *Richardson* v. *Richardson*, 766 So. 2d 1036 (Fla. 2000); *Saul* v. *Brunetti*, 753 So. 2d 26 (Fla. 2000); *Von Eiff*, 720 So. 2d 510; *Beagle*, 678 So. 2d 1271.

reasonable expectation of privacy must exist."). Second, once the privacy interest is shown to be implicated, the state must demonstrate that "the challenged regulation serves a compelling state interest." *Von Eiff*, 720 So. 2d at 514 (quoting *Winfield*, 477 So. 2d at 547). Third, the state must demonstrate that, even if the regulation serves a compelling state interest, it does so "through the use of the least intrusive means." *Id*.

An individual challenging the statute need only show that the statute burdens his or her privacy interest. Once shown, the burden of justifying the challenged statute—*e.g.*, meeting the second and third parts of the strict test—falls entirely to the State. *Id*.; *see also Singletary* v. *Costello*, 665 So. 2d 1099, 1109-10 (Fla. 4th DCA 1996) (holding State failed to demonstrate an alleged compelling interest because the State "adduced no evidence" to support it).

As shown in Sections II, III and IV below, the sexual history newspaper notice requirement infringes fundamental privacy interests, advances no compelling state interest, and is by no means tailored to achieve its legitimate goals through the least intrusive means.

II. SEXUAL HISTORY NEWSPAPER NOTICE IMPINGES UPON APPELLANTS' LEGITIMATE AND CONSTITUTIONALLY PROTECTED PRIVACY INTEREST.

As the Circuit Court correctly determined, the government-compelled newspaper publication of sexual history burdens the privacy rights of Appellants, triggering the application of the compelling interest standard of review. (R 228-29.)

A. Sexual History Newspaper Notice Infringes Mothers' Right to Information Confidentiality About the Identity, Number and Location of Their Sexual Partners.

To suggest that the sexual history publication requirement merely "implicates" the Appellants' privacy rights is far too generous: as a price for proceeding to place her child for adoption, a woman is required to place newspaper advertisements reciting her sexual past for all to read, even if, for example, the events occurred when she was a minor or are unknown to her present husband and her family. One can scarcely conceive a more egregious intrusion than such forced disclosure of one's sexual relations in the mass media. Sexual relations is unquestionably one of the most private activities in which an individual may engage. *See B.B.* v. *State*, 659 So. 2d 256, 258 (Fla. 1995) ("Carnal intercourse is by express definition an intimate act."). Disclosure of sexual relations therefore implicates "the most intimate details of [the Appellants'] lives." *S. Fla. Blood Serv., Inc.* v. *Rasmussen*, 467

So. 2d 798, 802 (Fla. 3d DCA 1985), *aff'd*, 500 So. 2d 533 (Fla. 1987); *see also* R 228 ("The intimacy of sexual relations is clearly sensitive information which an individual is protected from disclosing under the State right to privacy."). The forced disclosure of sexual history required by Florida raises the prospect of public humiliation, salacious publicity, damage to intimacy with current partners or spouses, harm to family life, loss of reputation, vulnerability to stalkers and other disturbed individuals, financial burdens, and a host of offensive consequences for those mothers unlucky enough to be covered by the statute.[3]

B. The Newspaper Notice Requirement Also Infringes Mothers' Right to *Decisional Autonomy* by Constraining the Choice Whether To Offer a Child for Adoption.

The challenged statute also significantly burdens each Appellant's autonomy and privacy regarding her decision to place her child for adoption. The prospect of forced disclosure of sexual history burdens this right because it forces a mother, who has reached the difficult and painful decision that her child would have a better life with others, to choose among several unattractive options. As explained on pages 20-23 below, a mother

[3] The privacy rights of the adoptee children—themselves potentially at sensitive ages and able, like their classmates, to read the public ads—and putative fathers are likewise infringed.

may: (1) participate in the adoption process and publish her sexual history; (2) voluntarily surrender all parental rights to the State (including the right to consent to subsequent adoption) and thereby avoid publishing her sexual history; (3) not put the child up for adoption despite her decision that it would be in her child's best interest to do so; or (4) terminate her pregnancy, despite her desire to carry her child to term.[4]

A forced choice between exercising fundamental decisional rights and protecting the privacy of intimate information from compelled publication in a newspaper plainly infringes decisional privacy interests. Thus, in another case of compelled disclosure of intimate information—a parental notification requirement for minors seeking an abortion—the First District Court of Appeals recently declared that the requirement "plainly interferes with 'the right to be let alone and free from governmental intrusion into the person's private life.'" *State* v. *N. Fla. Women's Health & Counseling Servs., Inc.*, No. SC01-843 2001 WL 111037, at *5 (Fla. 1st DCA

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[4] *See* James R. Langford, *"Scarlet Letter" Adoption Law Pushes More Women to Abortion*, Fla. Today, Aug. 19, 2002, at 1, *available at* 2002 WL 16430765 (Appendix E). A mother who wishes to legalize her older child's relationship with a stepfather through an adoption proceeding may likewise be deterred and forced to choose between options (1) and (3).

