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

STEVEN LOFTON, ET AL.,

Appellants,

-v-

KATHLEEN A. KEARNEY, ET AL.,

Appellees.

# APPELLANTS' SUPPLEMENTAL BRIEF


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Certificate of Interested Persons and Corporate Disclosure Statement

Under F.R.A.P. 26-1 and 11th Cir. R. 26-1, appellants certify that the following is a complete list of all trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal who were not identified in papers previously filed with the Court:

Laurence H. Tribe

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Leslie Cooper

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<u>Supplemental Brief</u>

The plaintiff families submit this supplemental brief to address the implications of the United States Supreme Court's decision in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), decided on June 26, 2003, in which the Court held Texas' "Homosexual Sodomy" law unconstitutional.

In *Lawrence*, the Supreme Court dramatically changed the constitutional landscape for gay people in America.

Seventeen years earlier, in *Bowers v. Hardwick*, the Court turned a challenge to a law that made sodomy a crime for everyone into a case about a "fundamental right to engage in homosexual sodomy." 478 U.S. 186, 191 (1986). Having recast the case as one about the rights of gay people, the Court rejected as "facetious" the claim that the right to privacy protected the intimacy of same-sex couples. *Id.*, at 194.

It was a rejection with profound consequences. While *Bowers* decided only the validity of a general sodomy law under the due process clause, that case and the sodomy laws it upheld became the leading justifications for discrimination

against gay people. They were treated as decisive and controlling in contexts ranging from employment to child custody and visitation.[1]

The *Lawrence* court was well aware of what *Bowers* had done. As the Court put it, "[i]ts continuance as precedent demeans the lives of homosexual persons," and it set about to undo the damage. *Lawrence*, 123 S. Ct. at 2482. In an extraordinary step, *Lawrence* not only overruled *Bowers,* but declared "*Bowers* was not correct when it was decided, and it is not correct today." *Id.*, at 2484.

Even more remarkable, the Court explained that it decided to strike Texas' law down under the due process clause precisely because if it chose the narrower ground of equal protection, some might believe facially neutral sodomy laws remained valid. This would be unacceptable, the Court said, going right to the heart of the wrong that *Bowers* had done, because it would be ". . . an invitation to

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[1]*See, e.g., Padula v. Webster*, 822 F.2d 97, 102-03 (D.C. Cir. 1987) (in rejecting lesbian's employment discrimination claim, court reasoned "[i]f the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious."); *Ex Parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (transferring custody away from mother because she is a lesbian, relying largely on the state's sodomy law).

subject homosexual persons to discrimination both in the public and the private spheres." *Id.*, at 2482.[2]

Finally, invoking sweeping language from *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992), the Court explained that ". . . [a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." In a breathtakingly simple statement, the Court made the point of the opinion: "[p]ersons in a homosexual relationship may seek autonomy for these purposes just as heterosexual persons do." *Lawrence*, 123 S. Ct. at 2481-82, quoting *Casey*, 505 U.S. at 851.

*Lawrence* is no narrow piece of legal craftsmanship, attentive to the details of the statute or the events involved. *Lawrence* does not simply strike down a

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[2]S*ee also id.* ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."); *Limon v. Kansas*, 71 U.S.L.W. 3794 (June 27, 2003) (vacating and remanding, in light of *Lawrence*, conviction under a Kansas law that penalizes young adults for sex with minors, but which is only applicable to same-sex sexual activity; the only cert. issue was an equal protection claim).

state law. *Lawrence* admits a great wrong. The *Lawrence* opinion was written not just to explain its result, but to restore gay people to full citizenship.[3]

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The State of Florida said it had two interests that justified its categorical exclusion of gay people from adopting: expressing moral disapproval of homosexuality and promoting children's welfare — more specifically, providing children homes with both a mother and a father. Appellees' Brief, at 15-16. The Supreme Court's decision in *Lawrence* is directly relevant to this Court's analysis

[3]The Court in *Lawrence* pointed out two issues that were not before it: government regulation of sex that is not consensual, non-commercial, private, and between adults; and same-sex marriage:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

