RESURRECTION OF STATE-SPONSORED BANS ON GAY ADOPTION AND VIOLATIONS OF CHILDREN'S RIGHTS

MANTAS GRIGOROVICIUS*

In light of a recent Supreme Court decision, the conflict between the gay community and the religious community has become more heated than ever before. By holding that, under the First Amendment, a wedding website designer can refuse to provide services to a same-sex couple, the Court has created multiple uncertainties for the future of the conflict. The decision came down during the rise of First Amendment absolutism, which had already been successfully used to argue that people's personal beliefs were more important than what is in the best interests of the children. Religious organizations that categorically refuse to consider otherwise qualified applicants for providing adoptive or foster care services just because of their sexual orientation violate children's right to permanency by making some children wait longer in the system, by denying some children an opportunity to be placed in the best available household that could potentially be led by a gay couple, and by completely denying some children an opportunity to find a home either because they are hard-to-place or because they will eventually age out and become ineligible. These religious organizations, which operate under the auspices of the state, have been able to successfully argue that the First Amendment protects their actions. Without any intervention, children's rights will continue to be violated while using taxpayer money at the expense of promoting the personal beliefs of adults.

* J.D. 2021, Indiana University Maurer School of Law.

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I. INTRODUCTION

In June 2023, the U.S. Supreme Court in *303 Creative LLC v. Elenis* held that, under the First Amendment, a wedding website designer could refuse to make a wedding website for a same-sex couple.[1] Lorie Smith believed that "God [was] calling her 'to explain His true story about marriage'" through her for-profit business.[2] Smith believed that same-sex marriages are "false" and that creating a website for a same-sex couple "would be expressing a message . . . [she] believe[s] is contrary to God's design."[3] The Court held that Smith's website was pure speech and thus Colorado could not use its public accommodations law to compel Smith to serve a same-sex couple seeking a wedding website.[4] The decision was celebrated by First Amendment supporters who echoed Justice Gorsuch's majority opinion in which he stated that the decision was consistent with "the Constitution's commitment to the freedom of speech."[5] People who disagreed with the decision pointed to Justice Sotomayor's dissent in which she wrote that "[t]oday is a sad day in American constitutional law and in the lives of LGBT people."[6] The entire list of wide-spreading implications of *303 Creative* along with what the decision means for the conflict between gay people and religious people and the future of public accommodations

[1] 303 Creative LLC v. Elenis, 600 U.S. 570, 602–03 (2023).
[2] *Id.* at 624.
[3] *Id.*
[4] *Id.* at 587, 592.
[5] *Id.* at 603.
[6] *Id.* at 636 (Sotomayor, J., dissenting).

statutes are beyond the scope of this Article. However, while many people disagree with the majority opinion, it is important to note that the case was about a conflict between two groups: the religious community and the gay community. The decision, at least in theory, also applies to both groups equally. Thus, a religious wedding website designer can refuse to create a wedding website for a same-sex couple, and a gay wedding website designer can refuse to create a wedding website for a religious couple. For this point to be compelling, however, one has to make several assumptions, such as that both parties are equally situated, that both parties will exercise their new rights equally, and that both parties will be equally affected by the denial of services. While these assumptions should not be taken for granted, the point is compelling, nonetheless. It is not difficult to understand why First Amendment supporters see *303 Creative* as a major victory. Some might argue that the decision was a temporary solution to the conflict between gay people and religious people. However, the decision came during the rise of First Amendment absolutism, which had already been clashing with children's rights.

When children are temporarily or permanently taken away from their parents, they are placed in the custody of the state, where the state stands *in loco parentis* to the child.[7] As such, the state is tasked with taking care of the child, which can include finding temporary foster parents or permanent adoptive parents. The states are also responsible for overseeing consensual adoptions in which the birth parents for whatever reason cannot or do not want to take care of the child. Finally, the state also contracts with other parties to help with ever-increasing numbers of children who need homes. All of this is done using taxpayer money. Thus, when the state is tasked with spending that money on helping children who need homes, the state must operate under one, and only one, principle—what is in the best interests of the child. However, recently, there has been a growing number of people who have successfully argued that their personal beliefs are protected by the First Amendment, even when doing so comes at the expense of compromising the principle of acting in the best interests of the child.

In 2021, there were approximately 114,000 children waiting to be adopted in the United States.[8] All people who want to be foster or adoptive parents must undergo multiple hurdles, such as applying for licenses, proving their financial stability, undergoing background checks, and passing mental health and psychological interviews. Adoption costs alone

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[7] Emily Pelletier, *Children and the Law, United States*, *in* THE SAGE ENCYCLOPEDIA OF CHILDREN AND CHILDHOOD STUDIES 380, 380 (Daniel Thomas Cook ed., 1st ed. 2020).

[8] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., TRENDS IN FOSTER CARE AND ADOPTION: FY 2012–2021, https://www.acf.hhs.gov/sites/default/files/documents/cb/trends-foster-care-adoption-2012-2021.pdf [https://perma.cc/EZF9-X2UP].

can range anywhere up to $60,000.[9] While there are many obstacles that have to be overcome by an adult who wishes to be an adoptive or foster parent, the obstacles are important to ensure that the placement is in the best interests of the child. That decision is made using an objective set of factors, such as income and parental ability, and on a case-by-case basis.

Fifty years ago, people had understandable reservations about gay parenting. Homosexuality was classified as a mental disorder, intimate conduct between two people of the same sex was criminal in many states, and gay couples could not provide a child with the same level of security as straight couples because they were not able to get married. However, much has changed. Homosexuality is no longer classified as a mental disorder, intimacy between two people of the same sex is no longer criminal, and is widely seen as normal, and gay people are no longer treated as second-class citizens because they are now allowed to get married. In addition, decades of scientific research have shown that sexual orientation has no bearing on a person's parenting abilities and, in many cases, gay people are able to be as good of parents or even better parents than heterosexual individuals.[10] Further, gay people are often the last resort for hard-to-place children who might otherwise remain in the foster care system in which their chances of finding a home decrease the longer they stay in the system.[11] However, some people, who believe that their religious texts state that homosexuality is a sin, categorically refuse to even consider gay applicants for adoption or foster care services. This means that some children will be deprived of a better home that could be provided by gay people, some will stay in the system longer, and some will not find a home at all because they are hard-to-place or because the children will reach the age of majority and become ineligible. Nevertheless, religious people have recently been able to successfully argue that the First Amendment protects their choice to exclude

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[9] CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., PLANNING FOR ADOPTION: KNOWING THE COSTS AND RESOURCES 3 (2022), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/s_costs.pdf?VersionId=ji7qZPkNbcPRF7RIMY.jfDldoEWiAgZY [https://perma.cc/45PV-226N].

[10] *See, e.g.*, Mike Allen & Nancy Burrell, *Comparing the Impact of Homosexual and Heterosexual Parents on Children: Meta-Analysis of Existing Research*, 32 J. HOMOSEXUALITY 19 (1996); Norman Anderssen, Christine Amlie & Erling André Ytterøy, *Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000*, 43 SCANDINAVIAN J. PSYCH. 335 (2002); Alicia L. Fedewa, Whitney W. Black & Soyeon Ahn, *Children and Adolescents with Same-Gender Parents: A Meta-Analytic Approach in Assessing Outcomes*, 11 J. GLBT FAM. STUD. 1 (2015); Bridget Fitzgerald, *Children of Lesbian and Gay Parents: A Review of the Literature*, 29 MARRIAGE & FAM. REV. 57 (1999); Mario I. Suárez, Elizabeth W. Stackhouse, Jeffrey Keese & Christopher G. Thompson, *A Meta-Analysis Examining the Relationship Between Parents' Sexual Orientation and Children's Developmental Outcomes*, 29 J. FAM. STUD. 1584 (2023); Fiona Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 224 (2005).

[11] David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 469 (1996).

gay applicants from consideration. This directly violates children's right to permanency and puts personal beliefs above what is in the best interests of the children.

Part I of this Article delves into the literature on negative attitudes toward gay parenting. After discussing some major reasons that are shared among people in general, this Article then focuses on religious beliefs and how they shape people's views on gay parenting. Part II analyzes the relationship between the politicization of gay parenting and religiosity, revealing how religious people mobilized to portray gay parenting as a political issue. In Part III, this Article discusses four different states and their laws on adoption. Each state serves as a case study demonstrating the unique challenges that gay people faced when seeking to become foster or adoptive parents in the past. Each case study also discusses the laws that were challenged, and the arguments made by both parties. This Part explains why excluding qualified gay people from consideration is not in the best interests of children. Part IV discusses several remaining areas in the foster and adoption system in which religious people can still refuse to consider qualified gay applicants, even when those religious people are operating at the request of the state and using taxpayer money. Finally, the Conclusion provides the steps that states should take in the future if the goal is to act in the best interests of the children.

II. UNDERSTANDING NEGATIVE ATTITUDES TOWARD GAY PARENTING

In 2001, psychology professor Victoria Clarke published a paper in which she used a robust thematic analysis of media documents and six focus groups to explore six arguments that are commonly used by people who oppose gay parenting: (1) their religion condemns same-sex parenting as a sin, (2) same-sex parenting is unnatural, (3) same-sex parents ignore the best interests of the child and are thus selfish, (4) same-sex parents cannot provide appropriate role models, (5) children in same-sex families grow up to be gay, and (6) children in same-sex families will be bullied.[12] Those who oppose same-sex parenting and are not willing to allow same-sex couples to adopt or foster a child may use all or a combination of these arguments.[13] Some people, when asked why they oppose same-sex parenting, might give three reasons, when in reality they only have one. For example, some people who have concerns about inappropriate behavior when two gay men are raising a boy may not be willing to publicly reveal these concerns, so they

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[12] Victoria Clarke, *What About the Children? Arguments Against Lesbian and Gay Parenting*, 24 WOMEN'S STUD. INT'L F. 555, 557 (2001).

[13] Natasha Quadlin, Nanum Jeon, Long Doan & Brian Powell, *Untangling Perceptions of Atypical Parents*, 84 J. MARRIAGE & FAM. 1175, 1178 (2022).

might provide another reason. Understanding the true reasons why someone opposes same-sex parenting can be very challenging and sometimes impossible.

Many concerns that people have about same-sex parenting stem from the stereotypes that are associated with gender.[14] Social role theory explains that gender stereotypes exist because certain societal norms dictate the roles that men and women are expected to fulfill.[15] There are expectations for men and women concerning their roles in creating a family. Some of the gender norms ascribed to men dictate that men should be masculine, work outside the home, and serve as providers for the family.[16] Similarly, some of the gender norms ascribed to women dictate that women should be feminine, nurture children, and engage in cooking and cleaning.[17] People who defy these roles may face disadvantages in the workplace and economic and social penalties.[18] Social role theory sheds some light on why some people generally prefer opposite-sex parents over same-sex parents.[19] Traditional gender norms reinforce the belief that a child needs to have proper role models that are best represented by a mother and a father.[20] Thus, same-sex couples are generally viewed less favorably than opposite-sex couples. The belief that a child needs proper role models is connected to normativity, in which heterosexuality and opposite-sex relationships are considered the norm, and anything that deviates from this norm is considered abnormal.[21] It is also suggested that some people's hesitancy toward same-sex parenting stems from their views on the morality of

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[14] Stephanie N. Webb, Jill M. Chonody & Phillip S. Kavanagh, *Attitudes Toward Same-Sex Parenting: An Effect of Gender*, 64 J. HOMOSEXUALITY 1583, 1591–92 (2017).

[15] ALICE H. EAGLY, SEX DIFFERENCES IN SOCIAL BEHAVIOR: A SOCIAL-ROLE INTERPRETATION 8–9 (1987); Kristine M. Baber & Corinna Jenkins Tucker, *The Social Roles Questionnaire: A New Approach to Measuring Attitudes Toward Gender*, 54 SEX ROLES 459, 460 (2006).

[16] *See* David L. Vogel, Stephen R. Wester, Martin Heesacker & Stephanie Madon, *Confirming Gender Stereotypes: A Social Role Perspective*, 48 SEX ROLES 519, 520 (2003).

[17] Rhacel Salazar Parreñas, *Transnational Mothering: A Source of Gender Conflicts in the Family*, 88 N.C. L. REV. 1825, 1841 (2010); Amanda B. Diekman & Monica C. Schneider, *A Social Role Theory Perspective on Gender Gaps in Political Attitudes*, 34 PSYCH. WOMEN Q. 486, 488 (2010).

[18] Corrine A. Moss-Racusin, Julie E. Phelan & Laurie A. Rudman, *When Men Break the Gender Rules: Status Incongruity and Backlash Against Modest Men*, 11 PSYCH. MEN & MASCULINITY 140, 147–48 (2010); Madeline E. Heilman, *Gender Stereotypes and Workplace Bias*, 32 RSCH. ORGANIZATIONAL BEHAV. 113, 129 (2012).

[19] Scott D. Ryan, Laura E. Bedard & Marc G. Gertz, *The Influence of Gender on the Placement of Children with Gay or Lesbian Adoptive Parents*, 3 J. GLBT FAM. STUD. 15, 17–21 (2007); BJ Rye & Glenn J. Meaney, *Self-Defense, Sexism, and Etiological Beliefs: Predictors of Attitudes Toward Gay and Lesbian Adoption*, 6 J. GLBT FAM. STUD. 1, 3–4 (2010).

[20] Stephen Hicks, *Gender Role Models . . . Who Needs 'Em?!*, 7 QUALITATIVE SOC. WORK 43, 44 (2008).

[21] Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 137, 152 (Carole S. Vance ed.,1984).

homosexuality.[22] While there are many different reasons for why some people express negative views toward same-sex parenting, perhaps the most important topic that is worth discussing, at least as it pertains to this Article, is religion.

Religiosity has been shown to be positively correlated with negative views toward homosexuality.[23] There is nothing intrinsically wrong with personally believing that engaging in same-sex behavior is sinful. One of the tenets of Christianity is that all people are sinners.[24] Most Christians acknowledge that engaging in premarital sex is a sin, yet they still do it and do not condemn people they know for doing so. And some Christians hold similar views on homosexuality—while they consider it a sin, they do not take any actions to condemn such behavior and treat it much like premarital sex. However, it is evident that some Christians do distinguish between the sins and feel more strongly toward some sins than others. For example, divorce is also considered a sin, but there was never a fervent anti-divorce movement that sparked so many negative emotions. The same cannot be said about homosexuality. Further, with the rise of gay-friendly Christian churches, it is also evident that many Christians disagree among themselves over homosexuality and even same-sex marriage.[25] According to psychologists Gregory Herek and Kevin A. McLemore, these inconsistencies can be answered by examining fundamentalism.[26]

Fundamentalism, as it pertains to Christianity, is often characterized by strict, literal interpretations of the Bible.[27] Further, fundamentalism is viewed in the context of modernism, in which one's religious beliefs are a response to secularism. Thus, some people believe "that there is one set of religious teachings that clearly contains the fundamental, basic, intrinsic, essential, inerrant truth about humanity and deity."[28] That one set of religious teachings, for some Christians, is the Bible. Herek and McLemore argue that people should not assume that negative attitudes toward homosexuality are somehow irrational or pathological and that instead people should consider the following about negative attitudes toward homosexuality:

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[22] N. Susan Gaines & James C. Garand, *Morality, Equality, or Locality: Analyzing the Determinants of Support for Same-Sex Marriage*, 63 POL. RSCH. Q. 553, 554 (2010).

[23] Bernard E. Whitley, Jr., *Religiosity and Attitudes Toward Lesbian and Gay Men: A Meta-Analysis*, 19 INT'L J. PSYCH. RELIGION 21, 29–30 (2009).

[24] *Romans* 3:9-20.

[25] Eric M. Rodriguez, *At the Intersection of Church and Gay: A Review of the Psychological Research on Gay and Lesbian Christians*, 57 J. HOMOSEXUALITY 5, 25–26 (2010).

[26] Gregory M. Herek & Kevin A. McLemore, *Sexual Prejudice*, 64 ANN. REV. PSYCH. 309, 317 (2013).

[27] Lyman Kellstedt & Corwin Smidt, *Measuring Fundamentalism: An Analysis of Different Operational Strategies*, 30 J. FOR SCI. STUDY RELIGION 259, 260 (1991).

[28] Bob Altemeyer & Bruce Hunsberger, *Authoritarianism, Religious Fundamentalism, Quest, and Prejudice*, 2 INT'L J. FOR PSYCH. RELIGION 113, 118 (1992).

> [A] functional perspective prompts consideration of how those attitudes are related to factors such as a heterosexual's self-defining values, ties to important social groups, and desires to avoid negative emotions and threats to self-esteem. Religiously based sexual prejudice may assist an individual in meeting needs in all of these domains. For some heterosexuals, expressing sexual prejudice solidifies social ties with their faith community. For others, it affirms their self-concept as a person of faith. These functions may both be concurrently salient for many religious heterosexuals and, in both cases, the individual's social and personal identities are likely to be closely tied to her or his attitudes toward sexual minorities. For some heterosexuals, sexual prejudice represents an attempt to deal with personal insecurities and anxieties by preserving order and promoting uniformity.[29]

Herek and McLemore explain that these functions allow some religious people to see themselves as oppressed members of society and to further see gay people as the oppressors who threaten their core morals, values, and beliefs.[30] Fundamentalism sheds some light on why some people have negative views toward homosexuality and is important to understand when considering the effect of religious views on homosexual adoption legislation.

III. POLITICIZATION OF GAY PARENTING

Conversations about the right of gay people to adopt children started becoming more public following the Stonewall Riots in 1969.[31] By that time, homosexuality as a concept was not new to much of the public as most people had encountered gay people in some form through film, mainstream media, academic journals, newspapers, and personal contact.[32] However, people's understanding of same-sex attraction and homosexuality, in a broad sense, was quite limited. Up until 1973, homosexuality was classified as a mental disorder by the American

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[29] Herek & McLemore, *supra* note 26, at 319.