Feb. 9, 2001) (finding that only the statute's judicial bypass provision saved the statute from unconstitutionality) (quoting Art. I, § 23, Fla. Const.), *review granted*, 799 So. 2d 218 (Fla. 2001). If being required to inform one's parent about the decision to have an abortion as a condition for obtaining an abortion implicates and burdens the mother's right of privacy, *a fortiori*, the requirement to describe one's sexual history in a public newspaper advertisement—disclosing the intimate information to a potentially vast audience of strangers as well as family and friends—does so as well.

III. SEXUAL HISTORY NEWSPAPER NOTICE DOES NOT SIGNIFICANTLY ADVANCE COMPELLING STATE INTERESTS.

A. The Circuit Court Impermissibly Reversed the Burden of Proving Whether the Statute Supports a Compelling State Interest.

The Circuit Court erroneously placed upon the Appellants the burden of proving that the challenged statute did not serve a compelling state interest and was not narrowly tailored to achieve its goals. This was reversible error. Once a fundamental right—here the right to privacy for intimate personal relations—is implicated, the burden of proving that the statute is narrowly tailored to meet a compelling state interest falls to the State. *See, e.g.*, *Von Eiff* v. *Azicri*, 720 So. 2d 510, 514 (Fla. 1998); *In re*

Dubreuil, 629 So. 2d 819, 824 (Fla. 1994) (the State has the "heavy burden" of proving a compelling State interest).

Far from meeting that burden below, the State, despite repeated notice of the proceedings, failed to appear and defend the statute or explain the State's interest in sustaining it.[5] In the face of that default, the lower court erred by ruling against Appellant, not because it found the statute compelling or narrowly tailored, but because it found "there is no data to establish that these alternative methods [proposed by Appellant] would be more or less effective than the existing notice requirements." (R 237.) In other words, the court found that because Appellants had not disproved a point on which the State had the burden of proof, Appellants must lose. This reasoning reversed the burdens of the compelling interest test and constituted plain error.

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[5] When the Attorney General's Office failed to produce and appear after being given notice, the Circuit Court ordered that appellants' attorneys obtain "some affirmative acknowledgement from the Attorney General's Office and the State Attorney's Office that they are aware of this hearing because we have a serious issue here. I want it known that this [failure to appear] is a conscious decision, and not an oversight." (R 177T-177U.) As the Circuit Court noted in its Order, it received written confirmation by way of a June 12, 2002 letter from Petitioner's counsel that the Attorney General's Office and the State Attorney's Office chose voluntarily not to appear. (R 219.)

There was in fact no evidence—proffered by the State or otherwise in the record—as to whether the statute in its current form achieves its purported goals. Even while ruling against Appellants, the Circuit Court recognized that the record was devoid of evidence that "these statutes accomplish their intended goals at all." (R 237.) This is hardly surprising given that the court had "been presented with no empirical data or statistics to establish the success (or failure) rate resulting from the existing notice requirements." (R 237.)

Even though the Attorney General is not legally bound to appear, *see* § 86.091 Fla. Stat. (Supp. 2002), the State's failure to appear before this Court and the Circuit Court, after repeated invitations, should be viewed as a concession of the constitutional flaws in the sexual history notice requirement. *Cf. In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989) ("[W]here the trial court finds a statute to be unconstitutional, it is proper that the Attorney General appear on appeal to defend the statute.") (quoting *State ex rel. Shevin* v. *Kerwin*, 279 So. 2d 836, 837-38 (Fla. 1973)). In short, the Attorney General's choice not to appear cannot justify the Circuit Court's decision to shift the burden of proof to the Appellants.

B. The Circuit Court Misconstrued the Interests Served by the Sexual History Notice Requirement.

1. The Interests Identified by the Circuit Court Are the Product of Speculation.

Without any appearance by the State or the introduction of any empirical evidence, the Circuit Court was reduced to speculating about what interest may have motivated the legislature to impose the sexual history notice requirement. After stating that the goal of the statute was apparently "to provide notice to biological fathers so that they may both exercise their rights and accept their responsibilities with respect to their biological children . . . ." (R 229), the Circuit Court, in less than confident terms, hypothesized that there "*would seem* to exist" two possible state interests: (1) "there would certainly be a compelling state interest in strengthening and maintaining the bond between parent and child" and (2) "in those instances where the biological mother would need financial assistance from the state due to lack of support from the biological father, the notice provisions . . . would reduce the financial burden on the state in each instance where a biological father comes forward and accepts his responsibility for financial support of the minor child." (*Id*.) (emphasis supplied.)