*Lawrence*, 123 S. Ct. at 2484. This observation can in no way be read, as the State suggests, as a declaration that the opinion is narrowly cabined to the facts that were before it; nor does it leave room for the State's suggestion that it is acceptable for government to legislate to express moral disapproval of gay parents. *See* Defendants' Rule 28(j) letter, dated July 9, 2003.

of both of these interests. The former is completely foreclosed by the Court's rejection of moral disapproval of homosexuality as a basis for government action. And after *Lawrence*, the State's purported child welfare justification is now subject to closer examination than deferential rational basis review.

*Lawrence* expressly confirms that moral disapproval of gay people is <u>not a legitimate basis for laws that disadvantage lesbians and gay men.</u>

In our briefs, we argued that moral disapproval of gay people is not a legitimate basis for laws that disadvantage this group. Supreme Court equal protection cases going back 30 years have repeatedly held that disapproval of a disadvantaged group is an impermissible purpose for government classifications. *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

The State relied on *Bowers v. Hardwick* to argue that this principle doesn't apply when a government acts out of moral disapproval of lesbians and gay men. Appellees' Brief, at 42, 46. The Court definitively took this argument off the table by overruling *Bowers* in *Lawrence*. 123 S. Ct. at 2484.

Moreover, moral disapproval of homosexuality was precisely the interest offered by Texas to justify its sodomy law (*see id.*, at 2486 (O'Connor, J., concurring)) and the Court rejected it. *Id.*, at 2480, 2483. The Court held that moral disapproval of gay people is not even a "legitimate state interest" in a challenge brought under the due process clause. *Id.*, at 2484. As Justice O'Connor pointed out, in the context of equal protection rational basis review, this has been the law for over 30 years. *Id.*, at 2486 (O'Connor, J., concurring) ("Moral disapproval of [gay people], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.").

With the overruling of *Bowers* and the Court's confirmation that moral disapproval of homosexuality is not a legitimate state interest, it is clear that there is no gay exception to the equal protection clause.

After *Lawrence*, the State's child welfare
justification must be subjected to a closer examination.

With moral disapproval off the table, the only remaining asserted justification for the challenged law is children's welfare, or more specifically, providing children homes with both a mother and a father. But, as the families

previously explained, the statute is not rationally related to achieving that state interest because the State never claimed that keeping gay people out of the pool of adoptive parents would get more kids placed with married mothers and fathers. Moreover, its placement of children with gay people and other unmarried people in what it calls "*de facto* permanency" (R-24-Defendants' Motion to Dismiss, at 10) makes it impossible to credit as the reason for the statute. Thus, as the families explained, this purported justification fails even under the most deferential form of scrutiny. But after *Lawrence*, it is clear that the law must be examined more closely than that.

In *Lawrence*, the Court recognized for the first time that lesbians and gay men have the same liberty interest in forming intimate, personal relationships that heterosexuals have. *Lawrence*, 123 S. Ct. at 2478 ("The liberty protected by the Constitution allows homosexual persons the right to make [the] choice" to enter into intimate, personal relationships), *id.*, at 2481-82 (for gay people, intimate adult relationships are part of the enduring personal bonds that give meaning to life just as they are for heterosexuals). Thus, "[p]ersons in a homosexual relationship may seek autonomy for [making personal decisions regarding family relationships and raising children, among others], just as heterosexual persons do."

*Id.* Gay people have the right to enter into these important personal relationships and "still retain their dignity as free persons." *Id.*, at 2478.

Now that this constitutional right is recognized, the State cannot penalize people for exercising it—as the challenged adoption law does—absent an important and narrowly tailored justification for doing so. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *see also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

In *Shapiro*, for example, the Court struck down Connecticut's one year residency requirement for eligibility for certain government benefits, holding that this policy unconstitutionally disadvantaged people based on their exercise of the right to travel interstate. "[A]ny classification which serves to penalize the exercise of [a fundamental right], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Shapiro*, 394 U.S. at 634; *see also Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (striking residency requirement for veterans' eligibility for civil service job preference as penalizing the right to interstate travel).