[30] *Id.*

[31] JENNIFER RICH, MODERN FEMINIST THEORY: AN INTRODUCTION 73 (Mark Addis ed., 2d ed. 2014).

[32] LARRY GROSS, UP FROM INVISIBILITY: LESBIANS, GAY MEN, AND THE MEDIA IN AMERICA xv–xvi (Lillian Faderman & Larry Gross eds., 2001).

Psychiatric Association.[33] It is difficult to conceptualize gay rights at a time when even the very essence of being homosexual immediately signaled that one had a psychiatric disorder. Thus, once homosexuality was removed from the list of mental disorders, engaging in homosexual behavior was, albeit symbolically, normalized.

In contemporary terms, the scope of gay rights includes a diverse array of rights. One of the first gay rights cases was brought by a same-sex couple in 1970, in which the couple argued that denying them a marriage license violated the U.S. Constitution. The couple's arguments failed at the highest state court, and the U.S. Supreme Court denied review.[34] The most important milestones, which are viewed as part of the broader gay rights movement, were the decriminalization of same-sex relationships in 2003,[35] legalization of same-sex marriages in 2015,[36] and prohibition of employment discrimination on the basis of sexual orientation in 2020.[37] Each of these decisions was important not only to gay people individually, but also to how gay people were seen by the public. Introducing same-sex couples as legitimate family units, after *Obergefell*, allowed these couples to be seen as equals to opposite-sex couples.[38] And that equality was vital for the debate surrounding gay parenting.

It is not difficult to understand people's resistance to allowing same-sex couples or even individual gay people to adopt or raise children in the early 1970s. Homosexuality was just removed from the Diagnostic and Statistical Manual of Mental Disorders, and the public's understanding about same-sex relationships was quite limited.[39] The Stonewall Riots inspired several gay rights organizations whose goal was to educate the public on homosexuality and gay rights. This goal ran in direct opposition to the values of many religious organizations, which led to the rise of the religious right.[40] Many religious people saw the new gay rights movement as a direct attack on the nuclear family, traditional family values, and proper

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[33] HENRY L. MINTON, DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA 2–3 (2001).

[34] Baker v. Nelson, 409 U.S. 810 (1972) (dismissing an appeal from the Supreme Court of Minnesota "for want of substantial federal question").

[35] Lawrence v. Texas, 539 U.S. 558 (2003).

[36] Obergefell v. Hodges, 576 U.S. 644 (2015).

[37] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[38] *See* Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1308–10 (2011) (discussing how "[l]aws banning same-sex marriage . . . appear to brand citizens as second-class [citizens]").

[39] Kristen Schilt & Jody L. Herman, *Lesbian, Gay, Bisexual, and Transgender (LGBT) Workers*, *in* 2 SOCIOLOGY OF WORK: AN ENCYCLOPEDIA 531 (Vicki Smith ed., 2013).

[40] BRUCE BAWER, A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY 52–54 (1993).

gender and sexuality norms.[41] At that time, there was a robust public conversation about human life because of *Roe v. Wade*.[42] All of these issues subsequently became a part of the Republican Party's platform in the 1980s.[43]

The politicization of gay rights amplified some of the already-existing struggles of gay people.[44] The AIDS epidemic damaged the public perception of same-sex relationships, leading to more negative views toward same-sex parenting.[45] Concerns of pedophilia, promiscuity, and lack of relationship stability led to an unfavorable environment in which the public support for gay adoption was relatively low. Further, several states started introducing measures that would negatively affect gay people.[46] In 1978, California residents voted on Proposition 6, under which school teachers could be fired for publicly expressing positive views on homosexuality and same-sex relationships.[47] Nearly 59% of California residents voted against this measure; however, Proposition 6 was a big part of the national debate on gay rights and more specifically about gay people and children.[48] In 1987, then-President Ronald Reagan appointed a federal task force to promote and encourage adoption as a substitute for abortion.[49] Recognizing the ever-increasing numbers of children who needed to be adopted, Reagan wrote that "[w]e must expand and broaden our efforts to make sure that America's familyless children are adopted" and that "[w]e must do all we can to remove obstacles that prevent qualified adoptive parents from accepting these children into their homes."[50] Even though the numbers of children in the foster care grew rapidly, the task force

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[41] SETH DOWLAND, FAMILY VALUES AND THE RISE OF THE CHRISTIAN RIGHT 10–12 (2015).

[42] Daniel K. Williams, *Religion and American Politics*, *in* THE OXFORD HANDBOOK OF AMERICAN POLITICAL HISTORY 278, 291 (Paula Baker & Donald T. Critchlow eds., 2020).

[43] SUSAN B. HANSEN, THE POLITICS OF SEX: PUBLIC OPINION, PARTIES, AND PRESIDENTIAL ELECTIONS 72 (2014).

[44] James W. Button, Barbara A. Rienzo & Kenneth D. Wald, *The Politics of Gay Rights at the Local and State Level*, *in* THE POLITICS OF GAY RIGHTS 269, 272 (Craig A. Rimmerman et al. eds., 2000).

[45] Gregory M. Herek, *The HIV Epidemic and Public Attitudes Toward Lesbians and Gay Men*, *in* IN CHANGING TIMES: GAY MEN AND LESBIANS ENCOUNTER HIV/AIDS 191, 192 (Martin P. Levine et al. eds., 1997).

[46] GLORIA FELDT, THE WAR ON CHOICE: THE RIGHT-WING ATTACK ON WOMEN'S RIGHTS AND HOW TO FIGHT BACK 75–76 (2004).

[47] TRICIA ANDRYSZEWSKI, GAY RIGHTS 18 (2000).

[48] RACHEL KRANZ & TIM CUSICK, GAY RIGHTS 38 (Terence Maikels ed., rev. ed. 2005).

[49] Nigel Ashford, *The Conservative Agenda and the Reagan Presidency*, *in* THE REAGAN YEARS: THE RECORD IN PRESIDENTIAL LEADERSHIP 189, 211 (Joseph Hogan ed., 1990).

[50] Memorandum Promoting Adoption, 2 PUB. PAPERS 1329 (Nov. 13, 1987).

recommended that the government should "not support adoption by homosexuals."[51]

At that time, one of the biggest reasons why people expressed a lack of support for gay adoption was concerns about the child's sexual development, specifically that children raised by a gay person would turn out gay themselves.[52] However, these concerns did not exist with self-identified gay teenagers who needed a home, and thus one of the first kind of adoptions that were approved by judges and social workers were adoptions of gay teenagers by gay people.[53] With the rise in the number of children who needed to be adopted, social workers further started placing hard-to-place children with gay parents.[54] These children included those who were older, had a disability or a health impairment, or were of a different background.[55] Recognizing the benefits of expanding the pool of available qualified parents by including gay people, many professional associations, such as the National Association of Social Workers, the American Psychological Association, and the American Psychiatric Association, started advocating for gay rights and gay parenting.[56] By the late 1970s, emerging scientific research had already shown positive outcomes for children raised by gay parents.[57] However, the opposition by the religious right grew steadily as more children were placed with gay parents and as gay parenting became more normalized.[58] Anita Bryan and her anti-gay Christian campaign received national media coverage that fueled mobilization efforts leading to several states taking action against

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[51] PRESIDENT'S TASK FORCE ON ADOPTION, AMERICA'S WAITING CHILDREN: REMOVING THE BARRIERS TO ADOPTION 47, https://www.reaganlibrary.gov/public/digitallibrary/smof/cea/sprinkel/oa17747/40-537-12013953-oa17747-003-2017.pdf [https://perma.cc/PY73-2328].

[52] Marie-Amélie George, *The Custody Crucible: The Development of Scientific Authority About Gay and Lesbian Parents*, 34 LAW & HIST. REV. 487, 501 (2016).

[53] Nancy D. Polikoff, *Lesbian and Gay Couples Raising Children: The Law in the United States*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 153, 161–62 (Robert Wintemute & Mads Andenæs eds., 2001).

[54] Chambers, *supra* note 11, at 469.

[55] Martha Satz & Lori Askeland, *Civil Rights, Adoption Rights: Domestic Adoption and Foster Care, 1970 to the Present*, *in* CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE: A HISTORICAL HANDBOOK AND GUIDE 45, 57 (Lori Askeland ed., 2006).

[56] Wendell Ricketts & Roberta Achtenberg, *The Adoptive and Foster Gay and Lesbian Parent*, *in* GAY AND LESBIAN PARENTS 89, 107 (Frederick W. Bozett ed., 1987).

[57] *See, e.g.*, Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692 (1978); Dorothy I. Riddle, *Relating to Children: Gays as Role Models*, 34 J. SOC. ISSUES 38 (1978); Brian Miller, *Gay Fathers and Their Children*, 28 FAM. COORDINATOR 544 (1979).

[58] *See* ROGER A. SNEED, REPRESENTATIONS OF HOMOSEXUALITY: BLACK LIBERATION THEOLOGY AND CULTURAL CRITICISM 196 (2010).

gay parenting.[59] The next section discusses laws that some states used to prevent gay people from becoming foster or adoptive parents.

IV. LESSONS FROM PREVIOUS BANS ON GAY ADOPTION

This section discusses four different states and their laws on adoption. Each state is presented as a unique case study that shows the obstacles that gay people have faced when they wanted to adopt a child. In all cases, the statutes and regulations had to be challenged in court. While the cases are different, they share many important similarities. The case opinions are analyzed in great detail because they shed light on the role gay people play in society as foster and adoptive parents. The order of the selected states (Ohio, Massachusetts, New Hampshire, and Florida) is important because they build on each other. When deciding the merits of the arguments, the courts looked at other states and cited their reasoning on the novel question of gay adoption. The four case studies cumulatively present a robust discussion of the arguments from both sides, including constitutional arguments and scientific expert opinions on what acting in the best interests of the children means.

A. OHIO

Melvin Balser was a counselor who graduated with a bachelor's degree specializing in childhood and adolescent psychology from Ohio State University.[60] He subsequently graduated from New York University with a master's degree in human sexuality and family life education.[61] At the time of *In re Adoption of Charles B.*, he also had been pursuing a doctorate degree in psychology.[62] Balser was in a same-sex relationship with Tom Kuzma, a research scientist who held a Ph.D. in astronomy.[63]

In July 1986, Balser met Charles, who was referred to Balser for counseling services by the Licking County Department of Human Services ("LCDHS").[64] Charles was born on June 17, 1981.[65] In January 1984, he was diagnosed with acute lymphocytic leukemia, which subsequently

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[59] TINA FETNER, HOW THE RELIGIOUS RIGHT SHAPED LESBIAN AND GAY ACTIVISM 37–40 (2008).

[60] *In re* Adoption of Charles B., 552 N.E.2d 884, 885 (Ohio 1990).

[61] *Id.*

[62] *Id.*

[63] CARLOS A. BALL, THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD 152 (2012).

[64] *In re Charles B.*, 552 N.E.2d at 885.

[65] Brief on the Merits of the Guardian Ad Litem of the Child, Charles B. at 4, *In re* Adoption of Charles B., No. 88-2163 (Ohio Oct. 28, 1988).

required radiation and chemotherapy.[66] When Charles first met Balser, Charles had also been suffering from a speech disorder, low I.Q., possible brain damage from fetal alcohol syndrome, and fine and gross motor skill impairments.[67] Charles's upbringing was full of abuse and neglect, and on April 23, 1985, his biological parents voluntarily relinquished their parental rights to LCDHS.[68] The agency had attempted to place Charles in several different homes, but all attempts failed due to Charles's challenges.[69]

Over many counseling sessions, Balser connected with Charles, and Balser eventually requested permission from LCDHS to allow Charles to visit his home and spend time with him over several weekends, including longer holiday periods.[70] In early 1987, Balser expressed his interest in adopting Charles to LCDHS, and a supervisor from the LCDHS's Family Services Unit suggested that Balser would be considered if he completed a home study.[71] On December 18, 1987, Balser submitted a pre-placement application in which he officially expressed his interest in adopting Charles, and on January 15, 1988, Balser filed an adoption petition in the Probate Division of the Court of Common Pleas of Licking County.[72] On March 29, Charles was appointed a guardian ad litem, and the adoption hearing was scheduled for April 14.[73] On April 13, the trial court received a statement from Russel Payne, an executive director of LCDHS, in which he wrote that the agency had officially withheld its consent to Balser's adoption of Charles.[74]

On April 14, 1988, the hearing still proceeded as scheduled. In addition to testifying himself, Balser also presented several witnesses. Joseph Shannon, a licensed psychologist with a doctorate in psychology, testified about Balser's stellar reputation.[75] Victoria Blubaugh, who also was a licensed psychologist with a doctorate in psychology, testified that in her role as a counselor, she observed a strong bond between Balser and Charles and that it was her professional opinion that it was in the best interest of Charles that he be adopted by Balser, especially considering Charles's special needs. During her testimony, Blubaugh stated: "I think that [Balser] is going to be a good parent. He certainly has behavior management down. At this point, I guess, just being real honest about it, my concern isn't so

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[66] *In re* Adoption of Charles B., No. 3382, 1988 WL 119937, at *3 (Ohio Ct. App. Oct. 28, 1988).
[67] *In re Charles B.*, 552 N.E.2d at 884.
[68] Brief on the Merits of the Guardian Ad Litem of the Child, Charles B., *supra* note 65, at 4.
[69] *In re Charles B.*, 552 N.E.2d at 887.
[70] *In re Charles B.*, 1988 WL 119937, at *3.
[71] *In re Charles B.*, 552 N.E.2d at 887.
[72] *Id.*
[73] *Id.* at 885.
[74] *In re Charles B.*, 1988 WL 119937, at *3.
[75] *In re Charles B.*, 552 N.E.2d at 889.

much that [Balser] gets Charlie, but that Charlie gets [Balser]."[76] Carol Menge, who was the vice-president of Lutheran Social Services and who also was an adoptive parent, testified that a child with special needs requires a parent who is able to provide flexibility, stability, and willingness to care for the child.[77] Balser's partner, sister, and mother further testified that Charles had already become an integral part of their entire family.[78] The guardian ad litem, who was appointed by the court to represent Charles and his interests, unequivocally urged the trial court to certify the adoption:

> [T]he stable factor that I could find when I looked at everything, was the petitioner in this matter, Mr. B. . . . I'm concerned about disrupting [Charles] again and removing Mr. B from his life. I feel that there is a very good chance that could be very detrimental to the child. . . . I believe there has been testimony today and there has been ample evidence made available to me regarding the support system that Mr. B and Mr. K have of their immediate family. . . . It would seem to me and would appear to me that the B family would provide ample female role models through the grandmother, both sets of grandparents for that much. . . . [Balser] has extensive experience in parenting issues.[79]

The LCDHS presented only one witness, the Administrator of Social Services for LCDHS. She had no formal education in psychology or social work.[80] She had only met with Charles one time for one hour and had not observed any interactions between Balser and Charles.[81] She concluded that Balser did not meet the LCDHS's "characteristic profile of preferred adoptive placement."[82] The matter was heard by Judge Robert J. Moore. In his order dated May 9, 1988, after hearing all parties and considering existing evidence, the judge held that it was in the best interest of Charles that he be adopted by Balser, and an interlocutory order of adoption was granted.[83] LCDHS subsequently appealed. During an oral argument at the Ohio Court of Appeals, the guardian ad litem presented the following written statement:

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[76] *In re Charles B.*, 1988 WL 119937, at *11 (emphasis omitted).
[77] *In re Charles B.*, 552 N.E.2d at 889.
[78] *Id.*
[79] *In re Charles B.*, 1988 WL 119937, at *7–8.
[80] *In re Charles B.*, 552 N.E.2d at 888.
[81] *Id.*
[82] *Id.*
[83] Brief on the Merits of the Guardian Ad Litem of the Child, Charles B., *supra* note 65, at 1.

> As Guardian Ad Litem, I am charged with the obligation and duty of representing the interests of the child. Separate and apart from what may be in the best interest of the Appellant or the Appellee, I submit that [it is] in the child's best interest that the adoption be granted. Charles B. is a bright young child who has survived a fight with leukemia as well as being shifted among at least five (5) foster homes. He is [in] need of permanency and stability. . . . The petitioner has demonstrated the maturity, commitment and love for the child such as is consistent with a parent, and, I submit the child will substantially benefit from such an adoption.[84]

On October 28, 1988, the Ohio Court of Appeals reversed the trial court's decision.[85] The case was heard by a three-judge panel.[86] Two judges agreed that the trial court's decision should be reversed.[87] The opinion was authored by Judge Turpin. LCDHS argued that the trial court's finding that the adoption of Charles by Balser was in the best interest of Charles was against the manifest of the evidence, specifically that Balser and Kuzma "are a homosexual couple and there are no practical precedent, studies, or other predictors as to adoptions by a homosexual couple and the viability or risks attendant to such an adoption."[88] At that time, unlike states such as Florida,[89] Ohio did not have a statute explicitly prohibiting adoptions by homosexuals:

> The following persons may adopt:
>
> (A) A husband and wife together, at least one of whom is an adult;
>
> (B) An unmarried adult;
>
> (C) The unmarried minor parent of the person to be adopted;
>
> (D) A married adult without the other spouse joining as a petitioner if any of the following apply:
>
> (1) The other spouse is a parent of the person to be adopted and supports the adoption;

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[84] *In re Charles B.*, 1988 WL 119937, at *8.

[85] *Id.* at *7.

[86] *See generally id.*

[87] *See generally id.*

[88] *Id.* at *4.

[89] *See* FLA. STAT. § 63.042 (1987).