2. The Circuit Court's Identification of the State Interests Is at Odds with the Legislative History.

Although the Circuit Court's task in attempting to reconstruct legislative intent without the State's assistance was a difficult one, the available legislative history contradicts the Court's assumptions about the purpose of the statute. Far from supporting the Circuit Court's identification of possible financial gains by the State, the regulatory impact statement for the bill concluded it would have a "minimal fiscal impact." Fla. H.R. on Comm. on Child & Fam. Sec., HB 141 (2001) Staff Analysis, at 15 (final June 27, 2001) [hereinafter "Child & Family Security Final Analysis"] (Appendix F). According to legislative staff materials, the larger adoption bill was an attempt "to balance the constitutionally protected rights of parents against the interest of all parties, including the children, in the finality and certainty of adoption proceedings and judgments." *Id*. at 17. The legislative reports explicitly state that procedural "safeguards" in the bill were intended to "reduce potential legal challenges to an adoption." Fla. H.R. Coun. for Healthy Comm., HB 141 (2001) Analysis, at 6 (Mar. 5, 2001) [hereinafter "Healthy Communities Analysis"] (Appendix G); *see also* Child & Family Security Final Analysis, at 4 (noting that the federal and state constitutions require due process, including notice and an opportunity to be heard, before

the parent-child relationship may be severed).[6] As shown in Part IV below, however, no requirement of federal or state constitutional law requires sexual history notice in order to meet the due process rights of putative fathers.

C. The Adoption Act's Arbitrary and "Selective Approach" (Sexual History Notice) Rebuts Any Suggestion That It Serves a Compelling State Interest.

If the State itself regarded as vital the notification of all possible fathers of a child offered for adoption—no matter how remote the prospect for reaching him—it would logically have to apply the newspaper notice rule to all adoptions within the State. In fact, application of the sexual history publication requirement is entirely arbitrary, depending not on the likelihood of reaching all similarly situated fathers, but on whether or not the mother has maintained her parental rights up until the time of adoption. Far from creating a comprehensive statutory framework to give every father the opportunity to participate in the life of his child, the Florida Adoption Act—for no apparent

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[6] See, *e.g.*, James R. Langford, *"Scarlet Letter" Adoption Law Pushes More Women to Abortion*, Fla. Today, Aug. 19, 2002, at 1 (paraphrasing statement by House sponsor Rep. Lynn that the bill was intended "to protect [adoptions] by making sure enough effort was made to locate birth fathers so they could not contest adoptions later"), *available at* 2002 WL 16430765 (Appendix E).

reason[7]—creates three separate regimes for notice to unknown fathers, depending on the *mother's* legal status.

1. Statutory Variants in Notice Requirements.

a. Section 383.50 Notice

Newspaper notice of the mother's sexual history is not required for adoption of a child if the mother has left her "newborn infant" at a hospital, fire station, or emergency medical center, "and expresse[d] an intent to leave the newborn infant and not return." § 383.50(5), Fla. Stat. (Supp. 2002). Florida law gives this mother "the absolute right to remain

[7] Key members of the legislature have publicly acknowledged the lack of forethought, further undermining any conclusion that the law furthers a compelling state interest. For example, the Senate sponsor has suggested that sexual history newspaper notice was a "significant unintended consequence[ ]," John-Thor Dahlburg, *Florida Wants All the Details from Mothers in Adoption Notices Rule*, L.A. Times, Aug. 21, 2002, at A1, *available at* 2002 WL 2498105 (Appendix B), and stated that the provision should be changed. *See* Tom Zucco, *Humiliating Mothers? Or Protecting Fathers?*, St. Petersburg Times, Aug. 19, 2002, at D1, *available at* 2002 WL 25546371 (Appendix H). The House sponsor also referred to sexual history newspaper notice as an "unintended consequence." *See* James R. Langford, *"Scarlet Letter" Adoption Law Pushes More Women to Abortion*, Fla. Today, Aug. 19, 2002, at 1, *available at* 2002 WL 16430765 (Appendix E).

anonymous," § 383.50(5), Fla. Stat. (Supp. 2002).[8] Even if known, her identity must be kept strictly confidential, unless another person claiming to be the child's parent comes forward. *See* § 383.51, Fla. Stat. (2002). Before adoption may proceed, a "local licensed child-placing agency," § 383.50 (7), Fla. Stat. (2002), must "initiate a diligent search to notify and to obtain consent [to the termination of parental rights in preparation for adoption] from a parent whose identity or location is unknown, other than the parent who has left a newborn infant at a hospital, emergency medical services station, or fire station in accordance with s. 383.50." § 63.0423(4), Fla. Stat. (Supp. 2002). If the agency does not know the identity of the missing father, constructive newspaper notice must be used, including "available identifying information." § 63.0423(4), Fla. Stat. (Supp. 2002). Because of the confidentiality and anonymity requirements of § 383.50(5), Fla. Stat. (2002), these provisions mean that the mother's identity—and thus her sexual history—is not "available" for publication in the newspaper notice. If no one comes forward to claim the infant within a specified time period, all parental rights can be