In *LaFleur*, 414 U.S. 632, the Supreme Court struck down a school policy requiring pregnant teachers to take maternity leave without pay starting five months before the expected birth of the child. The Court found that "[b]y acting to

penalize the pregnant teacher for deciding to bear a child," the challenged policy constituted "a heavy burden" on the exercise of teachers' constitutionally protected freedom of personal choice in matters of family life. *Id.*, at 640. The Court struck the policy because the proffered bases for the policy— continuity of instruction and keeping unfit teachers out of the classroom— did not "justify the sweeping mandatory leave regulations." *Id.*, at 647-48.[4]

In *Speiser*, 357 U.S. 513, the Court struck down a California law that entitled veterans to property tax exemptions provided they took a loyalty oath.

As these cases illustrate, when a law penalizes the exercise of a fundamental right—whether the right to travel interstate, the right of free speech, the right to bear children, or any other fundamental right— the Supreme Court does not give rational basis deference to the government.

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[4]Subsequent Supreme Court case law casts doubt on the analytical framework of this opinion – the irrebutable presumption doctrine – but not the outcome, and in fact, the Court has suggested that the correct analysis is equal protection heightened scrutiny *See Michael H. v. Gerald D.*, 491 U.S. 110, 120-21 (1989) (plurality) ("our 'irrebutable presumption' cases must ultimately be analyzed as calling into question not the adequacy of procedures but – like our cases involving classifications framed in other terms, see, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Carrington v. Rash*, 380 U.S. 89 (1965) – the adequacy of the 'fit' between the classification and the policy that the classification serves."); *see also Weinberger v. Salfi*, 422 U.S. 749, 772-74 (1975).

Not all classifications that touch on fundamental rights are subject to heightened scrutiny. It is only where the government act penalizes the fundamental right (as opposed to having an incidental effect on that right),[5] or when the activity affected is a significant (as opposed to trivial) part of life, that the classification merits heightened scrutiny. In some cases, this has been described by the Court as a "direct and substantial" burden or interference. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978).

For example, in *Lyng v. Castillo*, 477 U.S. 635 (1986), and *Bowen v. Gilliard*, 483 U.S. 587 (1987), the Court rejected claims that government benefit eligibility schemes infringed on the right to family autonomy because the policies did not penalize the exercise of that right. The challenged policies drew eligibility lines based on the income of those who live together as a family, and prohibited the exclusion from the household unit of members with income that would reduce

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[5]The purposeful penalization of the exercise of a fundamental right that the Court is referring to does not mean disapproval of the exercise of the right *per se*, but rather that the government is judging the exercise or manner of exercise of that right as somehow less good or less worthy in a particular context. For example, in *LaFleur*, 414 U.S. at 647-48, heightened scrutiny was applied even though there was no indication that the government disapproved of women becoming pregnant; it just thought pregnant women should not be school teachers.

household benefits.[6] The government was not penalizing people because they married or had children or otherwise formed their family units. In *Bowen*, the Court explained, "'Congress adopted this rule in the course of constructing a complex social welfare system that necessarily deals with the intimacies of family life. This is not a case in which government seeks to foist orthodoxy on the unwilling.'" *Bowen*, 483 U.S. at 602, quoting *Califano v. Jobst*, 434 U.S. 47, 54 (1977). The government was merely recognizing the economies of scale that occur when individuals live and eat meals together, and attempting to ascertain which household members would more likely do these things together in order to distribute benefits fairly. *Id.*, at 599, 600. Moreover, the Court noted, "[t]his standard of review is premised on Congress' 'plenary power to define the scope and the duration of the entitlement to . . . benefits . . . .'" *Id.*, at 598 (quoting *Atkins v. Parker*, 472 U.S. 115, 129 (1985)).