> (2) The petitioner and the other spouse are separated under section 3103.06 or 3105.17 of the Revised Code;
> (3) The failure of the other spouse to join in the petition or to support the adoption is found by the court to be by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain either the support or refusal of the other spouse.[90]

Judge Turpin wrote that "adoption is a statutory concept" and that "[t]here is no right to adopt except as it is conferred by the legislature."[91] However, even though the statute did not expressly prohibit homosexuals from adopting a child, Judge Turpin stated the following: "In our opinion, the concepts of homosexuality and adoption are so inherently mutually exclusive and inconsistent, if not hostile, that the legislature never considered it necessary to enact an express ineligibility provision."[92] Judge Turpin wrote that, as a matter of law, it was in the best interest of Charles to ignore the findings and recommendations of his court-appointed guardian ad litem. Instead of placing Charles in a stable, loving household headed by Balser and Kuzma, it was in the best interest of Charles to place him back in the foster care system in which the chances of him being adopted by someone else were virtually non-existent. Judge Turpin emphasized that his decision was purely based on the best-interest-of-the-child standard:

> The so-called "gay lifestyle" is patently incompatible with the manifest spirit, purpose and goals of adoption. Homosexuality negates procreation. Announced homosexuality defeats the goals of adoption. It will be impossible for the child to pass as the natural child of the adoptive "family" or to adapt to the community by quietly blending in free from controversy and stigma.
> . . .
> [T]he polestar that guides this court must be what is best for the child, not what is best for the petitioner. We reverse this placement because, as a matter of law, it is not in the best interest of a seven (7) year old male child to be placed for adoption into the home of a pair of adult male

[90] OHIO REV. CODE ANN. § 3107.03 (West 1988).
[91] *In re Charles B.*, 1988 WL 119937, at *2 (referring to § 3107.03).
[92] *Id.* at *1.

> homosexual lovers. The goals of announced homosexuality are hostile to the goals of the adoption statute. Accordingly, we cannot impute to the legislature an intention that announced homosexuals are eligible to adopt. It is not the business of the government to encourage homosexuality.[93]

Judge Wise wrote a critical dissent. Judge Wise wrote that "the majority has been so blinded by the dazzling lights of the antipodal stars of 'homosexuality,' 'gay rights,' and 'gay lifestyle' that they strayed from the polestar of the welfare of *this particular child*."[94] Judge Wise wrote that the statute permits "an unmarried adult" to adopt a child and that there is "no Ohio law prohibiting adoption simply because a parent has a variant sexual persuasion."[95] He further wrote that "all adult male homosexuals do not pursue a 'gay-lifestyle' any more than all adult male heterosexuals pursue a 'swingers-lifestyle."[96] As such, the focus had to be not on whether the unmarried adult was heterosexual or homosexual but "whether that lifestyle is practiced in such a manner so as to be a detriment to or against the best interest of the child."[97] Judge Wise added that while homosexuality did not lead to procreation, many heterosexuals also could not have biological children. Judge Wise also stated that there was "no evidence from which the trial could find that the best interests of this *particular child* would not be served by granting this adoption."[98] Judge Wise went further and stated that "if the court had ruled the other way, denying the adoption, we would be constrained that such a decision was against the manifest weight of the evidence."[99] Judge Wise concluded by saying the following: "Charles, with all his problems, especially deserves a chance to be someone's child forever. The petitioner, Mr. B., offers that chance."[100] As such, Judge Wise "agree[d] with the trial court that Charlie should get Mr. B."[101]

Balser and the guardian ad litem subsequently appealed to the Supreme Court of Ohio. William B. Sewards Jr., the county prosecutor representing LCDHS, defended the ban on gay adoption, stating the following: "When a child lives with two homosexual lovers, the parental role model is then two adult male homosexuals. . . . It is not the business of the government to

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[93] *Id.* at *2, *6.
[94] *Id.* at *7 (Wise, J., dissenting).
[95] *Id.* at *10.
[96] *Id.*
[97] *Id.*
[98] *Id.* at *8.
[99] *Id.*
[100] *Id.* at *11.
[101] *Id.*

promote homosexuality. In this case, it would not be in the best interest of the child."[102]

On March 28, 1990, in a per curiam opinion, six out of seven justices agreed that the trial court's decision had to be reinstated.[103] The majority stated that Balser, as an unmarried adult, was "statutorily permitted to adopt" pursuant to the adoption statute.[104] The majority then emphasized that the right to adopt was not absolute and that adoption cases had be guided by the best-interest-of-the-child standard on a case-by-case basis.[105] After reviewing the record, the majority concluded that the trial court had not abused its discretion when it decided to grant the adoption petition.[106]

Justice Resnick dissented. She also stated that homosexuals were not as a matter of law barred from adoption.[107] However, she would have reversed the trial court's decision for another reason. She argued that a homosexual who wishes to adopt a child "must present evidence demonstrating that his or her homosexuality will not harm the child."[108] Justice Resnick wrote that "there does exist a nexus between the homosexuality of Mr. B and adoption of Charles B which could adversely affect the child and thus would not be in the best interest of the child."[109] Even though Balser underwent a test showing that he was HIV negative, Justice Resnick argued that "Mr. B falls within a high-risk population for AIDS."[110] Therefore, she concluded that "[b]ecause Charlie's immune system has been dramatically altered due to treatment for leukemia, in the long term, this adoption simply is not in his best interest."[111]

The decision to pursue litigation to adopt Charles cost the couple over $20,000 even with reduced rates.[112] Friends of the family had established a fund that received donations from many people across the country. However, most contributions came from straight people who wanted to express their support for a couple who wanted to adopt a child with special needs.[113]

The Ohio case demonstrates how even a neutral statute that does not explicitly prohibit gay people from becoming adoptive parents could be

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[102] *Ohio High Court Questions Sexual Preference in Adoption*, OHIO UNIV. POST, Sept. 14, 1989, at 11.
[103] *In re* Adoption of Charles B., 552 N.E.2d 884, 890 (Ohio 1990).
[104] *Id.* at 886.
[105] *Id.*
[106] *Id.* at 889.
[107] *Id.* at 890 (Resnick, J., dissenting).
[108] *Id.*
[109] *Id.*
[110] *Id.* at 891.
[111] *Id.*
[112] *Charlie B.*, GAY PEOPLE'S CHRON., Mar. 1990, at 1.
[113] *Id.*

interpreted as doing just that. The case also illustrates how important the testimonies of experts and the guardian ad litem are when considering what is in the best interests of the child. Gay parenting was still relatively new in the 1980s, and for some people, like Judge Turpin, permitting a child to be adopted by a gay person was so unfathomable that even the opinion of the state-appointed guardian ad litem, vehemently supporting the placement, had to be ignored. Justice Resnick's concerns about AIDS, albeit unreasonable, were understandable considering how very little information was available at the height of the AIDS epidemic. At the same time, preliminary research had already shown promising results that gay people could be as good of parents as straight people. The next case shows that the focus in adoption and foster care matters must always be on what is in the best interests of the children.

B. MASSACHUSETTS

In 1984, David Jean and Donald Babets, together as a same-sex couple, applied to the Department of Social Services ("DSS") in Boston for a license to become foster parents.[114] Babets was raised as a Catholic in the Midwest and spent over seven years with the army during the Vietnam War.[115] Jean was raised in Massachusetts.[116] They met when Babets was still serving in the army.[117] Both men were involved in the community and were able to provide financial stability for a future foster child.[118] Jean worked as a manager of a care facility, and Babets worked for the Boston Fair Housing Commission.[119] The men had been together for almost a decade.[120] After jointly submitting their application, they subsequently underwent multiple screenings and evaluations, which included extensive character examinations from people who knew them professionally and personally.[121] In May 1984, the couple started a six-week parenting course, which consisted of four-hour weekly sessions.[122] Two weeks after the course was completed, the couple underwent a home study that lasted for several more

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[114] LAURA BENKOV, REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS 86–87 (1994).
[115] Patti Doten, *They Want a Chance to Care: Gay Couple Still Hurts from Decision That Took Away Their Foster Children*, BOS. GLOBE, Sept. 27, 1990, at 85.
[116] *Id.*
[117] *Id.*
[118] WENDELL RICKETTS, LESBIANS AND GAY MEN AS FOSTER PARENTS 42 (1990).
[119] *Id.*
[120] *Id.*
[121] BENKOV, *supra* note 114, at 87.
[122] Kay Longcope, *Gay Couple Express Anger, Grief and Hope: Media, Politics Blamed in Loss of Boys*, BOS. GLOBE, May 16, 1985, at 14.

weeks.[123] The social worker came in twice a week, spending several hours with the men and asking questions: "How did you resolve your last argument, what was it like for you growing up, problems with peers and siblings, why we wanted to be foster parents."[124] After the home study was completed, the couple waited almost a year until they were finally approved and granted a license to become foster parents.[125] Two young boys were subsequently placed with Babets and Jean. The boys' biological mother approved the placement knowing about the men's sexual orientations.[126]

About two weeks later, on May 8, 1985, a Boston Globe news article was published highlighting the fact that the DSS approved the placement of the boys with two homosexuals.[127] The story received a lot of public attention. In defending the placement, Reverent Thomas Payne, who wrote a recommendation for one of the men, stated: "What we're dealing with is a very stable family in the community who is interested, concerned and willing to provide a foster home for children. . . . I don't think there's really anything to fear."[128] At that time, Massachusetts did not have a law prohibiting homosexuals from becoming foster parents. Marie A. Matava, who worked at the DSS, stated that the official policy was to make placement decisions on "parenting ability to nurture and provide basic needs of a child."[129] She further stated: "We don't have any arbitrary definitions of what does or does not include families in this sense."[130] However, the story received public pushback, and the boys were promptly taken away on the same day the article came out. In a brief statement after taking away the boys, the department stated the following: "We have decided it is clinically not in these children's best interest to remain in their current placement, arrd [sic] we are changing that placement today."[131] On July 3, 1985, Massachusetts Governor Michael Dukakis signed an appropriations bill into law.[132] The bill attached several requirements for the allocated funds that the DSS would receive:

> [P]rovided further, that it shall be the policy of the department of social services to place children in need of

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[123] *Id.*
[124] *Id.*
[125] BENKOV, *supra* note 114, at 87.
[126] *Id.* at 88.
[127] Kenneth J. Cooper, *Some Oppose Foster Placement with Gay Couple*, BOS. GLOBE, May 8, 1985, at 21.
[128] *Id.*
[129] *Id*. at 24
[130] *Id.* at 24.
[131] Christine Guilfoy, *State Removes Children from Gay Foster Parents*, GAY CMTY. NEWS, May 18, 1985.
[132] Act of July 3, 1985, ch. 140, 1985 Mass. Acts 143.

> foster care exclusively in the care of persons whose sexual orientation presents no threat to the well-being of the child, including not more than forty permanent positions and one hundred and fifty-seven temporary positions.[133]

Effective on February 1, 1986, Supplemental Issue No. 501 provided a provided a preference hierarchy for future child placements:

> The Department shall consider the following placement resources in the following order:
>
> (g) placement in the child's own home;
> (h) placement in family foster care with relatives; with consideration given to extended family members and persons chosen by the parent(s) to be utilized for substitute care;
> (i) placement in family foster care with a married couple preferably with parenting experience and time available for parenting;
> (j) placement in family foster care with a person with parenting experience and preferably with time available for parenting;
> (k) placement in family foster care with a person without parenting experience and preferably with time available for parenting.
> (l) placement in community residential care.
> Any placement made pursuant to (j) or (k) above shall require the written approval of the Commissioner.[134]

Further, Rule 7.103(3)(a) stated the following: "Application forms shall require at least the following and consent: the name, date of birth, address, telephone number, sex, sexual preference/orientation, ethnicity, and occupation of the applicant."[135] On January 30, 1986, Babets, Jean, and some other plaintiffs filed a complaint against Governor Dukakis and the DSS.[136] They sought injunctive and declaratory relief arguing that the new regulations "irrationally and arbitrarily categorize foster parent applicants by marital status and sexual preference in such a way as to exclude single

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[133] *Id.* at § 4800-0010, 1985 Mass. Acts at 240.
[134] Supp. Issue 501 Mass. Reg. 1, 113 (Jan. 3, 1985).
[135] *Id.* at 99.
[136] RICKETTS, *supra* note 118, at 50.

persons, unmarried couples and gay men and lesbians from equal consideration as foster parents."[137] The State moved to dismiss the case.

On September 8, 1986, Chief Justice Morse of the Massachusetts Superior Court ruled that the case could proceed to trial.[138] In considering the equal protection argument, the judge found that strict or heightened scrutiny was not appropriate because marital status was not a suspect classification.[139] As such, the regulation had to satisfy the rational basis test.[140] Justice Morse stated that the new regulations appeared to have no rational basis for the identified purpose, which was "to assure good substitute parental care."[141] He wrote that "it is anomalous that the Commonwealth should concoct a classification so disadvantageous to a class of persons—single parents—who may be as good as or better at parenting than some married couples."[142] He further argued that if the guiding principle was what was in the best interests of the children, "then any distinction between married couples and single persons is wholly arbitrary and capricious and adverse to the needs of children" and that "prospective foster parents should be selected on the basis of their ability to provide temporary care and support for children, not on the basis of an arbitrary factor such as marital status."[143] Next, Justice Morse cited Massachusetts case law stating that sexual orientation was not relevant when considering parenting skills.[144] Thus, he wrote the following: "Any exclusion of homosexuals from consideration as foster parents, all things being equal, is blatantly irrational."[145] The plaintiffs were allowed to proceed to trial with their equal protection claim and prove that the intent behind the regulations was to discriminate against homosexuals rather than to create a policy that was in the best interests of the children.[146] Justice Morse wrote that applying to become adoptive or foster parents was optional, and thus requiring applicants to disclose their sexual orientation did not infringe upon the applicants' privacy or freedom of association rights. He further stated that applicants often had to undergo extensive background checks and to disclose much more sensitive information about

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[137] Babets v. Sec'y of Exec. Off. of Hum. Servs., 526 N.E.2d 1261, 1262 (Mass. 1988).
[138] ARTHUR S. LEONARD, SEXUALITY AND THE LAW: AN ENCYCLOPEDIA OF MAJOR LEGAL CASES 351 (Arthur S. Leonard & Charles E. Quirk eds., 1993).
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] RICKETTS, *supra* note 118, at 51.

their health and criminal record: thus, the question about sexual orientation was not unrelated to a legitimate state interest.[147]

Because Justice Morse allowed the lawsuit to proceed, the parties entered the discovery stage. To prove their case, the plaintiffs requested a number of documents from the State; however, the State refused to comply with some requests arguing that certain documents "constitute or contain information protected by the governmental privilege."[148] The trial court ruled that the requested documents were not protected by such privilege.[149] The Supreme Judicial Court of Massachusetts granted an application for direct appellate review and subsequently affirmed the trial court's decision, emphasizing "the plaintiffs' specific and demonstrable need for the requested documents in order to prosecute their action for the vindication of their constitutional and statutory rights, allegedly violated by the defendants."[150] The litigation continued until both parties agreed to settle. On April 27, 1990, the state released the following Notice of Proposed Amended of Regulations:

> The proposed amendment to 110 CMR 7.101(1) will modify DSS substitute care placement guidelines, emphasizing that placement decisions shall be based on the best interest of the child, prioritizing parenting experience in the selection criteria, and enabling Area Directors to approve certain placement decisions.
>
> All persons desiring to submit comments concerning the proposed regulation shall file the same with the DSS General Counsel, 150 Causeway St, Boston, MA 02114 on or before 5/4/90. It is anticipated that this regulation will go into effect 5/25/90.[151]

The new proposed policy switched its focus to parental experience rather than marital status, which allowed homosexuals to apply and be considered.[152] As to Babets and Jean, after the two boys were removed from the two gay men, the couple moved away to the countryside south of Boston.[153] In an interview given in September 1990, they stated the following: "We knew things weren't going to change. We knew it was not

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[147] *Id.* at 51–52.
[148] Babets v. Sec'y of Exec. Off. of Hum. Servs., 526 N.E.2d 1261, 1262–63 (Mass. 1988).
[149] *Id.* at 1262.
[150] *Id.* at 1266.
[151] Supp. Issue 633 Mass. Reg. 53 (Apr. 27, 1990).
[152] RICKETTS, *supra* note 118, at 54–55.
[153] BENKOV, *supra* note 114, at 104.

going to get any easier to live there. And we had talked about having a farm for a long time."[154] Eventually, the couple agreed to foster several siblings who grew up in a violent household.[155] In 1992, Babets and Jean were in the process of adopting them.[156]

The Massachusetts case shows that policymakers have to clearly identify their goals in adoption and foster care matters. On its face, there was not much wrong with the earlier placement hierarchy. For example, placing a child with two married people usually tends to be better than placing a child with one person. However, that is not the case in every scenario, and that was the problem. The placement hierarchy effectively stated that two married people over one person will always be in the best interests of the child. As explained by the trial court judge, that is not always the case. What ultimately matters is a person's ability to be a parent, and thus, in order to act in the best interests of the child, a case-by-case determination of every applicant is necessary. Because sexual orientation by itself has nothing to do with parental competence, categorically excluding homosexuals from consideration goes directly against what is in the best interests of the child because it potentially deprives them of the best available placement, which could be provided by a gay person. The next case discusses the role of social workers and how they were able to find a way to disregard official bans on gay adoption.

C. NEW HAMPSHIRE

In February 1985, Jody Minns, a troubled sixteen-year-old boy, voluntarily agreed to be placed in a household ran by a homosexual couple.[157] Tom Herman and Jeremy Youst have been together for over fifteen years and over time have been foster parents for many children. Paul Kane, who was the social worker that had placed Jody with the couple, stated the following in an interview about the placement:

> Tom and Jeremy's being gay uh . . . really had nothing to do with my initial interest in placing Jody here. What . . . what actually came to mind was that this was a foster family that could work with Jody because of his special needs. It was someone I knew that wouldn't give up on Jody, it was someone who had the education, the counseling background that I needed . . . I needed more than just foster care, more than a loving couple to . . . to

[154] Doten, *supra* note 115.
[155] BENKOV, *supra* note 114, at 104.
[156] *Id.*
[157] WE ARE FAMILY (WGBH Bos. 1986).