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[8] The statute creates a narrow exception to this right to anonymity if "there is actual or suspected child abuse or neglect." § 383.50(5), Fla. Stat. (2002).

terminated and the child placed for adoption despite the absence of a notice publishing the mother's identity and sexual history. *See* § 63.0423(5), Fla. Stat. (Supp. 2002).

b. Chapter 39 Notice

Where parental rights are terminated pursuant to Chapter 39 of the adoption law, subsequent adoption proceedings are "exempt" from the notice requirements of §§ 63.087 and 63.088—*i.e.*, exempt from newspaper notice. *See* § 63.037, Fla. Stat. (Supp. 2002). Yet Chapter 39 makes no provision for sexual history newspaper notice during the termination of parental rights proceedings.[9]

As in the case of Section 383.50 notices, in Chapter 39 proceedings, the required notice to potential missing fathers does not require

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[9] Parental rights may be terminated under Chapter 39 in two distinct ways. *First*, a "parent or parents" may "voluntarily execute[] a written surrender of the child" to the Department of Children and Family Services ("DCF"). § 39.806(1)(a), Fla. Stat. (Supp. 2002). This initiates a process where DCF takes custody of the child and proceeds to terminate parental rights. *Id.* §§ 39.806(1)(a) & (3). Upon the showing of a valid consent that was not obtained by fraud or duress, the petition to terminate parental rights will be granted. *See In the Matter of Adoption of Doe*, 543 So. 2d 741, 743-44 (Fla. 1989). *Second*, parental rights may be "involuntarily" terminated where the parent or parents have abandoned the child, abused or neglected the child or otherwise placed the child at risk. §§ 39.806(1)(b)-(c), Fla. Stat. (Supp. 2002).

the mother to advertise her sexual history in the newspaper. If, after questioning the mother or a relative, a potential putative father is identified, that individual must be served with notice; if his location is unknown, a "diligent search" must be conducted for him by contacting relatives, the post office, relevant federal and state agencies, and the like. *See* § 39.803(1), (3), (5) & (6), Fla. Stat. (Supp. 2002). If the questioning does not uncover the identity of the father "the court . . . may proceed without further notice" to that individual. *Id*. § 39.803(4); *see also id*. § 39.801(3)(a)(3) (if parent is "unknown," notice may be given to "a living relative of the child"); *id*. § 39.502(8) ("It is not necessary to the validity of a proceeding covered by this part that the parents be present if their identity or residence is unknown after a diligent search has been made."). Where a putative father's identity or location is unknown, Chapter 39 specifically does *not* require that the identifying details of the mother and putative father be published in the newspapers. *See* § 39.803, Fla. Stat. (Supp. 2002). Nor is such notice required during a subsequent adoption proceeding. *See* §§ 39.812(2), 63.037 & 63.062(7), Fla. Stat. (2002).

c. Chapter 63 Notice

Only mothers whose children will be privately adopted through Chapter 63 proceedings must endure the humiliation of newspaper notice provisions. Chapter 63 "applies to terminations of parental rights respecting children who have been placed with intermediaries or licensed child placing agencies for the purpose of adoption." Healthy Communities Analysis, at 1 (Appendix F).

2. There Is No Rational Basis for the Notice Requirement Provided in the Statute

Neither the bill itself nor the legislative record suggest any possible reason why mothers who proceed privately must provide newspaper notice or the sexual histories, while mothers who surrender their children to DCF, abandon their children at fire houses, or lose their parental rights due to misconduct, are exempt. Of course the problem of unknown biological fathers is not unique to Chapter 63 situations. It is at least as likely to occur in cases where the mother has voluntarily surrendered the child to the state, *see, e.g.*, *C.S.* v. *S.H.*, 671 So. 2d 260, 263 (Fla. 4th DCA 1996) (noting that child was placed for adoption following natural mother's consent and that the father "was unknown"), or where the mother's parental rights were involuntarily terminated for reasons such as abandonment, *see, e.g.*, *S.B.* v. *Dep't of*

Children & Family Servs., 745 So. 2d 1144, 1145 (Fla. 3d DCA 1999) (affirming termination of mother's parental rights so that the child "may be adopted without further delay" where the "identity of the father remains unknown"). Nor is there any basis to believe that notice through diligent search but without newspaper notice of the mother's sexual history would be more effective in public than in private adoptions. In short, the distinction is not rational.

First of all, a father will only "receive" newspaper notice if his child's mother chooses to maintain her parental rights throughout the adoption process. A young mother, faced with the obvious public shaming imposed by the sexual history notice requirements may well decide to avoid the Chapter 63 adoption process and voluntarily execute a written surrender of the child pursuant to section 39.806(1)(a). The adoption will then proceed without the requirement of sexual history notice (but at the cost to the mother of being excluded from the adoption process).