Similarly, in *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 614 (11th Cir. 1995), this Court rejected a claim that a city's anti-nepotism policy infringed

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[6]The challenged rule in *Bowen* required that the income of all parents, children and siblings in the household be included in calculating eligibility for AFDC benefits. *Bowen*, 483 U.S. at 589-90. The food stamp rule challenged in *Lyng* similarly prohibited the exclusion from the "household" of resident family members who had income, but did not treat distant relatives and non-relatives who lived together as part of the same "household." *Lyng*, 477 U.S. at 636.

on the right to marry because, it found, "[t]he true intent and direct effect of the policy is to ensure that no city employee will occupy a supervisory position vis-a-vis one of his or her relatives." *Id.*, at 614. This policy served a management purpose, it did not disapprove of the decision to marry or the institution of marriage. Nor did the City treat the decision to marry as undesirable "for a particular class of persons." *Id.*, at 614. And the burden on those affected by the policy was minimal– it did not prevent spouses from working in different departments of the city government, or in other jobs. *Id.*, at 616.

The principle running through all of the cases is that when the government acts to penalize the exercise of a protected right or when the penalty for doing so is more than trivial, the Court applies heightened scrutiny. Sometimes the government burden triggering heightened scrutiny is a complete bar on the exercise of the protected activity, *see, e.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972); *Loving v. Virginia*, 388 U.S. 1 (1967), and sometimes it is less sweeping. Thus, for example, Connecticut's residency requirement for benefit eligibility did not bar anyone from entering the state; but it penalized people who chose to do so by denying them benefits. *Shapiro*, 394 U.S. 618; *see also Saenz v. Roe*, 526 U.S. 489 (1999) (California's residency requirement for eligibility for benefits for needy families did not prohibit anyone from traveling interstate, but penalized

travelers by reducing their benefits). And Cleveland's mandatory maternity policy did not prevent teachers from having children; but they were forced to leave their jobs if they did. *LaFleur*, 414 U.S. 632. *See also Speiser*, 357 U.S. 513 (property tax exemption for veterans who sign a loyalty oath did not compel veterans to declare their loyalty; but if they refused, they were denied the tax benefit); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (fundamental freedoms "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference.").[7]

Florida's adoption law significantly penalizes people who enter into personal relationships with same-sex partners. Florida singles out lesbians and gay men for exclusion from adopting precisely because of their exercise of this fundamental right. The State says it excludes gay people because it prefers heterosexual couples as parents. Thus, in the adoption context, some constitutionally protected intimate relationships— heterosexual ones—are deemed

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[7]While government may choose to <u>subsidize</u> the exercise of a right without subsidizing its opposite (*see, e.g. Harris v. McCrae*, 448 U.S. 297, 317-18 (1980)), it may not <u>penalize</u> the exercise of a right by withholding enjoyment of a benefit or privilege except where narrowly tailored to serve an important government interest. *See, e.g.*, *F.C.C. v. League of Women Voters*, 468 U.S. 364, 399-401 (1984) (while Congress may refuse to subsidize lobbying activities of tax-exempt organizations by prohibiting them from using tax-deductible contributions for lobbying, it may not prohibit charitable organizations that receive federal funds from editorializing with their own private funds).

worthier than others— same-sex relationships. This is not a law that incidentally affects people who exercise the right to form same-sex relationships; excluding people who enter into such relationships is its objective.[8]

And the disadvantage is hardly trivial. This is not a law that just prevents people from manipulating government benefit schemes to get more than their designated share; nor is it a law that merely denies an individual potential employment in one particular department of one government office. The penalty Florida imposes on people because they form same-sex relationships is severe. The price of exercising this right is being permanently[9] excluded from the possibility of forming parent-child relationships through adoption.

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[8]The definition of the term "homosexual" as used in the adoption law that the State offered in *Dep't of Health and Rehab. Servs v. Cox*, 627 So.2d 1210, 1213-14 (Fla. 2nd D.C.A. 1993), *rev'd in part*, 656 So.2d 902 (1995)—which covered only people who enter into intimate same-sex relationships—would not help the State's case. Under that definition, the only way gay people could be treated like all other Floridians and have their applications considered would be to forego the exercise of their constitutional right to maintain such relationships.