> take care of . . . of . . . of this boy. We were guaranteeing the court that they would know where he was that they would deal him and we had an alternative to a lock up unit at that point.[158]

The original placement did not receive much media attention. However, on June 19, 1985, a news story broke out discussing the placement.[159] At that time, homosexuals were not prohibited from being considered as adoptive or foster parents. On June 28, 1985, the public attention prompted the director of the Division of Children, Youth, and Families to issue a directive officially prohibiting homosexuals from becoming foster or adoptive parents, and social workers were directed not to make any future placements with homosexuals.[160] However, social workers were not required to inquire about the sexual orientation of the applicants, and this gave them more discretion.[161] The new policy was not enough for some lawmakers. On July 4, 1985, New Hampshire state representative Mildred Ingram introduced a bill prohibiting homosexuals from running day care centers and being considered for adoptive or foster parents.[162] The news story about Herman and Youst came out at the right time, and Ingram "used them as a rallying point to gather support for her legislation."[163] She claimed that her views were motivated by what was in the best interests of the children:

> I'm not against homosexuals. They are adult people. They made their own choice and the only one they have to answer to is their maker. They can go on their merry way to hell if they want to. I just want them to keep their filthy paws off the children.[164]

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[158] *Id.* at 00:41.

[159] Jordan Blair Woods, *Religious Exemptions and LGBTQ Child Welfare*, 103 MINN. L. REV. 2343, 2381 (2019) (citing Paul R. Lessard, *Sexuality Issue Raised in Foster Child Care Case*, UNION LEADER, June 19, 1985, at 1).

[160] Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 51 HARV. C.R.-C.L. L. REV. 363, 399 (2016) (citing Memorandum from David A. Bundy, Dir., Dep't of Children, Youth & Families (June 28, 1985)).

[161] *Id.*

[162] Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL'Y REV. 83, 129 (2017) (citing Donn Tibbetts, *Rep. Files Bill to Ban Homosexuals from Running Foster Homes*, UNION LEADER, July 4, 1985, at 1).

[163] Kim Westheimer, *New Hampshire Foster Care Fiasco: Strategists Split on Whether to Fight Against "Invasion of Privacy" or for Les/gay rights*, GAY CMTY. NEWS, Sept. 13–19, 1987, at 3.

[164] BALL, *supra* note 63, at 148.

The bill received a lot of negative attention, and some lawmakers questioned whether the bill, if passed into law, would be constitutional.[165] As such, the House defeated the bill by a margin of 205 to 145, leaving the matter to the agency's discretion and expecting that the agency would take more restrictive measures.[166] The agency resisted, adopting a new policy, under which the applicants only had to show that they were able to provide "a safe, nurturing, and stable family environment which is free from abuse and neglect."[167] The move to keep homosexuals was driven by social workers who were faced with increasing numbers of children who needed to be adopted and who believed that the guiding standard was what was in the best interests of the children.[168]

However, Ingram did not give up. In February 1987, she reintroduced House Bill 70, which "establishe[d] an irrebuttable presumption that homosexuals are unfit to serve as foster parents, adoptive parents, and to be licensed to operate day care centers."[169] The proposed bill prohibited homosexuals from running day care centers and from being considered as adoptive or foster parents.[170] On March 3, 1987, the House of Representatives adopted House Resolution No. 23, requesting an opinion from the New Hampshire Supreme Court.[171] The resolution was filed with the court on March 4.[172] The House had five questions regarding the state and federal constitutionality of the new bill: (1) whether the bill violated the equal protection clauses of either the United States Constitution or the New Hampshire Constitution; (2) whether the bill violated the due process clauses of either the U.S. Constitution or the New Hampshire Constitution; (3) whether the bill violated privacy rights of either the U.S. Constitution or the New Hampshire Constitution; (4) whether the bill violated freedom of association rights under either the U.S. Constitution or the New Hampshire Constitution; and (5) whether the bill violated any other constitutional provisions.[173] On March 11, the Supreme Court issued a response, requesting "that it be excused from giving an opinion . . . . [b]ecause the bill does not define 'homosexual.'"[174] Additionally, the court requested "a statement of factual findings about the nexus between homosexuality as the

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[165] George, *supra* note 160, at 400.

[166] *Id.* at 401 (citing Norma Love, *Homosexual Parent Bill Stirs Emotion*, UNION LEADER, Apr. 28, 1986, at 8).

[167] George, *supra* note 162, at 129 (citing N.H. DEPT. OF HEALTH & HUM. SERVS., He-C 6446, Foster Family Care Licensing Requirements at 3, 13 (effective Aug. 28, 1986)).

[168] George, *supra* note 160, at 401.

[169] *In re* Op. of the JJ., 530 A.2d 21, 21 (N.H. 1987).

[170] Op. of the JJ., 522 A.2d 989, 989 (N.H. 1987).

[171] *In re Op. of the JJ.*, 530 A.2d at 21.

[172] *Op. of the JJ.*, 522 A.2d at 989.

[173] *Id.* at 990.

[174] *Id.*

legislature would define it and the unfitness of homosexuals as declared by the bill."[175] On April 2, 1987, the House passed Resolution 32, which stated the following:

> That for the purposes of HB 70, a homosexual is defined as any person who performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another person of the same gender[. . . .]
>
> The general court finds that, as a matter of public policy, the provision of a healthy environment and a role model for our children should exclude homosexuals, as defined by this act, from participating in governmentally sanctioned programs of adoption, foster care, and day care. Additionally, the general court finds that being a child in such programs is difficult enough without the added social and psychological complexities that a homosexual lifestyle could produce. The general court makes this statement in a deliberative and balanced manner both recognizing the rights of consenting adults, as limited [in *Bowers*] . . . and the rights of the children of this state, who are intimately affected by the policies of this state in the above governmentally sanctioned programs, to positive nurturing and a healthy environment for their formative years[.]
>
> That in light of this resolution, the justices of the supreme court are respectfully requested to give their opinion on the questions asked in House Resolution No. 23[.][176]

House Resolution 32 was submitted to the New Hampshire Supreme Court on April 3, 1987.[177] On May 5, the court issued a response.[178] Four out of five justices agreed that HB 70 would not violate the federal and state constitutions.[179] The court prefaced the opinion by saying that the provided definition of "homosexual" was too narrow and thus for the purposes of the opinion, the majority expanded the definition to include homosexual acts and behavior that were done knowingly and voluntarily.[180] The court also added that homosexual conduct had to be

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[175] *Id.*
[176] *In re Op. of the JJ.*, 530 A.2d at 22–23.
[177] *Id.* at 23.
[178] *Id.* at 21.
[179] *Id.* at 27.
[180] *Id.* at 24.

committed "reasonably close in time to the filing" of an adoption application.[181] In the equal protection analysis, the court stated that homosexuals were not a suspect class and therefore did not enjoy heightened scrutiny.[182] Further, the court stated that there was no fundamental right to adopt, foster, or run a child care agency and, citing *Bowers*, the court also stated that there was no fundamental right to engage in homosexual sodomy.[183] As such, the bill only had to satisfy the rational basis test. The court stated that the purpose of the bill was to promote, among other things, "appropriate role models for children" and this purpose was a legitimate government purpose.[184] The court held that excluding homosexuals from becoming foster or adoptive parents was rationally related to the bill's purpose and that the state "can rationally act on the theory that a role model can influence the child's developing sexual identity."[185] The majority stated that the theory only extended to adoption and foster care and that homosexuals could not be excluded from running day care centers.[186] The majority reached a similar conclusion under the due process analysis, emphasizing that a person did not have a cognizable property or liberty interest in becoming an adoptive or foster parent.[187] Next, the majority, again citing *Bowers*, also stated that the bill would not violate any substantive privacy rights.[188] The court emphasized that the state had "especially great responsibility in the foster care and adoption contexts to provide for the welfare of the children affected by placement decisions" and that the state "by law has either the exclusive, or a highly significant, responsibility to choose what is best for the child."[189] Finally, the majority stated that the right to freedom of association would not be violated by the bill.[190]

Justice Batchelder authored a separate opinion. He pointed out that homosexual conduct was not a crime in New Hampshire, but heterosexual adultery was.[191] He also argued that the bill would exclude all homosexuals without considering a wide variety of important factors, such as "financial stability," "the strength to discipline a child firmly yet patiently," and "the intelligence to provide proper education."[192] Citing numerous studies,

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[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.* at 25.
[185] *Id.*
[186] *Id.* at 26.
[187] *Id.*
[188] *Id.* at 27.
[189] *Id.* at 25.
[190] *Id.* at 27.
[191] *Id.* at 28.
[192] *Id.*

Batchelder wrote that the legislature had no strong evidence showing that homosexual parents negatively affected their children's sexual development.[193] He further argued that every person who wanted to adopt a child should be able to "provide a healthy, caring, nurturing environment for a child" and that existing regulations were broad enough to allow a thorough examination of every applicant's fitness.[194] Batchelder argued that the focus had to be on the best interest of the child and not on the sexual orientation of the applicant.[195] As such, he argued that the bill would be unconstitutional.[196]

The court issued the opinion on May 5, 1987.[197] On May 7, the House passed the bill by a margin of 202 to 155.[198] On July 24, 1987, the law became effective, stating the following:

> Specifically as follows, any individual not a minor and not a homosexual may adopt:
> I. Husband and wife together.
> II. An unmarried adult.
> III. The unmarried father or mother of the individual to be adopted.
> IV. Any foster parent.
> V. A married individual without the other spouse joining as a petitioner, if the individual to be adopted is not his spouse; and if
>
> > (a) The other spouse is a parent of the individual to be adopted and consents to the adoption;
> > (b) The petitioner and the other spouse are legally separated; or
> > (c) The failure of the other spouse to join in the petition is excused by the court by reason of prolonged unexplained absence, unavailability, or circumstances constituting an unreasonable withholding of consent.[199]

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[193] *Id.*
[194] *Id.* at 29.
[195] *Id.*
[196] *Id.*
[197] *Id.* at 21.
[198] George, *supra* note 160, at 405 (citing Donn Tibbetts, *Homosexuals Banned in House Bill from* Adopting *Kids; Senate OK Sure*, UNION LEADER, May 8, 1987, at 1, 16).
[199] Carrie Bradshaw, *Protecting Children in Nontraditional Families: Second Parent Adoptions in Washington*, 13 U. PUGET SOUND L. REV. 321, 338 n. 89 (1990).

Following the passing of the bill, some openly gay parents, including Herman, lost their foster licenses.[200] In defending her stance on banning gay adoption, Ingram stated the following:

> I'm not trying to take anybody's rights away from them. I'm just trying to protect the rights of the other children. Of little children that have no rights in their state. They have no one to speak up for them. You can't convince me that, that's a wholesome place to bring up a child.
> . . .
> Well of course I'd like to see every child abuser run right off the earth, that's why I feel they ought to be tied and feathered. Anybody that would abuse a child, but I do know that homosexuals, the only way they can sustain their lifestyle is to proselytize and I don't want any child subject to do that.[201]

Even though the law officially did not permit homosexuals to adopt a child, many state agency workers who were responsible for implementing the new law and approving foster and adoption placements, subsequently found a way to go around the new law.[202] With the rising number of children who needed to be adopted, the Department of Child Services decided to enact a policy under which it would not approve openly gay applicants. However, while this incentivized gay applicants to hide their identity, the agency also decided not to inquire about applicants' sexual orientation at all. This allowed the agency to continue approving placements with gay people. Professor Marie-Amélie George calls this resistance "agency nullification," which "allowed gay men and women to become parents, albeit at the cost of hiding their sexual identity."[203]

In 1986, Ray Buckley, an openly gay man, was elected to the New Hampshire House of Representatives.[204] In 1999, he introduced a repeal bill.[205] On March 18, 1999, the House passed the repeal bill by a margin of

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[200] George, *supra* note 160, at 405.

[201] WE ARE FAMILY, *supra* note 157.

[202] George, *supra* note 160, at 405.

[203] *Id.*

[204] Kathleen Ronayne, *A Bid to Lead National Democrats*, SEACOASTONLINE (Dec. 22, 2016, 4:27 PM), https://www.seacoastonline.com/story/news/local/hampton-union/2016/12/22/a-bid-to-lead-national/23291533007 [https://perma.cc/D844-VKR3].

[205] Jenn Vento, *Bill Seeks House Adoption*, SEACOASTONLINE (Jan. 18, 1999, 1:00 AM), https://www.seacoastonline.com/story/news/1999/01/18/bill-*See*ks-house-adoption/51314817007 [https://perma.cc/5SMK-24JL].

233 to 123.[206] House Speaker Donna Sytek voted against the bill, stating the following: "It's not because I have any problems with people who are gay, but because I am against putting a child who already has problems in a home where they are subject to ridicule."[207] Nevertheless, on April 22, 1999, the state senate passed the bill by a margin of 18 to 6.[208] The bill was signed into law by Governor Jeanne Shaheen, and on May 3, 1999, the New Hampshire law no longer excluded homosexuals from applying to become foster or adoptive parents.[209]

The New Hampshire case discusses the role that social workers play in the adoption and foster care system. These workers have unique experiences that allow them to understand the real challenges of the system, which include thousands of children who need homes and an insufficient number of people who are willing to provide those homes. Further, social workers are better equipped to make placement determinations because they deal with parents and children on a daily basis. After recognizing that categorically excluding gay people from consideration ends up hurting children, social workers found a way to resist. By not inquiring about the applicant's sexual orientation, they were able to still place children with qualified gay people. Further, while the New Hampshire Supreme Court ultimately greenlit the bill, the court touched on an important point. While excluding gay people from adoption seemed intuitive to the court, defining what a "homosexual" is was less so. This is important because it shows that the focus of the conversation was on gay people and not on what is in the best interests of the children. The legislature's definition considered someone a homosexual only if that person engaged in same-sex behavior. By that definition, people who identify themselves as homosexual, but have not engaged in homosexual behavior for some time, would be allowed to adopt a child. Thus, it is challenging to see how exclusion of homosexuals serves the best interests of the children when the true basis for the exclusion is disapproval of the type of intimate behavior someone privately engages in with another person. The final case shows how multiple courts from the same state examined all arguments surrounding gay adoption. Eventually, it would take multiple experts to explain why prohibiting such adoption was not in the best interests of the children.

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[206] SUSAN GLUCK MEZEY, GAY FAMILIES AND THE COURTS: THE QUEST FOR EQUAL RIGHTS 24 (2009).

[207] Clay Wirestone, *In 1987, the New Hampshire Legislature Targeted Gay People as Unfit for Parenting*, CONCORD MONITOR, June 29, 2013, at 1.

[208] *Id.*

[209] Act of May 3, 1999, 1999 N.H. Laws 18.

D. FLORIDA

Edward Seebol was raised in New York City, where he also attended the City College of New York.[210] After graduating, he spent a few years at IBM.[211] In 1969, he moved to Key West, Florida, which he, as a homosexual man, found more accepting.[212] In the early 1980s, the AIDS epidemic hit the Key West homosexual community.[213] After seeing many of his friends getting ill, Seebol started getting involved in public health advocacy by becoming the director of AIDS Help, where he would later provide support for over a hundred AIDS patients.[214] In addition to his advocacy in the gay community, Seebol also advocated for abused children as a guardian ad litem for the state through which he had witnessed many struggling children.[215] Claudia Jackson, who was the district director of the state guardian ad litem program, called Seebol an "exemplary" advocate, who "has benefited children who could have otherwise fallen through the cracks of this system."[216] After representing children's best interests for several years, Seebol eventually decided to become a parent himself. On March 5, 1990, he filled out an application to adopt a child with special needs. The child was hard-to-place because he had tested positive for HIV.[217] In 1990, such a diagnosis would render any child virtually unadoptable because public understanding of how the virus operated was very limited. At that time, more than 800 children with special needs were looking for a home, which was difficult to find because people were less willing to take a child with special needs.[218] On May 11, 1990, Seebol received a letter from the Department of Health and Rehabilitative Services ("HRS"), in which the agency denied his request, citing Florida's adoption statute that barred homosexuals from adopting children.[219] Section 63.042, which was passed in 1977, stated the following:

> (1) Any person, a minor or an adult, may be adopted.

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[210] BENKOV, *supra* note 114, at 101.
[211] *Id.*
[212] *Id.*
[213] MARK ELLWOOD, LAURA SICILIANO-ROSEN, REBECCA STRAUSS & ROSS VELTON, THE ROUGH GUIDE TO FLORIDA 192 (7th ed. 2006).
[214] *Man Challenges Law Barring Gay Adoption*, SUN SENTINEL, Sept. 26, 1990, at 8A.
[215] BENKOV, *supra* note 114, at 102.
[216] *Judge Throws Out Florida Law Banning Gays from Adopting*, TAMPA BAY TIMES, Mar. 19, 1991, at 2A.
[217] *Suit Filed Over Ban on Adoptions by Homosexuals*, TAMPA BAY TIMES, Sept. 25, 1990, at 8B.
[218] *Judge Throws Out Florida Law Banning Gays from Adopting*, *supra* note 216.
[219] *Suit Filed Over Ban on Adoptions by Homosexuals*, *supra* note 217.

> (2) The following persons may adopt:
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> (a) A husband and wife jointly;
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> (b) An unmarried adult, including the natural parent of the person to be adopted;
>
> (c) The unmarried minor natural parent of the person to be adopted; or
>
> (d) A married person without the other spouse joining as a petitioner, if the person to be adopted is not his spouse, and if:
>
> 1. The other spouse is a parent of the person to be adopted and consents to the adoption; or
>
> 2. The failure of the other spouse to join in the petition or to consent to the adoption is excused by the court for reason of prolonged unexplained absence, unavailability, incapacity, or circumstances constituting an unreasonable withholding of consent.
>
> (3) No person eligible to adopt under this statute may adopt if that person is a homosexual.[220]

The legislative intent of the statute was "to protect and promote the well-being of persons being adopted and their natural and adoptive parents and to provide to all children who can benefit by it a permanent family life."[221] The statute further required the agency to make a case-by-case determination "to ascertain whether the adoptive home is a suitable home for the minor and the proposed adoption is in the best interest of the minor."[222] After the law was passed, the bill's sponsor, Senator Curtis Peterson said: "The purpose of the bill was to send a message to lesbians and gay men that we're really tired of you. We wish you'd go back into the closet."[223]

With the assistance of the American Civil Liberties Union, Seebol filed a claim against the HRS, challenging the constitutionality of section 63.042(3). Robyn Blummer, who was the executive director of the ACLU in Florida, publicly argued that "Florida law currently deprives needy children of caring, loving families because of an irrational and irresponsible

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[220] FLA. STAT. § 63.042 (1991) (amended 2015).