Thus, in the interest of accomplishing the goal of providing fair notice, the disparity in the law simply puts a mother to the insidious choice of publishing her sexual history or, to circumvent doing so, choosing either to avoid adoption or to surrender her right to participate in the adoption process.

Consequently, the notice requirements are not rationally connected to achieving the identified state interest in "strengthening and maintaining the bond between parent and child" or "reduc[ing] the financial burden on the state" espoused by the Circuit Court.

Second, the sexual history notice requirement tends to impair rather than advance the Circuit Court's identified state interest in "reduc[ing] the financial burden on the state." (R 229.) Because of the exemption from notice granted to cases handled under Chapter 39 and § 383.50, the Florida Adoption Act now creates a perverse set of incentives for a mother who wishes to place her child for adoption either to surrender her child to the state or to abandon the child entirely. This will actually increase the State's burden because it must now care for the child until adoption and must find suitable adoptive parents without the assistance of the natural mother. These reasonably foreseeable costs far outweigh the purely speculative financial benefit suggested by the Circuit Court and do not add one whit to the prospect of unknown fathers getting notice of prospective adoptions.[10]

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[10] *See* (R 229) (suggesting that the State's financial burden will be reduced if the biological father receives notice, comes forward and decides to accept responsibility for financial support).

Third, by omitting those situations in which the mother's parental rights have been involuntarily terminated, the statute fails to cover those children most in need of establishing a connection with the biological father. By definition, these are cases in which a child has been abandoned, neglected, abused or otherwise put at risk. These children are at least as likely to benefit from being acquainted with their natural father as those in the custody of a responsible mother who has maintained her parental rights and has sought to protect the welfare of her child through participation in the adoption process. Yet the statute excludes from its coverage these children and their unknown fathers.

The result of this gerrymandered requirement is that notice of sexual history is required only arbitrarily and capriciously, not rationally or evenhandedly. The Florida Supreme Court has held the fact that a statute that operates in this fashion is evidence that it does not further the kind of substantial interest that would justify impairing the constitutional rights of individuals. In *In re T.W.*, 551 So. 2d 1186, 1195 (Fla. 1989), the Court struck down a statute that required parental consent before a minor could obtain an abortion that threatened her safety. In doing so, the Court contrasted the abortion statute with a parallel statute that permitted a minor

to consent to any surgical procedures involving her pregnancy except for abortion. *See id*. The Court held that "[a]lthough the state does have a compelling interest in protecting minors, 'the selective approach employed by the legislature evidences the limited nature of the . . . interest being furthered by these provisions.'" *Id*. (quoting *Ivey* v. *Bacardi Imports Co.*, 541 So. 2d 1129, 1139 (Fla. 1989) (alteration in original). Thus the underinclusiveness or arbitrariness of a statute which burdens fundamental constitutional rights will fatally undercut the claim that it serves compelling state interests. *See also, e.g.*, *City of Ladue* v. *Gilleo*, 512 U.S. 43, 52-53 (1994); *Fla. Star* v. *B.J.F.*, 491 U.S. 524, 540-41 (1989); *id*. at 541-42 (Scalia, J., concurring); *B.B.* v. *State*, 659 So. 2d 256, 261 (Fla. 1995) (Kogan, J., concurring); *State* v. *Global Communications, Corp.*, 648 So. 2d 110, 113 (Fla. 1994), *aff'g* 622 So. 2d 1066 (Fla. 4th DCA 1993).

IV. THE SEXUAL HISTORY NEWSPAPER NOTICE PROVISION IS NOT NARROWLY TAILORED TO ADVANCE THE STATE'S INTERESTS.

The goal of the new adoption statute, as evidenced by its text and by committee staff reports and statements of sponsors, is to provide finality in the adoption process by defining what notice is adequate to inform missing fathers of the impending adoption and to extinguish their ability

later to challenge a completed adoption. *See supra* at 18-19. At this level of generality, the State undoubtedly has a compelling interest in achieving this goal. But sexual history newspaper notice is perhaps the *most intrusive* manner of accomplishing that goal—and thereby runs afoul of the third requirement of the compelling interest test—that the ends be accomplished by narrowly tailored provisions that are as respectful as possible of an implicated constitutional interest such as the right to privacy. This statute falls far short of meeting that standard.

First of all, the State has concluded that for many adoptions a putative father's parental interests may be terminated simply by complying with the other notice requirements of the statute. It is only in the case of private adoptions under Section 63 that the State seeks to infringe upon the privacy rights of the mother. This should be the end of inquiry as to whether less intrusive alternatives are available—the legislation is premised on that very assumption. In addition, as discussed below, if the State wished to provide putative fathers with additional notice, there is another less intrusive means of giving notice that is used in other states and available on a voluntary basis in Florida already.