[9]The permanency of the penalty is constitutionally significant. In *Sosna v. Iowa*, 419 U.S. 393, 406 (1975), the Court upheld a one year residency requirement to obtain a divorce, concluding that no one was "irretrievably foreclosed from" getting what they seek; the law delayed access to the courts, but individuals "could ultimately have obtained the same opportunity for adjudication." *Id. See also M.L.B. v. S.L.J.*, 519 U.S. 102, 118, 121, 124 (1996) (in striking down fee requirement for parent to appeal a termination of parental rights, Court stressed the permanent nature of the termination of the parent-child bond).

Many people rely on adoption to fulfill the compelling human desire to love and nurture a child and experience the wonders of parenthood; others turn to adoption to cement and legally protect existing *de facto* family relationships that come into being in myriad ways. And the centrality of the parent-child bond to our values and culture cannot be minimized. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (The liberty interest in parent-child relationships is "perhaps the oldest of the fundamental liberty interests recognized by the Court."); *Santosky v. Kramer,* 455 U.S. 745, 758-759 (1982) (The parent-child relationship is "far more precious than any property right."). The exclusion from the possibility of adopting —whether to protect existing parent-child relationships or create new ones— is a burden of the highest order. It is at least as burdensome as five months of forced job leave (*LaFleur*, 414 U.S. 632), and the denial of a tax exemption (*Speiser*, 357 U.S. 513), both of which triggered heightened scrutiny.

And the children—who, after all, have constitutional rights as well—are denied the important legal recognition of adoption because the State disapproves of the constitutionally protected relationships of their parents. The Constitution ordinarily does not allow the government to penalize children because it believes that their parents have done something wrong. *Plyler v. Doe*, 457 U.S. 202, 219-

20 (1982). It could hardly allow such treatment of children where, as here, their parents' conduct to which the State objects is constitutionally protected.

This is not to say that there is a separately protected right to adopt. Neither is there a right to receive government welfare benefits (*Shapiro*, 394 U.S. at 634), nor a constitutional right to work as a school teacher (*LeFleur*, 414 U.S. at 647-48), or to receive non-emergency medical treatment (*Memorial Hospital v. Maricopa County*, 415 U.S. 250, 257-258 (1974). Yet unequal treatment in these contexts as penalties for the exercise of fundamental rights triggered heightened scrutiny. Similarly, there is no right to adopt, but because Florida is penalizing adoption applicants who exercise their constitutional right to form intimate relationships with same-sex partners, heightened scrutiny of the adoption law is warranted.

*Lawrence* says that gay people who enter intimate, personal relationships are entitled to "retain their dignity." *Lawrence*, 123 S. Ct. at 2478. Florida's law labels gay people, and gay people only, automatically and irrebuttably unfit to parent. It says that if people have the kind of relationship that Steven Lofton has had with Roger Croteau for nearly 20 years, they are not fit to adopt children. Perhaps with the singular exception of sodomy laws which, until *Lawrence*, branded gay people criminals, it is difficult to imagine a greater assault on human

dignity than to be presumed unfit to provide love and care for a child. *Cf. M.L.B.,* 519 U.S. at 118 (terminating parental rights "work[s] a unique kind of deprivation"). If largely unenforced sodomy laws "demean[] the lives of homosexuals" (*Lawrence*, 123 S. Ct. at 2482), a systematically enforced ban on adoption by lesbians and gay men is at least as degrading.

The families are not suggesting that the fundamental right announced in *Lawrence*, or any other fundamental right, means that every government burden on the exercise of a right would necessarily be forbidden. Rather, where government legislates in a way that burdens personal rights, it has to be able to justify the burden; it cannot count on the deference the courts give under rational basis review.