[221] *Id.* at § 63.022(1) (1991) (current version at FLA. STAT. § 63.022(3)).

[222] *Id.* at § 63.122(5) (1991) (amended 1992).

[223] Maya Bell, *State's Gay-Adoption Ban Upheld: A Federal Appeals Court Said Florida's Blanket Prohibition Is Constitutional*, ORLANDO SENTINEL, Jan. 29, 2004, at A1.

homophobia."[224] On March 15, 1991, M. Ignatius Lester, the judge of the 16th Judicial Circuit of Monroe County, ruled that the statute was constitutionally invalid.[225] The judge started by reciting the legislative intent of the statute emphasizing that the role of the court in approving adoptions was to "protect and promote the well-being of persons being adopted."[226] When considering suitability, the judge pointed out that previous Florida courts had denied that modest income and advanced age are ground for the rejection of adoption applications.[227] Many things had changed since the statute was passed in 1977. Florida passed a constitutional amendment that provided a right to privacy.[228] In addition, with the rising epidemic of AIDS and substance abuse issues, the numbers of children with special needs who needed placements had sharply increased.[229] The judge mentioned that many other jurisdictions had ruled that the sexual orientation of parents should not prohibit them from visitation or custody.[230] He cited many studies suggesting that there were no adverse effects on children who were raised by homosexuals.[231] The judge also cited *In re Adoption of Charles B.*, in which the Ohio Supreme Court emphasized that adoption cases had to be guided by what was in the best interest of the child who needed to be adopted.[232]

In addressing the argument under the privacy rights, the judge emphasized that the Florida Constitution provided broader privacy protections than the U.S. Constitution.[233] The judge wrote that "[b]y inquiring into sexual orientation, and then penalizing an applicant based on his truthful response to that inquiry, the challenged statute unconstitutionally punishes the exercise of the right to privacy of prospective adoptive parents."[234] Next, the judge wrote that the State had not presented any compelling, substantial, or even rational interest in inquiring into the applicant's sexual orientation:

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[224] *Suit Filed Over Ban on Adoptions by Homosexuals*, *supra* note 217.

[225] *See* Dep't of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993) (republishing as Appendix A the otherwise unpublished decision in Seebol v. Farie, 16 Fla. L. Weekly C52 (Fla. Cir. Ct. 1991)).

[226] *Id.* at 1220 (quoting FLA. STAT. § 63.022(1) (1991) (current version at FLA. STAT. § 63.022(3))).

[227] *Id.*

[228] *Id.*

[229] *Id.*

[230] *Id.* at 1222.

[231] *Id.*

[232] *Id.*

[233] *Id.* at 1223.

[234] *Id.* at 1224.

> The statute suffers from the trite notions of homosexuals' unsuitability as fit parents and evidences discrimination through archaic stereotypes associated with homosexuals. . . . Homosexuals have been proven to be capable, loving parents whose sexual orientation is not necessarily adopted by their children. . . . Determining parents' suitability to adopt on a case by case basis . . . would be a less intrusive means to accomplish the important state interest at stake. The sexual orientation of the adoptive parent should be considered as a factor in determining the adoption only if shown to directly and adversely affect the child. . . . The statutory exclusion of one class of persons to become adoptive parents based upon their sexual orientation unconstitutionally, thus, interferes with their right to privacy under the Florida Constitution.[235]

In considering the equal protection argument, the judge argued that the statute could not withstand the strict scrutiny test.[236] He argued that "[h]omosexuals clearly constitute a suspect class."[237] They had been "subjected to purposeful discrimination," they were "defined by a trait that bears no relationship to [their] ability to perform or function in society," they possessed "political powerlessness of the minority group," and they were "defined by traits which are immutable."[238] Therefore, to survive a constitutional challenge, the categorical exclusion of homosexuals (a suspect class) from being considered as adoptive parents had to serve a compelling governmental interest, which had to be further accomplished by the least restrictive means.[239] Promoting the best interests of the children was a compelling government interest; however, the judge argued that the exclusion "which denies eligibility to prospectively fit parents defeats its very purpose of providing to all children who can benefit by adoption a permanent family life."[240] As such, the exclusion "is poorly tailored to achieve its compelling interest and must be stricken."[241] Moreover, even if homosexuals were not considered a suspect class, the judge wrote that the exclusion would not be able to satisfy the rational basis test because "[t]he

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[235] *Id.* at 1225.
[236] *Id.* at 1226.
[237] *Id.* at 1225.
[238] *Id.* at 1226.
[239] *Id.* at 1225–26.
[240] *Id.* at 1226.
[241] *Id.*

best interests of children are not supported by the regulation which is clearly irrelevant to the promotion of any legitimate state goal."[242]

Finally, in addressing the due process argument, the judge wrote that the liberty interest in this case was "the right to apply for adoption and, thus, enjoy the possibility of a statutorily-created family relationship."[243] The judge further emphasized that the statute specifically stated that in addition to promoting the well-being of the children, the statute also was there to "promote the well-being of . . . natural and adoptive parents."[244] The judge argued that there had to be a procedure to ensure that these interests were protected, and that this procedure was categorically denied to homosexuals:

> Although the state claims a statutory intent of the best interests of children, the statute deprives children of the possibility of adoption by an entire group of individuals historically shown to be fit and capable parents. . . . Additionally, a special needs child requires great care and may be unsuitable for adoption by most families. Such children may conceivably spend their prematurely shortened lives in state foster institutions and may never experience the joy of family life or care by a devoted parent. It is in the best interests of these children to be adopted by a caring homosexual parent rather than to languish alone and unwanted in a state institution. Thus, the government function involved completely fails to achieve its legislative intent of providing a permanent family life to all children who can benefit by it. The Florida statute which denies homosexuals the right to determine eligibility for adoption deprives them of procedural due process of law and violates both the State and Federal Constitutions.[245]

The judge further argued that the statutory exclusion that categorically prohibited homosexuals from being considered as adoptive parents "jeopardizes individuals' rights in the interest of state convenience."[246] The judge wrote that every applicant's suitability had to be evaluated using many factors and with the goal of serving the best interests of the child.[247] If a biological parent's sexual orientation could not bar the parent from visitation or custody, then a prospective parent's sexual orientation could

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[242] *Id.* at 1227.
[243] *Id.*
[244] *Id.* (citing FLA. STAT. § 63.022(1) (1991) (current version at FLA. STAT. § 63.022(3))).
[245] *Cox*, 627 So. 2d at 1228.
[246] *Id.*
[247] *Id.* at 1228.

not bar the applicant from being considered as an adoptive parent.[248] The judge wrote that the statutory exclusion that categorically excluded homosexuals was not a proper means of determining a prospective applicant's parental fitness and thus violated the substantive due process clause.[249] The judge argued that it was more convenient for the state to presume parental unfitness and thus exclude an entire group of people and that such convenience did not justify denying a permanent family relationship to some prospective parents and children who need to be adopted.[250]

The director of the ACLU Lesbian and Gay Rights Project in New York called the opinion "a landmark decision," which "will open the door to lesbians and gay men throughout the state of Florida who want to adopt and will have a positive impact nationwide."[251] However, during the trial, the state did not defend the constitutionality of the statute and did not subsequently appeal the decision.[252] Thus, the circuit court's decision was binding only in Monroe County. Seebol subsequently attempted to adopt a child from Florida, but had little success with adoption agencies. However, two years later, he was able to adopt a child from a different state.[253]

During the same time, another same-sex couple was trying to adopt a child in Sarasota County. James Cox, a professional pianist, and Rodney Jackson, a collections specialist at the Florida Department of Revenue, were a homosexual couple who decided to adopt a child of special needs.[254] On March 22, 1991, Cox attempted to sign up for parenting classes that were offered by the HRS.[255] On April 3, Jackson also attempted to sign up for the same classes.[256] Even though they signed up separately, HRS noticed that they lived at the same address.[257] Subsequently, they received a letter indicating that their applications were denied pursuant to section 63.042(3).[258]

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[248] *Id.* at 1222.

[249] *Id.* at 1228–29.

[250] *Id.*

[251] *Judge Throws Out Florida Law Banning Gays from Adopting*, TAMPA BAY TIMES (Mar. 19, 1991), https://www.tampabay.com/archive/1991/03/19/judge-throws-out-florida-law-banning-gays-from-adopting [https://perma.cc/98KV-AQAW].

[252] *Ban on Adoption by Gays Is Unconstitutional, Judge Rules*, TAMPA BAY TIMES (Mar. 19, 1991), https://www.tampabay.com/archive/1991/03/19/ban-on-adoption-by-gays-is-unconstitutional-judge-rules [https://perma.cc/3R2E-6WXN].

[253] BENKOV, *supra* note 114, at 104.

[254] *Law Against Gay Adoption Faces Another Challenge*, ORLANDO SENTINEL, July 12, 1991, at D7; *High Court Hears Gay Adoption Case*, SUN SENTINEL, Nov. 5, 1994.

[255] Dep't of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210, 1212 (Fla. Dist. Ct. App. 1993).

[256] *Id.* at 1212.

[257] *Id.*

[258] *Id.*

In July, the couple filed suit for declaratory and injunctive relief, arguing that section 63.042(3) was unconstitutional as applied to them and on its face.[259] They argued that the statute violated their privacy, due process, and equal protection rights.[260] Both sides filed motions for summary judgment. Unlike in the Monroe County case, in which the state refused to defend the statute, here, the state took a different position. Lynda Russel, the HRS spokesperson stated the following: "In the prior case, we felt as though the issue might be addressed in the upcoming legislative session. It wasn't. So now we have taken actions to defend the state's position. It does need some interpretation by the courts, obviously."[261] The Sarasota County Circuit Court Judge Brownell subsequently returned a favorable decision for the couple.[262] Relying on *Seebol v. Farie*, the judge held that section 63.042(3) violated homosexuals' privacy and equal protection rights and that section 63.042(3) was void for vagueness.[263] The judge enjoined HRS from enforcing the statute. HRS subsequently filed an appeal to the Second District Court of Appeal.

On December 1, 1993, the Second District Court of Appeal reversed and remanded.[264] In addressing the vagueness argument, the district court held that the statute was not constitutionally vague.[265] The court acknowledged that the statute did not define "homosexual"; however, the court also noted that the statute did not need to provide a definition for every word in the statute for it to survive a constitutional vagueness challenge.[266] The court further pointed to 170-B:4 (a statute that expressly prohibited homosexuals from adopting a child in New Hampshire), which was upheld by the Supreme Court of New Hampshire in *Opinion of the Justices*.[267] The majority also cited *Bowers*, emphasizing that there had been a history of statutes addressing homosexuality.[268] Next, the district court held that no privacy rights were violated.[269] The court emphasized that both the trial judge in the present case and the previous trial judge in *Seebol v. Farie*, failed to give "sufficient consideration to the fact that the statute does not establish a governmental intrusion into a person's private life" and that instead "it bars the statutory privilege to adopt a child when it is known that

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[259] Cox v. State Dep't of Health & Rehab Servs., 656 So. 2d 902, 903.
[260] *Id.*
[261] *State Law Prohibiting Adoption by Homosexuals Challenged*, S. FLA. SUN SENTINEL, Aug. 11, 1991.
[262] *Cox*, 656 So. 2d at 903.
[263] *Cox*, 627 So. 2d at 1212.
[264] *Id.* at 1212.
[265] *Id.* at 1214.
[266] *Id.* at 1213–14.
[267] *Id.* at 1214.
[268] *Id.* at 1215.
[269] *Id.* at 1216.

the applicant is homosexual."[270] The court also pointed out that the two men voluntarily disclosed their sexual orientation and thus they could not later claim an expectation of privacy about something they willingly shared.[271] Furthermore, the court stated that adoption was a statutory privilege and not a private matter.[272] As such, state agencies were allowed to examine people who want to adopt or foster a child.[273] The district court also held that no due process rights were violated. [274] It again cited *Opinion of the Justices* and agreed with the Supreme Court of New Hampshire that "the opportunity to adopt an unrelated child is not a fundamental liberty."[275] Further, the district court cited *Bowers* for the proposition that "the decision to engage in homosexual activity is not a fundamental right."[276] It stated that "[t]he plaintiffs have not clearly established a valid legal justification for this court to depart from the rule announced in *Bowers*."[277] Finally, the district court held that the plaintiffs had not established a basis for a strict scrutiny review and that the statute satisfied the rational basis standard.[278] It stated that only cases that involve fundamental rights or a suspect class required strict scrutiny in equal protection cases.[279] Adopting a child or engaging in homosexual activity did not involve a fundamental right.[280] Additionally, the court further found that there were no previous court decisions that would support treating homosexuals as a suspect class.[281] As such, there was no basis for strict scrutiny review. The district court did not analyze the intermediate review because the parties and the trial court did not address it.[282] As for the rational basis review, the court stated that the statute was presumed to be constitutional and that the state had no burden of persuasion and was under no obligation to present evidence to argue the rationality of the statute until that presumption was overcome.[283] The district court held that the presumption of constitutionality was not overcome and that the reasoning excluding homosexuals was not irrational:

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[270] *Id.* at 1215.
[271] *Id.*
[272] *Id.* at 1216.
[273] *Id.*
[274] *See* i*d.* at 1217–18.
[275] *Id.* at 1217.
[276] *Id.*
[277] *Id.* at 1218.
[278] *Id.*
[279] *Id.*
[280] *Id.*
[281] *See id.* at 1217–18.
[282] *Id.*
[283] *Id.* at 1219.

> Given that adopted children tend to have some developmental problems arising from adoption or from their experiences prior to adoption, it is perhaps more important for adopted children than other children to have a stable heterosexual household during puberty and the teenage years. Without reliance upon any unsubstantiated notion that a homosexual parent could "teach" a child to become a homosexual, HRS maintains that the legislature may still decide that the best interests of children require that they be adopted by persons who can and will serve as heterosexual role models.[284]

The Supreme Court of Florida subsequently agreed to hear the case. On April 27, 1995, in a per curiam opinion, five out of seven sitting justices agreed with the district court on all points except the equal protection analysis.[285] The Supreme Court held that the trial court record was not sufficient for a proper rational basis analysis.[286] As such, the case had to be remanded to the trial court where the parties would present more evidence.

Judge Kogan filed a separate opinion, which was joined by Judge Anstead. Judge Kogan agreed with the majority that the equal protection matter had to be remanded to the trial court; however, Judge Kogan argued that the due process issue also had to be remanded to the trial court.[287] Judge Kogan pointed to section 800.02, under which "[w]hoever commits any unnatural and lascivious act with another person shall be guilty of a misdemeanor of the second degree."[288] The HRS argued that homosexual acts violated section 800.02.[289] However, Judge Kogan stated that section 800.02 was not limited to homosexuals; yet the HRS's application forms only asked questions about whether the person was bisexual or homosexual, and there were no other questions asking about lascivious and unnatural acts.[290] Thus, Judge Kogan argued that there was a question about whether the HRS applied the law in a way that did not violate due process.[291] Further, Judge Kogan argued that there was no case law supporting the proposition that private, non-harmful sexual acts between two consenting adults violated section 800.02. Judge Kogan stated that "serious doubt remains as to whether any private and nonharmful conduct between two consenting

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[284] *Id.*

[285] Cox v. Fla. Dep't of Health & Rehab. Servs., 656 So. 2d 902, 902–03 (Fla. 1995).

[286] *Id.* at 903.

[287] *Id.* at 904 (Kogan, J., concurring in part and dissenting in part).

[288] *Id.* at 903–04, n.1 (quoting FLA. STAT. ANN. § 800.02 (West 1991)).

[289] *Id.*

[290] *Id.* at 904.

[291] *Id.*

adults can ever fall within the statute's scope."[292] Moreover, Judge Kogan argued that homosexuals were not permitted to even apply for consideration to become adoptive parents; however, there was no similar law that categorically restricted convicted felons or people on the Child Abuse Registry.[293] The HRS had set strict procedures under which felons or people on the Child Abuse Registry could apply and be considered for adoption, but completely removed homosexual individuals from consideration.[294] Judge Kogan argued that this differential treatment "raises a serious substantive due process question."[295] For these reasons, Judge Kogan would have also remanded the case to the trial court for due process issues. After the case was remanded to the trial court, Cox and Rodney Jackman decided that they did not want to pursue it.[296]

The statute was then challenged by other plaintiffs. Steven Lofton (born 1957) and Roger Croteau (born 1955) met when they both were earning advanced nursing degrees.[297] In 1983, both men started living together in a committed relationship.[298] They subsequently ended up working as nurses at the Jackson Memorial Hospital in Miami, where they worked in the pediatric AIDS unit.[299] Although the two men never envisioned themselves as parents, they changed their mind in 1988 when they met Frank—an eight-month-old boy who had tested positive for HIV.[300] They agreed to take in the boy after his biological mother asked Lofton as she was dying in the hospital from AIDS-related infections. Dr. Margaret Fischl, the Director of the Aids Clinic Research Unit, gave an interview in the early 2000s, in which she recalled her experience working at the height of the AIDS epidemic:

> We had to face the fact that health care professionals themselves would not take care of patients that had HIV . . . And realizing that in the beginning, AIDS was a fatal disease . . . The whole health care system, the public health prevention network was not prepared for this

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[292] *Id.* at 905.
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *Gay Men Give Up on Adoptions*, TAMPA BAY TIMES (Dec. 15, 1995), https://www.tampabay.com/archive/1995/12/15/gay-men-give-up-on-adoptions [https://perma.cc/R4L7-UUJ5].
[297] WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 331 (2008).
[298] *Id.*
[299] Jeanne Malmgren, *Gay Adoption in Florida: It's Out of the Question*, TAMPA BAY TIMES (Mar. 14, 2002), https://www.tampabay.com/archive/2002/03/14/gay-adoption-in-florida-it-s-out-of-the-question [https://perma.cc/VK8U-CF77].
[300] BALL, *supra* note 63, at 169.