A. A Paternity Registry Would Provide a More Narrowly Tailored Vehicle To Afford Putative Fathers with Notice.

Paternal adoption registries are used successfully by many states to give fathers with an interest in their children's lives and possible adoption a chance to assert that interest. Paternal registries preserve an unknown putative father's right to notice of termination or adoption proceedings, provided he takes the initial step to register. Generally, the unknown putative father must register within a certain period of time or his rights are extinguished by a "door-closing" clause. Putting some minimal responsibility on the interested father seems entirely appropriate.[11]

Florida currently has a paternity registry that is purely voluntary; failure to register does not currently close the door on the putative father's rights to assert a parental interest. *See* § 63.062(1)(d)(1), Fla. Stat. (Supp. 2002). Even as a voluntary mechanism, however, Florida's paternity

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[11] As Governor Jeb Bush acknowledged, the sexual history newspaper notice "in its efforts to strike the appropriate balance between rights and responsibilities, [has] a shortage of responsibility on behalf of the birth father that could be corrected by requiring some proactive conduct on his part." Letter from Gov. Bush to Sec'y of State, at 2 April 17, 2001, (*available at* http://www.myflorida.com/myflorida/government/laws/2001legislation/documents/hb_141.doc) (Appendix D).

registry alleviates whatever modest risk exists of bypassing the rights of an interested but unknown father.

Moreover, a registry that operates as a "door closing" mechanism is plainly feasible as shown by its use in a number of other states. *See* Letter from Gov. Bush to Sec'y of State, at 2-3 April 17, 2001, (*available at* http://www.myflorida.com/myflorida/government/laws/2001 legislation/documents/hb_141.doc) (Appendix D). It is also clearly a less intrusive manner of providing sufficient notice to missing fathers and therefore to achieving the finality of the adoption process that is the State's most obvious interest.

A door-closing paternity registry would target the same group of men as those sought to be protected by sexual history newspaper notice: those who have had such a transitory or casual sexual relationship with the mother that she does not know their location and/or identity (and cannot find it through the exercise of due diligence), but who are sufficiently interested in potential fatherhood to take an affirmative step to grasp the opportunity.

While not all those who suspect they may be fathers will avail themselves of the registry, neither will they all spend time scouring the legal

notices section of local newspapers in cities where they have had sex in the recent or distant past.

B. The Current Notice and Diligent Search Provisions, with a Paternity Registry Instead of Sexual History Newspaper Notice, Would More Than Satisfy the Due Process Rights of the Target Group of Putative Fathers.

Without resorting to such notice, any potential father who knows, or suspects, that he is the father of a child and has had even a passing relationship with the child can be found and notified. Other provisions of Florida adoption law require diligent efforts to locate any potential father whose identity or suspected identity is known to the mother—indeed anyone with whom she recalls having had sexual relations. In addition, fathers have actual notice of potential fatherhood inferred from the act of having intercourse with a woman.[12]

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[12] The United State Supreme Court has examined the question of a putative father's due process rights. In *Lehr* v. *Robinson*, the Court's concern was whether "New York has adequately protected [the biological father's] opportunity to form . . . a relationship" with his offspring by creating a paternal registry to "protect the unmarried father's interest in assuming a responsible role in the future of his child" and the Court determined that his constitutional rights were not offended because the Family Court adhered strictly to the provisions of the statute. 436 U.S. 248, 262-63, 64 (1983).

Who then is missed by the other notice requirements? Only persons whose relationship with the mother was so fleeting that she no longer recalls their names, and whose interest in mother or child has not led to any meaningful contact during pregnancy or since childbirth.[13] For this limited class of putative fathers, adoption registries employed in other states have been held sufficient to withstand due process challenges from putative fathers.[14]

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[13] Of course, the newspaper notice provisions do not even target this entire group—only those where the mother opts for a private adoption under Section 63. (*See* p. 20-24 *supra*).

[14] *Heidbreder* v. *Carton*, 645 N.W.2d 355, 370, 374 (Minn. 2002) (Minnesota Father's Adoption Registry statute, which requires a putative father to register no later than 30 days after the child's birth "adequately protected putative father's opportunity to establish a relationship with his child." Adoption registries "provide a mechanism to identify putative fathers and giv[e] them notice of adoption proceedings" and "adoption registries are also intended to balance the putative father's interests with those of the child, the birth mother, and adoptive parents.)"; *In the Matter of Robert O.*, 80 N.Y.2d 254, 262 (1992) ("[I]n some instances the Constitution protects an unwed father's opportunity to develop a relationship with his infant [child]. This constitutional right to the opportunity to develop a qualifying relationship does not extend to all unwed fathers or arise from the mere fact of biology."); *See, e.g.*, *Wells* v. *Children's Aid Soc'y of Utah*, 681 P.2d 199, 207 (Utah 1984) (Utah statute terminating rights of the father of an illegitimate child if he fails to provide required notice of his paternity provides sufficient due process as "[d]ue process does not require that the father of an illegitimate child be (continued ...)