And as the families have explained in their briefs, Florida's adoption law does not pass even the most deferential rational basis review. When analyzed under *Allegheny Pittsburgh Coal Co. v. Webster*, 488 U.S. 336 (1980), and *Heller v. Doe*, 509 U.S. 312, 321 (1993), as well as *Romer*, 518 U.S. 330, *Cleburne*, 477 U.S. 432, and *Moreno*, 413 U.S. 528, the law fails even minimal scrutiny because Florida's justification for it makes no sense and cannot possibly be believed given the factual reality. *See* Appellants' Brief, at 26-38.

Moreover, in her concurring opinion in *Lawrence*, Justice O'Connor observed that the Court has been more likely to strike down laws under rational basis review when the laws burden personal relationships. *Lawrence*, 123 S. Ct. at 2485 (O'Connor, J., concurring). Florida's adoption law certainly is such a law.

Justice O'Connor described the Court's analysis in *Romer*, *Cleburne* and *Moreno* as the application of a "more searching" form of rational basis review because there was evidence of or reason to infer legislative animus against the disadvantaged group. *Id.* This description is consistent with the premise for deferential rational basis review— "absent some reason to infer antipathy even improvident decisions will eventually be rectified by the democratic process . . . ." *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). But where there is reason to believe that a classification discriminates for its own sake, this rationale for such deference disappears.

Just as Justice O'Connor concluded that the circumstances of *Lawrence* (the fact that Texas rarely enforced its sodomy law against private, consensual conduct) show that "the law serves more as a statement of dislike and disapproval against homosexuals than as a tool to stop criminal behavior" (*Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring)), the facts of this case (that excluding gay

people from adopting gets no more married couples and that the State places children in the care of gay people and other unmarried people) demonstrate that Florida's ban on adoption by gay people "serves more as a statement of dislike and disapproval against homosexuals than as a tool" of promoting children's welfare.[10]

Moreover, as discussed in our briefs, there is ample evidence that Florida's ban on adoption by lesbians and gay men was motivated by an intense hostility towards gay people that pervaded Florida in 1977 when the law was enacted (Appellants' Reply Brief, at 21-22), and indeed Florida, like Texas, proffered "moral disapproval of homosexuality" as a primary justification for the law.[11]

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[10] *Cf. Mississippi Univ. For Women v. Hogan*, 458 U.S. 718, 730 (1982) (Because Ole Miss had no objection to males attending nursing classes as long as they didn't seek to enroll and get nursing degrees, the State was not pursuing its asserted interest in the benefits of an all-woman atmosphere in the classroom). Here, similarly, the State is not pursuing any interest in the supposed virtues of parenting by opposite-sex couples because it places children in the care of gay parents and has no objection as long as those parents don't seek formal recognition as adoptive parents.

[11] After *Lawrence*, sexual orientation classifications should generally get intermediate scrutiny as quasi-suspect classifications (*cf. Hogan*, 458 U.S. at 724) because, among other things, the principal justification for denying that treatment was *Bowers v. Hardwick*. *See, e.g., Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-93 (6th Cir. 1997); *Padula*, 822 F.2d at 102-03. It is not necessary to address this issue here because this law fails any level of scrutiny and obviously impinges on a fundamental right. However, if the Court believes this issue is central to the case, plaintiffs respectfully request that it order briefing.

Particularly after *Lawrence*, courts cannot look the other way when government treats lesbians and gay men as second-class citizens. The time when the state could just make up an explanation for a law and have it accepted at face value without careful examination has passed. Whether the Court applies heightened scrutiny, "more searching" rational basis review, or even simple real world rational basis review (*Heller*, 509 U.S. at 321), it need not look far, if at all, past the surface of what Florida says. Any reflection on this law reveals its irrationality, its illogic and its unbelievability. Gay people have the same right to pursue autonomy that heterosexuals do. This law can not stand.

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Respectfully Submitted,

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## CERTIFICATE OF WORD COUNT

Appellants' brief contains 4588 words, excluding the materials referred to in 11th Cir. Rule 28-1(a), (b), (d), (e), (m), and (n), according to the word count program in Word Perfect word processing system, which was used to prepare the brief.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by federal express this 18th day of July, 2003, to:

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