> epidemic at all . . . We also had to deal with the utter panic and fear that was occurring . . . And it really took on almost political overtones that, you know, were not really appropriate to identify what was going on . . . And for the patient, in the end, the patient suffered the most for this . . . We began to see prostitutes, those that went out to get drugs and brought in the whole issue of mothers that were infected with HIV and having children. We worked very hard to take care of those mothers and doing the best we could. In the beginning, AIDS was a fatal disease, and therefore the number of patients we saw eventually died of that, including the mothers. And, therefore, we now had to deal with children that didn't have parents.[301]

After the couple completed the required foster care training, the state requested that the two men also take two other children that had tested positive for HIV: Ginger, a six-month-old, and Tracy, a one-year-old.[302] In order to care for all three children who had HIV, Lofton quit his full-time-job.[303]

In July 1991, the Lofton-Croteau household expanded yet again, when a state social worker asked the couple to take in Bert, a nine-week-old infant who had tested positive for HIV.[304] The two men subsequently enrolled their four foster children in a study of the first FDA-approved HIV medication. Over the next four years, the family took multiple trips to Maryland, where the children had medical care at the National Institutes of Health campus. Unfortunately, in 1994, Ginger passed away.[305]

A few months later, the couple received some good news: Bert seroreverted to being HIV negative. Under Florida regulations, this meant that Bert now became eligible for adoption. However, even with the HIV suppressed, nobody wanted to adopt a child who had tested positive for HIV in the past. In September 1994, Steven Lofton submitted an application to adopt Bert, but his application was denied because of section 63.042(3).[306]

After retaining the ACLU, the two men, together with a few other similarly situated gay people, subsequently sued Kathleen A. Kearney (DCF Secretary) and Charles Auslander (DCF District Administrator) in the

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[301] WE ARE DAD (2005).

[302] BALL, *supra* note 63, at 170.

[303] Maya Bell, *Justices Let Ban Stand on Gay Adoption*, ORLANDO SENTINEL (Jan. 11, 2005, 12:00 AM), https://www.orlandosentinel.com/2005/01/11/justices-let-ban-stand-on-gay-adoption [https://perma.cc/LS78-GUYH].

[304] BALL, *supra* note 63, at 170.

[305] *Id.* at 171.

[306] Samuel M. Davis, Elizabeth S. Scott, Walter Wadlington & Charles H. Whitebread, CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS 782 (3d ed. 2004).

United States District Court for the Southern District of Florida.[307] In July 2001, both sides filed motions for summary judgment.[308] The court was made aware that in 1998, the Children's Home Society that originally placed foster children with Lofton and Croteau created the Lofton-Croteau Award, which symbolized "outstanding foster parent of the year," and gave the first award to the two men.[309] By that time, Lofton had been a licensed foster parent for ten years. However, on August 30, 2001, the district court entered final judgment granting the defendants' motion for summary judgment.[310]

The plaintiffs argued that the statutory exclusion violated their fundamental rights to family privacy. The court held that "the Constitution protects only those social units that share an expectation of continuity justified by the presence of certain basic elements traditionally recognized as characteristic of the family."[311] The court further wrote that unlike the relationships between biological parents and children, foster relationships are intended to be temporary and "do not warrant justified expectations of family unit permanency."[312] Further, the court stated that adoption was a statutorily created privilege and that there was no fundamental right to adopt or apply for adoption.[313]

Moreover, the equal protection argument was evaluated under the rational basis test, under which the statutory exclusion had to be rationally related to a legitimate state interest. The defendants argued that the exclusion served two purposes. First, they argued that the exclusion "reflects the State's moral disapproval of homosexuality consistent with the legislature['s] right to legislate public morality."[314] The district court held that the State could not justify excluding an entire group of people simply because the State expressed moral disapproval of that group.[315] As such, the court held that public morality by itself was not sufficient to justify the exception.[316] Second, the defendants argued that the exclusion served the best interests of the children, which were fulfilled when they were "raised in a home stabilized by marriage, in a family consisting of both a mother and a father."[317] The plaintiffs argued that the exception was "merely a

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[307] Lofton v. Kearney, 157 F. Supp. 2d 1372, 1376–77 (S.D. Fla. 2001).
[308] *Id.* at 1374.
[309] Appellants' Brief at 7, Lofton v. Sec'y of the Dep't of Child. & Fam. Servs., 358 F.3d 804 (11th Cir. 2004) (No. 01-16723).
[310] *Lofton*, 157 F. Supp. 2d at 1377.
[311] *Id.* at 1379.
[312] *Id.* at 1380.
[313] *Id.*
[314] *Id.* at 1382.
[315] *Id.*
[316] *Id.* at 1383.
[317] *Id.*

pretext for discrimination against homosexuals."[318] However, the court held that "it is unnecessary and improper for [the] Court to determine whether the conceived reason for the challenged distinction actually motivated the legislature" and that it was "enough for the legislation to be supported by plausible or hypothesized reasons."[319] Under the rational basis standard, the State did not have an obligation to provide evidence explaining the reasons behind its statutory classification. Because the plaintiffs did not provide such evidence, the court held that the exclusion was rationally related to a legitimate state interest.[320]

The plaintiffs subsequently appealed. The Eleventh Circuit was presented with the following facts that were undisputed or stipulated:

> 25% of adoptions out of foster care are to single people. . . . Despite the State's efforts to place children with married couples or single heterosexuals, there are 3,400 children ready and waiting to be adopted in Florida. . . . 79% of foster children in Florida stay in foster care for more than two years; 54% for more than three; 36 percent for more than four. . . . The State entrusts children to the care of gay people, in long-term foster care, and in guardianships which DCF does not supervise. . . . DCF knows of no children who are in foster care because of the sexual orientation of those who raise them. . . . The only DCF official whose testimony is before the court says there is no child welfare basis for the gay exclusion; he is unaware of any harms associated with having lesbian or gay parents. . . . Substance abuse and domestic violence pose serious dangers to children. They play a role in over half the cases where children are removed from families; substance abuse alone is a factor in over 57%. . . . Gay people are categorically prohibited from adopting. Substance abusers and child abusers are not.[321]

On January 28, 2004, the Eleventh Circuit affirmed the trial court's decision.[322] In their appellate brief, the plaintiffs asked the court to consider *Lawrence v. Texas*, which came down on June 26, 2003.[323] In addressing the

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[318] *Id.*

[319] *Id.*

[320] *Id.* at 1384.

[321] Appellants' Reply Brief at 2–3, Lofton v. Sec'y of Dep't of Child. & Fam. Servs., 358 F.3d 804 (11th Cir. 2004) (No. 01-16723).

[322] Lofton v. Sec'y of Dep't of Child. & Fam. Servs., 358 F.3d 804 (11th Cir. 2004).

[323] *Id.* at 809.

plaintiffs' due process arguments, the circuit court held that there was no fundamental right to family integrity.[324] The plaintiffs conceded that there was no fundamental right to adopt and that there was no fundamental right to apply for adoption.[325] However, they argued that the exclusion "refus[es] to recognize and protect constitutionally protected parent-child relationships" that exist between prospective adoptive parents and their prospective children.[326] The circuit court emphasized that foster care placements are temporary in nature.[327] Thus, there was no justifiable expectation of a permanent relationship.[328] Further, even if there was such an expectation, the circuit court stated that this would provide just procedural due process protections if the state decided to take away the foster child.[329] Further, the plaintiffs argued that in light of *Lawrence*, "the Florida statute, by disallowing adoption to any individual who chooses to engage in homosexual conduct, impermissibly burdens the exercise of this right."[330] The circuit court emphasized that the central holding of *Lawrence* was that a state was not permitted to impose criminal penalties on people who engaged in private consensual homosexual conduct.[331] However, the circuit court argued that the majority in *Lawrence* did not establish any rights that were fundamental.[332] As such, the circuit court refused to create a new fundamental liberty interest that would apply to the present plaintiffs. Because the circuit court found no fundamental right, it refused to analyze whether the exclusion created an impermissible burden on exercising the right to engage in private intimate conduct.[333] The court also emphasized several differences between *Lawrence* and the present case, including relevant actors (adults and minors) and the subject matter (intimacy and adoption).[334]

Next, the court considered the equal protection arguments. The court cited other circuits and concluded that homosexuals were not a suspect class.[335] Thus, because the present case did not involve a suspect class or a fundamental right, the court reviewed the exclusion under the rational basis test.[336] The court wrote that the State had a legitimate interest in promoting

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[324] *Id.* at 815.
[325] *Id.* at 811–12.
[326] *Id.* at 812.
[327] *Id.* at 814.
[328] *Id.*
[329] *Id.*
[330] *Id.* at 815.
[331] *Id.*
[332] *Id.* at 816.
[333] *Id.* at 817.
[334] *Id.*
[335] *Id.*
[336] *Id.* at 816–18.

a nurturing and stable environment, finding it rational for the State to conclude that it was in the best interest of the children when that environment was created by a mother and a father.[337] The plaintiffs did not dispute that the State had a legitimate interest in preferring a couple that was married.[338] The plaintiffs instead argued that the exclusion was not rationally related to that interest and that the exclusion was not in the best interests of the children.[339]

First, the plaintiffs pointed out that the State allowed adoptions by single heterosexual people while prohibiting adoptions by single homosexual people.[340] The plaintiffs argued that this disparate treatment failed the rational basis test and thus disproved any connection between the exclusion and the State's interest in promoting children being adopted into married homes.[341] However, the circuit court held that the State could rationally determine that heterosexuals and homosexuals were not similarly situated.[342] For example, single heterosexual people had "a markedly greater probability" of getting married than single homosexual people.[343] The court further cited *Cox* for the proposition that "the state does know that a very high percentage of children available for adoption will develop heterosexual preferences."[344] Therefore, the state could rationally believe that single heterosexual people would be better equipped to provide guidance for an adoptive child who had statistically higher chances of being heterosexual. The circuit emphasized that the rational basis test only required that these rationales be "reasonably conceivable," and they did not have to be perfect—the court recognized that some single homosexual people could be better parents than some single heterosexual people.[345]

Second, the plaintiffs argued that prohibiting homosexuals from being allowed to adopt children decreases the pool of eligible people.[346] Pointing to the fact that there were over three thousand children who needed to be adopted, the plaintiffs argued that the statutory exclusion did not serve the best interests of the children who ended up waiting too long or not getting adopted at all.[347] The circuit court argued that the State's interest was not

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[337] *Id.* at 819.
[338] *Id.* at 820.
[339] *Id.*
[340] *Id.* at 819–21.
[341] *Id.*
[342] *Id.* at 820–21.
[343] *Id.* at 822.
[344] *Id.* at 822 (quoting Dep't of Health & Rehab. Servs. v. Cox, 627 So. 2d 1210, 1220 (Fla. Dist. Ct. App. 1993)).
[345] *Id.*
[346] *Id.* at 823.
[347] *See id.*

simply placing children in any home as soon as possible.[348] Instead, the court argued that the goal was finding an optimal home that had "a heterosexual couple or the potential for one."[349] The court further argued that by the plaintiffs' logic, any exclusion, such as in-state residency or income, could also not be in the best interests of the children.[350] The court also argued that the State could rationally act on the idea that not placing children with homosexuals would increase the chances of children being placed with heterosexuals, thus promoting the State's goal of placing a child in an optimal home.[351]

Third, the plaintiffs argued that because Florida allowed homosexuals to become foster parents or guardians but did not allow homosexuals to adopt, Florida did not believe that a homosexual parent could not be in the best interests of the child.[352] The circuit court disagreed, stating that guardianships and foster care placements were designed to address different situations than adoption.[353] As such, the fact that the State allowed homosexuals to be foster parents or guardians was "irrelevant to the question of the *legislative* rationale for Florida's adoption scheme."[354]

Fourth, the plaintiffs argued that social science research suggested that parental skills of homosexuals were equivalent to parental skills of heterosexuals and thus the State's decision to exclude homosexuals had no rational basis.[355] The circuit court disagreed, emphasizing that "[o]penly homosexual households represent a very recent phenomenon, and sufficient time has not yet passed to permit any scientific study of how children raised in those households fare as adults."[356] In addition, the court stated that the results from existing studies had been inconclusive and inconsistent.[357]

Finally, the plaintiffs argued that *Romer v. Evans* required the court to invalidate the exclusion.[358] In *Romer*, the U.S. Supreme Court invalidated an amendment to the Colorado state constitution that sought to prohibit all executive, legislative, and judicial action that was intended to protect homosexuals from discrimination.[359] In distinguishing *Romer*, the circuit court emphasized that the constitutional amendment in Colorado and the

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[348] *Id.*
[349] *Id.* at 823.
[350] *Id.*
[351] *Id.*
[352] *Id.* at 823–24.
[353] *Id.* at 824.
[354] *Id.*
[355] *Id.* at 824–26.
[356] *Id.* at 826.
[357] *Id.*
[358] *Id.*
[359] *Id.*

statute in Florida were very different.[360] For example, the Colorado amendment deprived homosexuals of protections in all areas of life, whereas the Florida statute only applied to adoptions.[361] Further, the Florida statute had a plausible relation to the State's interest.[362]

The circuit court emphasized that it "exercise[s] great caution when asked to take sides in an ongoing public policy debate, such as the current one over the compatibility of homosexual conduct with the duties of adoptive parenthood."[363] The court further stated that the legislature was the proper forum to have discussions over what was in the best interest of the children.[364] As such, the court ruled that all plaintiffs' arguments failed. On July 21, 2004, the plaintiffs' petition for rehearing en banc was denied.[365] On October 1, 2004, the plaintiffs filed a petition to the U.S. Supreme Court. On January 10, 2005, the U.S. Supreme Court declined to review the case.[366]

Lofton and Croteau eventually decided to move to Oregon, and Florida gave them permission to take their three foster children with them.[367] The news about the couple moved fast, and soon social workers in Oregon asked the gay couple to take in Wayne (aged five) and Ernie (aged two), who both had tested positive for HIV. Because Oregon allowed homosexuals to adopt children, Lofton and Croteau subsequently adopted the two boys.

It took gay Florida residents six more years before they finally were legally able to adopt children. The facts of the following case are like the facts in the previous cases. On December 11, 2004, two brothers, aged four months and four years, were removed from their parents.[368] The State asked Frank Martin Gill, a licensed foster parent, to take in the two boys.[369]At that time, Gill was living with his male partner and the partner's biological son.[370] The two men met in 1999 and started living together in July 2000.[371] Eventually, the couple decided to become foster parents, and over time have fostered several children.[372]

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[360] *Id.*

[361] *Id.*

[362] *Id.*

[363] *Id.* at 827.

[364] *Id.*

[365] Lofton v. Sec'y of Dep't of Child. & Fam. Servs., 377 F.3d 1275 (11th Cir. 2004).

[366] Lofton v. Sec'y, Fla. Dep't of Child. & Fams., 543 U.S. 1081 (2005).

[367] Maya Bell, *Ban on Adoption by Gays Upheld*, ORLANDO SENTINEL (Aug. 31, 2001), https://www.orlandosentinel.com/2001/08/31/ban-on-adoption-by-gays-upheld [https://perma.cc/E82N-A23U].

[368] Randy Schultz, *No Home for Gay Adoption Ban*, PALM BEACH POST, Dec. 14, 2008, at A.12.

[369] *Repeal Gay Adoption Ban*, PALM BEACH POST, Aug. 23, 2009, at A.22.

[370] Dana Rudolph, *Movement to Ban Gay Adoption: Sacrificing the Well-Being of Children*, KEEN NEWS SERV. (July 29, 2010), https://keennewsservice.com/2010/07/29/movement-to-ban-gay-adoption-sacrificing-the-well-being-of-children [https://perma.cc/H4ZH-C24D].

[371] *In re* Adoption of Doe, 2008 WL 5006172, at *2 (Fla. Cir. Ct. Nov. 25, 2008).

[372] *Id.*

When the two boys arrived, they were seriously neglected and were suffering from scalp ringworm.[373] The four-year-old boy also had speech and developmental delays.[374] In July 2006, after the boys' biological parents' rights were terminated, the boys became eligible for adoption.[375] By then, since the boys had already been integrated into the family, Gill applied to adopt them, but his petition was denied because he was a homosexual.[376] On January 18, 2007, Gill filed a petition with the Miami-Dade County Circuit Court, asking the court to declare section 63.042(3) unconstitutional and allow him to adopt the two boys.[377] The DCF filed a motion to dismiss, arguing that the exclusion served a legitimate state interest, but the court denied the motion. In October 2008, the arguments were presented in a four-day trial, during which Gill presented multiple expert witnesses who were able to convince the judge that granting the adoption to him was in the best interests of the children.[378]

Multiple witnesses were presented during the trial. David Brodzinsky, Ph.D., a clinical and developmental psychologist specializing in foster care and adoption, spent six hours evaluating the family over two days in May 2007.[379] Brodzinsky testified that the children saw the two men as their parents with whom they were emotionally attached.[380] Brodzinsky also testified that the boys' teachers had reported that the two men were very involved in the boys' school activities.[381] Brodzinsky concluded that if the boys were removed from the two men, they would endure significant emotional damage as well as academic anxiety, sleep, and trust issues.[382] He concluded that it was in the best interests of the boys to keep them with the homosexual couple because of the couple's quality of parenting, the healthy relationship between the couple and the boys, and the trauma the boys would endure if they were removed from the two men.[383]

Ronald Gilbert, who had been the boys' guardian ad litem since June 2005, testified that after being a guardian ad litem in over one hundred cases, he thought that the two men's household was one of the most nurturing and caring households he had ever seen.[384] Gilbert testified that

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[373] Rudolph, *supra* note 370.