In addition to protecting the mothers' rights, an adoption registry protects the privacy rights of the putative fathers (and others with whom the mother may once have had sex) far more effectively than sexual history newspaper notice. *See Alterra HealthCare Corp*. v. *Estate of Shelley*, No. SC01-709, 2002 WL 31026990, at *7 (Fla. Sept. 12, 2002) (holding that court should "fully consider" the privacy interests of non-parties even if they do not intervene to assert that interest); *Rasmussen* v. *S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 537 (Fla. 1987) (carefully weighing "the consequences of disclosure to nonparties"); *Berkeley* v. *Eisen*, 699 So. 2d 789 (Fla. 4th DCA 1997) (holding that the constitutionally-protected right to privacy of non-party clients of the defendant outweighed plaintiffs' need for information). *Cf. In re Dubreuil*, 629 So. 2d 819 (Fla. 1994) (recognizing that the State has a legitimate, compelling interest in protecting innocent third-parties from harm).

Since the State chose the most rather than the least intrusive manner to give notice to missing fathers and arbitrarily exempted large

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(... continued)
identified and personally notified before his parental right can be terminated").

categories of fathers from its intrusive new notice requirement, the State's interest must defer to more compelling privacy concerns. *See In re Dubreuil*, 629 So. 2d 819, 828 (Fla. 1994) (holding that alleged interest in protecting children from abandonment was not supported by the facts and did not outweigh privacy rights of mother); *In re T.W.*, 551 So. 2d 1186, 1194-96 (Fla. 1989) (finding interest in "preservation of the family unit" not compelling enough to justify privacy invasion); *Public Health Trust of Dade County* v. *Wons*, 541 So. 2d 96, 97-98 (Fla. 1989) (state interest in allowing a minor child to be reared by two parents did not override mother's privacy right to refuse medical treatment which conflicted with her religious beliefs).

In sum, the State has not articulated a position which would permit the privacy rights of the mother to be superseded by either a compelling interest of the state or the unknown putative father's interest. It also has failed to take into account the privacy interests of men who may suddenly find their names in newspaper advertisements because of a long ago liaison that did not lead to fatherhood at all.

V. SEXUAL HISTORY NEWSPAPER NOTICE VIOLATES THE FUNDAMENTAL RIGHT TO PRIVACY UNDER THE UNITED STATES CONSTITUTION.

The federal constitutional right to privacy encompasses decisional autonomy, information confidentiality, and associational freedom. Sexual history newspaper notice is particularly invasive and repugnant because it infringes each component of the federal constitutional right to privacy.

A. The Newspaper Notice Requirement Infringes Mothers' Right to Decisional Autonomy.

The United States Constitution protects the autonomy and freedom of decisions regarding whether or not to have a family and how to raise that family. *See, e.g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 849 (1992) (plurality opinion) ("It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."); *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982) ("freedom of personal choice in matters of family life is a fundamental liberty interest"); *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, 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."). Necessarily comprised in the rights to choose whether to bear children and how to raise them is the right to choose whether to put one's child up for adoption. *See Y.H.* v. *F.L.H.*, 784 So. 2d 565, 571-72 (Fla. 1st DCA 2001) (relying on federal constitutional law).

Government-required disclosure of personal information unconstitutionally infringes decisional autonomy where it substantially coerces an intimate, private decision within this protected sphere of family, procreation and child-rearing. *See Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 766-68 (1986); *Plante* v. *Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978); *see also Duplantier* v. *United States*, 606 F.2d 654, 669-71 (5th Cir. 1979) (recognizing that government-required disclosure of personal information which "impact[s] . . . the way intimate family and personal decisions are made" could violate the federal right to privacy).

Sexual history newspaper notice substantially diminishes the ability of mothers who do not wish to disclose their sexual history and their decision to give up their children to make a free and uncoerced choice between adoption and other options. The arbitrary distinctions in the Florida adoption law exacerbate this problem. For instance, a mother desirous of

avoiding newspaper notice might avoid giving such notice by abandoning her newborn at a hospital or fire house, or surrendering her child to DCF—but this would deprive her of the right to have any involvement in the adoptive placement of her child. *See supra*, Section III C 1(a) at 20-22. The coercive potential of the notice requirement upon mothers' protected decisions is plainly unconstitutional. *See Thornburgh*, 476 U.S. at 767 (1986) (Supreme Court struck down Pennsylvania statute that would make information about women having abortions publicly available, reasoning such a statute "raise[s] the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right" and explaining that this "Court consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities.").

The privacy invasion occasioned by the requirement of sexual history newspaper notice is equally outrageous, and therefore correspondingly likely to chill a mother's exercise of her personal right to make decisions about whether to have a family.