[374] BALL, *supra* note 63, at 117–18; Mike Thomas, *State's Hypocrisy on Gays Is a Train Wreck for Foster Kids*, ORLANDO SENTINEL, Dec. 11, 2008, at B.1.

[375] *Repeal Gay Adoption Ban*, *supra* note 372.

[376] Rudolph, *supra* note 370.

[377] *In re* Adoption of Doe, 2008 WL 5006172, at *1 (Fla. Cir. Ct. Nov. 25, 2008).

[378] *See generally id.*

[379] *Id.* at *3.

[380] *Id.* at *4.

[381] *Id.*

[382] *Id.*

[383] *Id.*

[384] *Id.* at *5.

as a guardian ad litem, it was his official recommendation that it was in the boys' best interests to be adopted by the two men.[385] Yves Francois, who worked for the Center for Family and Child Enrichment as an adoption supervisor, performed a home study in October 2006.[386] He testified that the home study was positive and that if the two men were not allowed to adopt the boys, there was a chance not only that the boys would remain in the foster care system, but also that the boys would eventually be separated.[387] Letitia Peplau, who was a psychology professor at UCLA specializing in romantic relationships, testified that social science research suggested that same-sex relationships and opposite-sex relationships did not differ in stability, satisfaction, quality, conflict resolution, and shared experiences.[388] She also testified that same-sex couples, just like opposite-sex couples, sought permanent and stable relationships and that sexual orientation was not a significant predictor of break-up.[389] Susan Cochran, who also was a psychology professor at UCLA specializing in health disparities, testified that sexual orientation alone was not a proxy for mental health conditions and psychiatric conditions.[390] Moreover, Michael Lamb, who was a psychology professor at the University of Cambridge specializing in child health and human development, testified that there were three predictors of healthy adjustment for a child: (1) the relationship between the parents and the child, (2) the relationship between the parents in the child's life, and (3) the resources provided to the child.[391] He emphasized that in the past it was believed that traditional families were treated as a proxy for the best environment for the child; however, he testified that this hypothesis was later proven wrong as the parenting quality was proven to be more important.[392] Based on three decades of research experience, Lamb testified that children raised by same-sex couples, as compared to children raised by opposite-sex couples, did not suffer higher risks of psychological, academic, behavioral, or maladjustment issues.[393] He further testified that there was no one optimal combination of parents that was guaranteed to provide better outcomes for the children.[394]

Margaret Fischl, who was a professor at the University of Miami School of Medicine specializing in HIV and AIDS, testified that HIV

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[385] *Id.*
[386] *Id.*
[387] *Id.*
[388] *Id.*
[389] *Id.*
[390] *Id.* at *7.
[391] *Id.* at *8.
[392] *Id.*
[393] *Id.*
[394] *Id.* at *10.

affected everyone, not just homosexuals.[395] She testified that about 35% of all transmissions occurred in heterosexuals and about 25% of all transmissions occurred among drug abusers.[396] Further, there was no risk of placing a child with homosexuals who were HIV-negative, and even if they were HIV-positive, they could take medication which prevents the risk of transmission to others.[397] Frederick Berlin, who was a professor at John Hopkins University School of Medicine specializing in human sexuality, testified that almost all current homosexual adults were raised by heterosexuals, and thus the environment where the child is raised cannot simply make the child homosexual.[398] Finally, Berlin testified that homosexuals were no more likely to abuse children than heterosexuals.[399]

Patricia Lager, who was a professor of social work at Florida State University in Tallahassee, testified that there were many characteristics that made someone a good parent, and there could be situations in which someone with a disability or modest income could be a proper fit for a particular child.[400] She further argued that individualized screening mechanisms were best because they were able to evaluate each applicant's strengths and weaknesses.[401] Lager testified that categorical exclusion of homosexuals reduced the pool of prospective qualified parents, ultimately resulting in children staying in foster care longer.[402] Christine Thorne, who worked at DCF as quality assurance manager, testified that the department's regulations mandated treating children placed with homosexual foster parents in the same way as children placed with heterosexual foster parents.[403] She also testified that the primary goal was reunification and then adoption and that the department policy was to consider the testimony of the guardian ad litem.[404] Ada Gonzalez, who was a licensing foster care specialist, testified that the department policy was to encourage foster parents to adopt their foster children because finding a new home for the foster children was damaging to the children.[405] She also testified that in her professional experience, the exclusion of homosexuals undermined the department's goal of finding qualified adoptive parents.[406] Gay Frizzell, who was the chief of child welfare services and training, testified that she

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[395] *Id.*at *13.
[396] *Id.*
[397] *See id.*
[398] *See id.*
[399] *Id.* at *14.
[400] *See id.*
[401] *Id.*
[402] *Id.*
[403] *Id.* at *15.
[404] *Id.*
[405] *Id.*
[406] *Id.*

found the current policy inconsistent because it allowed homosexuals to be foster parents, but did not allow them to be adoptive parents.[407]

The state presented George Rekers, who was a professor of neuropsychiatry and behavioral sciences at the University of South Carolina. Dr. Rekers had published multiple articles, titled *Behavioral Treatment of Deviant Sex-Role Behaviors in a Male Child*, *The Behavioral Treatment of a "Transsexual" Preadolescent Boy*, *Sex-Typed Play in Feminoid Boys Versus Normal Boys and Girls*, *Child Gender Disturbances: A Clinical Rationale for Intervention*, *Sex-Role Stereotypy and Professional Intervention for Childhood Gender Disturbance*, and many others. In 1982, Dr. Rekers published *Growing Up Straight: What Every Family Should Know About Homosexuality*, in which he gives advice to parents on how to prevent their children from becoming homosexual.[408] In 1983, Dr. Rekers was one of the founding members of Family Research Council, an American evangelical non-profit that promoted family values.[409] He was an ordained Southern Baptist minister who in addition to being a biological parent was also an adoptive parent himself.[410] He was also affiliated with the National Association for Research & Therapy of Homosexuality, an organization offering conversion therapy.[411] As a clinical child psychologist, Dr. Rekers spent time providing treatment to adolescent boys who were called "sissy" and "effeminate."[412] He said that the goal of the therapeutic treatment that he personally provided was to "help these children to become better adapted to themselves and to their environment."[413] In 2005, he published an article in St. Thomas Law Review titled *An Empirically-Supported Rational Basis for Prohibiting Adoption, Foster Parenting, and*

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[407] *Id.*

[408] GEORGE REKERS, GROWING UP STRAIGHT: WHAT EVERY FAMILY SHOULD KNOW ABOUT HOMOSEXUALITY 40 (1982).

[409] AMERICAN CONSERVATISM: AN ENCYCLOPEDIA 292 (Bruce Frohnen et al., eds., 2014).

[410] Remy Stern, *Florida's Attorney General on George Rekers: He Was the Best Anti-Gay Expert Available*, GAWKER (July 27, 2010, 5:19 PM), https://www.gawker.com/5597983/florida-attorney-general-on-george-rekers-he-was-the-best-anti-gay-expert-around [https://perma.cc/9KMX-ZAT7]; Brandon K. Thorp & Penn Bullock, *How George Alan Rekers and His Rent Boy Got Busted by New Times*, MIA. NEW TIMES (May 13, 2010), https://www.miaminewtimes.com/news/how-george-alan-rekers-and-his-rent-boy-got-busted-by-new-times-6366835 [https://perma.cc/7LTR-BGPK].

[411] Florence Ashley, *Homophobia, Conversion Therapy, and Care Models for Trans Youth: Defending the Gender-Affirmative Approach*, 17 J. LGBT YOUTH 361, 371 (2020).

[412] Ellen K. Feder, *Disciplining the Family: The Case of Gender Identity Disorder*, 85 PHIL. STUD. 195, 205–06 (1997); Scott Bronstein & Jessi Joseph, *Therapy to Change 'Feminine' Boy Created a Troubled Man, Family Says*, CNN (June 10, 2011, 7:44 AM), http://www.cnn.com/2011/US/06/07/sissy.boy.experiment/index.html [https://perma.cc/T4GX-VYBG]; Tracy Thompson, *Scouting and New Terrain*, WASH. POST (Aug. 2, 1998, 1:00 AM), https://www.washingtonpost.com/archive/lifestyle/magazine/1998/08/02/scouting-and-new-terrain/c546f2c6-a66e-4a24-8621-5e69db27b43c [https://perma.cc/V7ED-VJN7].

[413] Feder, *supra* note 412.

Contested Child Custody by Any Person Residing in a Household That Includes a Homosexually-Behaving Member. For his expert testimony, the State of Florida paid Rekers $120,000.[414]

Dr. Rekers testified that homosexuals were at a higher risk of suffering from psychiatric disorders. Further, he argued that homosexuals had a larger number of sexual partners than heterosexuals: therefore, children in households led by homosexuals were less likely to receive a stable upbringing. He also testified that the American Psychological Association's stance on homosexual parents, specifically that there was no difference between heterosexual and homosexual parenting, was biased, political, and not based on science. Dr. Rekers hypothesized that even if a child had been living with a homosexual couple for ten years, it was in the best interest of the child to remove the child and place the child with a new heterosexual couple. The State also presented another witness—Walter Schumm, who was a family studies professor at Kansas State University, focusing on religion and family. In one of his published articles, he wrote the following: "With respect to integration of faith and research, I have been trying to use statistics to highlight truths of the Scripture."[415] Schumm believed that homosexuals should not be permitted to join "the military due to the ease which they can have oral sex."[416] He testified that he believed there were significant differences between children raised by opposite-sex couples and children raised by same-sex couples.[417]

After hearing the evidence, the trial judge concluded that "Rekers' testimony was far from a neutral and unbiased recitation of the relevant scientific evidence" and that his "beliefs are motivated by his strong ideological and theological convictions that are not consistent with the science."[418] The judge concluded that the most important factor that should be considered was parental ability and that someone's sexual orientation did not predict the person's potential ability to parent.[419] After summarizing the entire literature on same-sex parenting, the judge concluded 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."[420]

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[414] Ashby Jones, *George Rekers, 'Rentboy' and the Law*, WALL ST. J. (May 19, 2010, 10:55 AM), https://www.wsj.com/articles/BL-LB-29034 [https://perma.cc/PNH3-6JSK].

[415] Walter R. Schumm, *Comments on Marriage in Contemporary Culture: Five Models that Might Help Families*, 31 J. PSYCH. & THEOLOGY 213, 221 (2003).

[416] *In re* Adoption of Doe, 2008 WL 5006172, at *12 (Fla. Cir. Ct. Nov. 25, 2008).

[417] *Id.*

[418] *Id.*

[419] *Id.* at *20.

[420] *Id.*

The trial court first held that the exclusion violated the children's right to permanency.[421] The court wrote that the state infringed on the boys' liberty interests by taking them away from their biological parents and then holding them in the system and denying them a permanent home that was in their best interest.[422] Next, the court considered the equal protection argument. The trial court acknowledged *Cox*, in which the Florida Supreme Court stated that the record lacked evidence, and *Lofton*, in which the Eleventh Circuit wrote that households led by homosexuals "represent a very recent phenomenon."[423] The trial court wrote that evidence presented in the present trial suggested that the issue of the exclusion's constitutionality was ripe again.[424]

The trial court wrote that the matter had to be decided using the rational basis test because no fundamental right was involved and because homosexuals did not constitute a suspect class.[425] The court emphasized that the burden was on the party who was challenging the statute and that the statute had to be upheld if there were any reasonably conceivable facts that could be rationally related to the classification.[426] First, the court wrote that the exclusion did not promote the well-being of children, specifically that "there are no set of facts for which such a stated interest can be reasonably conceived of to justify the legislation."[427] Next, there was no legitimate interest in having an opposite-sex couple because there was no optimal gender combination of parents.[428] The trial court also stated that regulating public morality through adoption was not a legitimate interest.[429] Further, the court emphasized that the state was inconsistent because it allowed homosexuals to serve as foster parents but not adoptive parents which by itself undermined the public morality argument.[430] Therefore, the trial court held that the exclusion violated the equal protection rights of Gill and the boys.[431] The state subsequently appealed.

On April 13, 2010, while both parties were anxiously waiting for the appellate decision, Dr. Rekers, the state's star witness who argued that homosexuality was a sin that could be cured, was waiting for an elevator at

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[421] *Id.* at *21.
[422] *Id.* at *25.
[423] *Id.* at *26 (quoting Lofton v. Sec'y of Dep't of Child. & Fam. Servs., 358 F.3d 804, 826 (11th Cir. 2004)).
[424] *Id.* at *27.
[425] *Id.*
[426] *Id.*
[427] *Id.* at *28.
[428] *Id.*
[429] *Id.* at *29.
[430] *Id.*
[431] *Id.*

the Miami International Airport.[432] Also waiting next to the 61-year-old Rekers was a 20-year-old athletic Puerto Rican man with blond hair and blue eyes.[433] On April 14, a Miami New Times reporter asked Rekers about the young man, and Dr. Rekers responded: "he was, um, advertising himself as a travel companion, and I cannot lift luggage."[434] When Dr. Rekers was asked about where he found out about the man's services, Dr. Rekers responded: "I did a Google search for 'travel companion,' and he came up on that. I contacted him."[435] Dr. Rekers also explained that in addition to covering all costs associated with a ten-day trip to Europe and travel companionship services, Dr. Rekers and his travel companion shared the same room, where Dr. Rekers discussed his scholarly work with the young man: "One thing for which I am grateful is that my travel assistant openly shared his spiritual doubts with me during the trip and he did let me share the gospel of Jesus Christ with him with many Scriptures in three extended conversations."[436] Dr. Rekers subsequently expressed surprise after evidently only later learning that his travel companion used "Lucien" as his pseudonym on Rentboy.com, a male escorting website.[437]

Dr. Rekers was soon no longer affiliated with the National Association for Research & Therapy of Homosexuality.[438] Meanwhile, on September 22, 2010, the District Court of Appeal of Florida affirmed the trial court's decision.[439] After losing the case, the state decided not to appeal the decision.[440] In 2015, the Florida Governor signed a bill into law which amended section 63.042 to "delete[] a prohibition against adoption by persons who are homosexual."[441]

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[432] Thorp & Bullock, *supra* note 410.

[433] *Anti-Gay Activist 'Took Ten-Day Holiday with Male Prostitute'*, DAILY MAIL (May 7, 2010, 2:51 AM), https://www.dailymail.co.uk/news/article-1273778/Anti-gay-activist-George-Rekers-took-10-day-holiday-Rentboy-male-prostitute.html [https://perma.cc/9PH3-EX2V].

[434] Thorp & Bullock, *supra* note 410.

[435] *Id.*

[436] Sarah Pulliam Bailey, *Psychologist Resigns from NARTH After Gay Prostitute's Claims*, CHRISTIANITY TODAY (May 12, 2010), https://www.christianitytoday.com/ct/2010/mayweb-only/29-32.0.html [https://perma.cc/FGS5-5EZC]; Kyle Munzenrieder, *George Rekers Will Take Trips with His Wife from Now on, NARTH Continues to Sever Ties*, MIA. NEW TIMES (May 13, 2010), https://www.miaminewtimes.com/news/george-rekers-will-take-trips-with-his-wife-from-now-on-narth-continues-to-sever-ties-6554456 [https://perma.cc/V3YG-B6YX].

[437] Rex Wockner, *Christian Right Leader Takes Europe Jaunt with 'Rentboy,'* PRIDE SOURCE (May 13, 2010), https://pridesource.com/article/41413 [https://perma.cc/79Y6-FLPY]; Thorp & Bullock, *supra* note 410.

[438] Frank Rich, *A Heaven-Sent Rent Boy*, N.Y. TIMES (May 15, 2010), https://www.nytimes.com/2010/05/16/opinion/16rich.html [https://perma.cc/YQK6-NCGJ].

[439] Fla. Dep't of Child. & Fams. v. X.X.G., 45 So. 3d 79, 81 (Fla. Dist. Ct. App. 2010).

[440] Susan Spencer-Wendel, *McCollum Won't Appeal Gay Adoption Ruling*, PALM BEACH POST (Oct. 22, 2010, 12:01 AM), https://www.palmbeachpost.com/story/news/2010/10/22/mccollum-won-t-appeal-gay/7275351007 [https://perma.cc/FRA6-383S].

[441] H.B. 7013, 2015 Leg. (Fla. 2015).

The Florida case helps to elucidate the arguments that had been made by both sides of the issue. When the state lost its case in *Seebol*, the state did not appeal. Thus, the small victory of gay people in that county had limited implications, showing just how difficult it was for gay people to bring lawsuits challenging bans of gay adoption. Eventually it took a four-day trial with multiple experts to convince the trial court judge and the appellate court that banning gay adoption was not in the best interests of the children and that sexual orientation by itself was not an indicator of parental competence. The trial court judge discussed the evidence in great detail to explain why the statute did not satisfy the rational-basis test. It was shown that measures prohibiting gay adoption not only were intended solely to condemn homosexuality, but also went against the best interests of the children.

Striking down the law that categorically excluded gay people from being able to become adoptive parents in Florida and in other states was a huge victory for gay Americans, elevating them from being seen and treated as second-class citizens. Excluding otherwise qualified candidates from being considered as adoptive parents just because they are gay, as explained above, ends up hurting children. Thus, when bans on gay adoption are overturned, the ultimate beneficiaries are children. That is why no state currently has a law that prohibits gay people from becoming adoptive parents. Public acceptance of same-sex relationships has been steadily increasing especially since same-sex couples have been able to get married and raise children just like opposite-sex couples.[442] As more research has come out, the prevailing norm when considering what is in the best interests of the child who needs a home has been to engage in a case-by-case analysis during which a set of factors are considered. Since sexual orientation by itself is not an indicator of parental competence, categorical exclusion of otherwise qualified gay people was inconsistent with the prevailing goal of acting in the best interests of the children. However, recently there has been a growing number of people who hold a different view. The next section shows how they have been able to use a novel set of arguments, under the guise of religious beliefs, to deny gay people an opportunity to become foster or adoptive parents.