B. Sexual History Newspaper Notice Violates Mothers' Right to Information Confidentiality.

The United States Constitution protects the individual's "interest in avoiding disclosure of personal matters," *Whalen* v. *Roe,* 429 U.S. 589, 599-600 (1977), including disclosure of information concerning one's sexual activities, *see, e.g.*, *James* v. *City of Douglas*, 941 F.2d 1539, 1543 (11th Cir. 1991) (finding "right to confidentiality" regarding videotape of sexual relations between unmarried adults),[15] and decisions regarding one's children, *see, e.g.*, *Thornburgh*, 476 U.S. at 766-68 (finding that required disclosure of detailed personal information about woman having an abortion violated right to privacy), *overruled on other grounds, Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1992); *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S.

15 *See also, e.g.*, *Sterling* v. *Borough of Minersville*, 232 F.3d 190, 195-96 & n.4 (3d Cir. 2000) (holding that information about one's sexual activities and preferences is constitutionally-protected from government disclosure); *Woodland* v. *City of Houston*, 940 F.2d 134, 136, 139 (5th Cir. 1991) (assuming that job applicants' constitutionally-protected privacy rights could be infringed by unnecessary questions about "affairs with married women, girlfriends, cohabitation . . . homosexual behavior, masturbation, sexual activity as a teenager . . . [and] sexual relations with [one's] wife"); *ACLU of Mississippi* v. *Mississippi*, 911 F.2d 1066, 1070 (5th Cir. 1990) (recognizing constitutionally-protected right to privacy implicated by planned disclosure of "allegations of homosexuality, child molestation, illegitimate births, and sexual promiscuity"); *Fadjo* v. *Coon*, 633 F.2d 1172, 1174-75 (5th Cir. Jan. 1981) (finding "right to confidentiality" regarding "the most private details of [plaintiff's] life").

425, 459 (1977) (identifying right to confidentiality in "extremely private communications between [Nixon] and, among others, his wife [and] daughters"). By requiring, *inter alia*, disclosure of former sexual partners, locations where intercourse occurred, and physical descriptions of the mother and child, the sexual history newspaper notice requirement plainly compels disclosure of personal information falling into these two protected areas.

The review of a statute impinging upon a federally-protected information privacy interest requires the balancing of any "legitimate state interest" against the intrusion into the individual's privacy. *See Nixon*, 433 U.S. at 526-527; *James*, 941 F.2d at 1544; *Duplantier*, 606 F.2d at 670; *Plante*, 575 F.2d at 1134.

As discussed in detail above, there is no question that the mothers' privacy is grievously invaded by sexual history newspaper notice, without any countervailing compelling state interest being furthered as a result. *See supra* sections III, IV. For the same reasons that the statute violates the Florida Constitution, the balance plainly tips in favor of the mothers' privacy as a matter of federal constitutional requirements.

VI. THE COURT SHOULD STRIKE DOWN THE ENTIRE SEXUAL HISTORY NEWSPAPER NOTICE REQUIREMENT

Because the sexual history newspaper notice provision is constitutionally repugnant, it should be severed from the rest of the adoption statute and excised. The unconstitutional part of a statute can be severed, permitting the constitutional remainder of the statute to stand when:

> (1) the unconstitutional provisions can be separated from the remaining valid provision, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and bad features are not so inseparable in substance that it can be said that the Legislature would have passed one without the other, and (4) an act complete in itself remains after the invalid provisions are stricken.

Richardson v. *Richardson*, 766 So. 2d 1036, 1041 (Fla. 2000). The excision of Section § 63.088(5) from the code would leave in place significant due process protections for missing fathers. (*See* Section IVB *supra*.) The legislative purpose of providing missing fathers sufficient due process to prevent later legal challenges to adoptions would be effectuated by the remaining notice provisions. The sexual history newspaper notice requirement is a small part of a comprehensive statutory scheme that already adequately protects the interests of absent fathers without the newspaper notice provision. The newspaper notice provision is not specifically discussed in the legislative history demonstrating that "the 'good' and 'bad'

portions of the act were not so inseparable that it could be said the Legislature intended to pass one but not the other." *Richardson*, 766 So. 2d at 1041. Thus, the multi-part test for severability is met. *Id*.

CONCLUSION

For the reasons set forth above, the Amicus, the American Civil Liberties Union and the ACLU of Florida, respectfully submit that this Court reverse the Circuit Court's determination that Sections 63.087 and 63.088 of the Florida Statutes (2001) are constitutional and that an order issue declaring such provisions to be invalid and of no effect.

Dated: Miami, Florida
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I hereby certify that the foregoing brief is submitted in Times New Roman 14 point font, pursuant to Fla. App. R. Pro. 9.210(a)(2).

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I hereby certify that on this 29th day of October 2002, I caused a true and correct copy of the Amicus Curiae Brief and Appendix to be served by over-night courier and United States Mail on:

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TABLE OF CONTENTS

Page

Page

TABLE OF CITATIONS

Page(s)

CASES

Page(s)

Page(s)

CONSTITUTION

Page(s)

STATUTES

RULES

MISCELLANEOUS