V. THE RISE OF BANS ON GAY ADOPTION

States generally consider raising children to be a personal matter that is mostly left to the discretion of parents. The right to raise one's own children is not unlimited; every state has laws on when that right can be

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[442] Justin McCarthy, *U.S. Same-Sex Marriage Support Holds at 71% High*, GALLUP (June 5, 2023), https://news.gallup.com/poll/506636/sex-marriage-support-holds-high.aspx [https://perma.cc/6GS7-6KCD].

taken away.[443] States generally prefer for children to stay with their parents and thus turn to termination of parental rights only as a last resort.[444] If there is an issue with a parent's ability to care for their child, the child may be temporarily taken away and placed in the foster care system, where the state stands *in loco parentis* to the child.[445] At this stage, the state is concerned with placing the child into a temporary home with the primary goal of eventually reunifying the child with the child's parents.[446] However, because sometimes it is not clear when a parent will be ready, if ever, to take their child back, the state is tasked with finding a foster parent to temporarily look after the child.[447] The state generally tries to work with the birth parent and correct the reasons why the child was taken away, but often, parental rights are eventually terminated, making the child a ward of the state.[448]

Whether the child is temporarily or permanently removed from the child's parents, the state overseeing the child always strives to act in the best interests of the child. However, because public state agencies are often overwhelmed with the number of children who need homes, they must rely on private parties to assist them in taking care of the children who need services.[449] Private adoption agencies, private foster care agencies, and private child-caring institutions play important roles in helping children, and most, if not all, of these private parties claim that they always operate under the polestar of the best interests of the children. The following subsections discuss the implications of what happens when that polestar is guided by the Bible.

A. PRIVATE ADOPTION AGENCIES

A pregnant woman might decide to carry a child but give the child up immediately after giving birth. If the woman personally knows a family member that would be willing to adopt her baby, generally no intermediary is required, and the process of adoption is uncomplicated. States usually

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[443] CHRISTINE ADAMEC & LAURIE C. MILLER, THE ENCYCLOPEDIA OF ADOPTION 285 (3d ed. 2007).

[444] MICHAEL L. PERLIN, PAMELA R. CHAMPINE, HENRY A. DLUGACZ & MARY A. CONNELL, COMPETENCE IN THE LAW: FROM LEGAL THEORY TO CLINICAL APPLICATION 280 (2008).

[445] 4 THE SAGE ENCYCLOPEDIA OF CHILDREN AND CHILDHOOD STUDIES 380 (Daniel Thomas Cook ed., 2020).

[446] ELIZABETH FERNANDEZ, ACCOMPLISHING PERMANENCY: REUNIFICATION PATHWAYS AND OUTCOMES FOR FOSTER CHILDREN 2 (2013).

[447] Laura Perrone, Kristin Bernard & Mary Dozier, *Adoption and Foster Placement*, *in* ENCYCLOPEDIA OF INFANT AND EARLY CHILDHOOD DEVELOPMENT 12–13 (Janette B. Benson ed., 2d ed. 2020).

[448] *See, e.g.*, ENCYCLOPEDIA OF COMMUNITY CORRECTIONS 240 (Shannon M. Barton-Bellessa ed., 2012).

[449] CRISTINA G. VILLEGAS, FOSTER CARE IN AMERICA: A REFERENCE HANDBOOK 5 (2022).

have some oversight primarily because of coercion concerns.[450] For example, some states impose statutory limits on how much money a woman can receive as compensation related to giving up her child for adoption.[451] Further, a state might require proposed adoptions to receive written approval from the state's department of child services, which could involve criminal history checks.[452]

In many circumstances, pregnant women do not know a family member that would like to adopt their child. In these cases, the woman would usually contact an adoption agency, which would help to facilitate finding a family that wants to adopt a child. An entity that wishes to become an adoption agency usually has to meet strict licensing requirements imposed by the state.[453] Once entities are licensed to provide adoption services, they have rigorous screening mechanisms for families that want to adopt, which include criminal background checks, extensive interviews, comprehensive assessments of medical, emotional, and financial stability, and home studies.[454] Using an agency to facilitate an adoption might cost the future parents up to $65,000.[455] A pregnant woman can contact a private adoption agency to start the adoption process even before giving birth. The entire process is very consensual and cooperative, and the woman is generally able to pick the future parents from a pool of pre-screened couples who often have been waiting for years to adopt a child.[456] Every state usually has several licensed adoption agencies to choose from. For example, in June 2023, the State of New York had sixty-three state-licensed adoption agencies that were listed on the official government website.[457] One of these agencies was New Hope Family Services ("New Hope").

When an entity wishes to provide adoption services in New York, it must be incorporated under the laws of New York to provide adoption services.[458] That incorporation further must be approved by the New York Office of Children and Family Services ("OCFS").[459] New Hope announced

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[450] *See* MIRAH RIBEN, THE STOCK MARKET: AMERICA'S MULTI-BILLION DOLLAR UNREGULATED ADOPTION INDUSTRY 22 (2007).

[451] *See, e.g.*, IND. CODE ANN. § 35-46-1-9 (West 2018).

[452] *See, e.g.*, IND. CODE ANN. § 31-19-7-1 (West 2012).

[453] *See, e.g.*, IND. CODE ANN. § 31-27-6-2 (West 2022).

[454] *See id.*

[455] CHILD. BUREAU, PLANNING FOR ADOPTION: KNOWING THE COSTS AND RESOURCES 2 (2022), https://www.childwelfare.gov/pubpdfs/s_costs.pdf [https://perma.cc/QHN7-AFHX]; *e.g.*, ADOPTIONS OF IND., AGENCY FEE SCHEDULE (2022), https://adoptionsofindiana.org/wp-content/uploads/2023/02/4-fee-schedulerevised012022.pdf [https://perma.cc/GD8D-5H4Y].

[456] Kathleen Wells & Paula Reshotko, *Cooperative Adoption: An Alternative to Independent Adoption*, 65 CHILD WELFARE 177, 179–81 (1986).

[457] *See Authorized Voluntary Adoption Agencies*, OFF. OF CHILD. & FAM. SERVS., https://ocfs.ny.gov/programs/adoption/agencies/voluntary.php [https://perma.cc/8LBG-CC4M].

[458] N.Y. SOC. SERV. LAW § 374(2) (McKinney 2009).

[459] N.Y. SOC. SERV. LAW § 460-a (McKinney 2006).

that it believes that "marriage as God created it consists of the union of one man and one woman" and that "a family built around this type of marriage is the family structure designed by God and is the ideal and healthiest family structure for mankind."[460] As such, "New Hope will not recommend or place children with . . . same-sex couples as adoptive parents."[461] New Hope was permitted to refuse to provide services to same-sex couples until September 2010, when New York amended adoption regulations to explicitly state that same-sex couples were allowed to adopt children.[462] In July 2011, OCFS sent a letter to all authorized adoption agencies, including New Hope, which stated the following:

> It is important to recognize that all types of families are potential resources for children awaiting adoption and should be considered as potential adoptive parents. Maturity, self-sufficiency, ability to parent, ability to meet the child's needs, and availability of support systems are the critical assessments in identifying adoptive applicants' appropriateness for specific children. . . . "[D]iscrimination based on sexual orientation in the adoption study assessment process" is prohibited.[463]

The State subsequently made several requests to New Hope to change its policy and consider same-sex couples for adoption; however, New Hope refused. After receiving a letter of non-compliance on December 6, 2018, New Hope filed a complaint in the federal New York district court, raising various First and Fourteenth Amendment violations.[464] On December 12, 2018, New Hope filed a motion for preliminary injunctive relief.[465] On January 14, 2019, OCFS filed a motion to dismiss.[466] On May 16, the court

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[460] *See generally* Verified Complaint for Injunctive and Declaratory Relief at 8, New Hope Fam. Servs., Inc. v. James, No. 5:21-cv-01031, 2022 WL 4494277 (N.D.N.Y. 2022).

[461] Opening Brief of Appellant at 6, New Hope Fam. Servs., Inc. v. Poole, 966 F.3d 145 (2d Cir. 2020) (No. 19-1715), 2019 WL 4016997.

[462] *See* Jay Carmella, *New York Governor Signs Law Allowing Unmarried Partners to Adopt*, JURIST (Sept. 21, 2010, 11:18 AM), https://www.jurist.org/news/2010/09/new-york-governor-signs-law-allowing-unmarried-partners-to-adoption [https://perma.cc/77UE-44PR].

[463] Brief for Appellee at 36, New Hope Fam. Servs., Inc. v. Poole, 966 F.3d 145 (2d Cir. 2020) (No. 19-1715) 2019 WL 5448405 (quoting Letter from Off. of Child. & Fam. Servs., Strategic Plan. & Pol'y Dev. Div., to Comm'rs of Soc. Servs. & Exec. Dirs. of Voluntary Authorized Agencies (July 11, 2011) (on file with author)).

[464] Verified Complaint for Injunctive and Declaratory Relief, *supra* note 460.

[465] Memorandum of Law in Support of New Hope Family Services' Motion for Preliminary Injunction, New Hope Fam. Servs., Inc. v. Poole, 387 F. Supp. 3d 194 (N.D.N.Y. 2019) (No. 5:18-CV-1419), 2018 WL 10701704.

[466] Memorandum of Law in Support of Defendant's Motion to Dismiss the Complaint Pursuant to FRCP 12(b)(6), New Hope Fam. Servs., Inc. v. Poole, 387 F. Supp. 3d 194 (N.D.N.Y. 2019) (No. 18-CV-1419), 2019 WL 8632054.

denied New Hope's motion for preliminary injunctive relief and granted OCFS's motion to dismiss.[467] On July 21, 2020, the Second Circuit remanded the case to the district court, which subsequently granted New Hope's motion for preliminary injunctive relief.[468] Both parties subsequently filed motions for summary judgment. On September 6, 2022, the district court ruled for New Hope.[469] The court held that the new regulation that prohibited authorized adoption agencies from discriminating among applicants on the basis of several protected characteristics, such as race, age, sex, and sexual orientation, compelled or prohibited New Hope's speech.[470] The court further stated that the new regulation was not narrowly tailored to advance any compelling interest.[471] The State argued that it had two interests: promoting the pool of applicants and avoiding discrimination.[472] The court held that the regulation was not narrowly tailored because it failed to accommodate people with religious beliefs.[473] Further, since New Hope argued that it would rather close and not provide any services than serve a few same-sex couples, the court held that enforcing the new regulation would lead to fewer families available for adoption.[474] Finally, the court held that New Hope's policy of refusing to serve same-sex couples and telling them to seek services elsewhere "was a more narrowly tailored means of avoiding discrimination than the closure of New Hope's adoption operation."[475]

Following the district court decision, the State also agreed to pay $250,000 in attorneys' fees and costs.[476] New Hope states that it "is a Christian ministry created . . . to serve women facing unplanned pregnancies who felt unable to keep and care for their children."[477] However, New Hope also states that if it was required to serve just one same-sex couple, "its First Amendment rights would be violated and it would be forced to shut down its adoption ministry."[478]

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[467] New Hope Fam. Servs., Inc. v. Poole, 387 F. Supp. 3d 194, 225 (N.D.N.Y. 2019).
[468] New Hope Fam. Servs., Inc. v. Poole, 493 F. Supp. 3d 44, 63 (N.D.N.Y. 2020).
[469] New Hope Fam. Servs., Inc. v. Poole, 626 F. Supp. 3d 575, 586 (N.D.N.Y. 2022).
[470] *Id.* at 580.
[471] *Id.* at 584.
[472] *Id.*
[473] *Id.*
[474] *Id.*
[475] *Id.*
[476] *New York to Pay $250K After Trying for Years to Shut Down Faith-Based Adoption Agency*, ALL. DEFENDING FREEDOM (Mar. 7, 2023), https://adflegal.org/press-release/new-york-pay-250k-after-trying-years-shut-down-faith-based-adoption-agency#:~:text=SYRACUSE%2C%20N.Y.,because%20of%20its%20religious%20beliefs [https://perma.cc/8DNS-V5GM].
[477] Memorandum of Law in Support of New Hope Family Services' Motion for Preliminary Injunction, *supra* note 465, at 4.
[478] *Id.* at 23.

If an entity whose sole stated purpose is to care for the well-being of women and children would rather close down its services than serve one same-sex couple, then the entity's stated purpose begs reexamination. If New Hope would rather shut down its services than serve one qualified same-sex couple, then one should wonder how much that organization cares about serving women and children. New Hope won the case, so it did not need to shut down, and it is not clear if it would have shut down had it lost the case. Perhaps New Hope's attorneys had to make that argument solely for the purposes of litigation. Nevertheless, New Hope's arguments worked, and as of June 2023, while unwillingly, the State of New York on its website is advertising an adoption agency that publicly refuses to serve qualified same-sex couples.[479] Thus, when a person who wants to give their child up for adoption unknowingly selects New Hope as the adoption agency, the person might not know their child will potentially wait longer and that their child will possibly be deprived of a better household led by a more qualified same-sex couple.

B. PRIVATE FOSTER CARE AGENCIES

As mentioned earlier, sometimes the child can be temporarily taken away from the child's parents. In these cases, the state assumes custody of the child and then tries to find a place for the child to stay while the state tries to correct the reasons why the child was taken away from the parent. In Pennsylvania, a private entity can apply for a license to operate as a foster family care agency ("FFCA"), which is tasked with conducting home studies to evaluate whether applicants meet the legal criteria to become foster parents and then certify them.[480] These agencies also receive referrals from the Department of Human Services ("DHS") to place children with foster parents that those agencies had previously certified. A private entity that chooses to become licensed as an FFCA and further conduct business has to sign a contract with DHS, which lists the amount of compensation every FFCA will receive for carrying out the contracted duties.[481] The contract also states that the entity that wishes to be compensated for providing such services must follow applicable non-discrimination law, which prohibits discrimination based on, among other things, sexual orientation.[482]

In fiscal year ("FY") 2018, and in many prior years, Catholic Social Services ("CSS") elected to sign the contract that included the non-

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[479] *See Authorized Voluntary Adoption Agencies*, *supra* note 457.
[480] *See* 55 PA. CODE §§ 3700.61–73 (1987).
[481] *Id.*
[482] *Id.*

discrimination clause with DHS to serve as an FFCA.[483] For these services, DHS agreed to pay almost $2 million of taxpayer money to CSS.[484] After the contract was signed, CSS informed DHS that CSS was unwilling to abide by the contractual terms and that it would not certify any same-sex couples.[485] DHS subsequently stopped making referrals to CSS.[486] On May 16, 2018, CSS filed a claim in the United States District Court for the Eastern District of Pennsylvania, arguing that DHS's decision to stop making referrals under the FY 2018 contract violated the First Amendment and the Pennsylvania Religious Freedom Protection Act.[487] On July 13, 2018, the district court ruled for DHS, stating that DHS did "not permit any foster agency under contract, faith-based or not, to turn away potential foster parents" on the basis on the applicants' protected characteristics.[488] On November 6, 2018, the Third Circuit affirmed, holding that DHS did not treat CSS "differently because of its religion."[489] On June 17, 2021, the U.S. Supreme Court reversed this decision.[490] The Court emphasized that CSS "believes that 'marriage is a sacred bond between a man and a woman'" and "[b]ecause the agency understands the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples."[491] CSS acknowledged that its refusal to abide by the contractual terms "blocked children entering foster care from reuniting with siblings who were placed with CSS families, and it blocked children re-entering foster care from returning to CSS foster parents they knew and loved."[492] However, even though "CSS ha[d] a dozen families ready to provide foster care," CSS chose to not provide services at all rather than consider a few same-sex couples.[493] The U.S. Supreme Court sided with CSS. The Court held that the non-discrimination provision was not generally applicable and it burdened CSS's religious exercise.[494] As such, under the strict scrutiny test, the State had to show a compelling interest in

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[483] Brief for City Respondents at 7, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123), 2020 WL 4819956.
[484] *Id.*
[485] Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 671–72 (E.D. Pa. 2018).
[486] Complaint at 1, Fulton v. City of Philadelphia, 320 F. Supp. 3d 661 (E.D. Pa. 2018) (No. 2:18CV02075), 2018 WL 11376235.
[487] *Id.*
[488] Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 684 (E.D. Pa. 2018).
[489] Fulton v. City of Philadelphia, 922 F.3d 140, 157–59 (3d Cir. 2019).
[490] Fulton v. City of Philadelphia, 593 U.S. 522, 542 (2021).
[491] *Id.* at 530.
[492] Brief for Petitioners at *11, Fulton v. City of Philadelphia, 140 S. Ct. 1104 (2020) (No. 19-123), 2020 WL 2836494.
[493] *Id.* at *12.
[494] *Fulton*, 593 U.S. at 533.

denying an exception to CSS. The Court held that the State had not shown that interest, writing the following: "CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else."[495] Therefore, the Court ruled that the State's refusal to contract with CSS unless CSS agrees to consider otherwise qualified same-sex couples, violated the Free Exercise Clause of the First Amendment.[496] As of May 2023, CSS has a license to operate as an FFCA in Pennsylvania, where it continues to receive taxpayer money to certify couples who want to be foster parents as long as the couples are not gay.[497]

CSS, just like New Hope Family Services, succeeded in arguing that it was forced to stop providing services because of state imposition on their religious rights. It is important to note that the decision of the Court was unanimous. While it is challenging to see how noble CSS is when it would rather choose to stop providing services than consider a few same-sex couples, the opposite could also be said about the State. The State must act in the best interests of the children, and if closing down CSS would negatively affect children, then was it wrong for the state to close down CSS unless CSS agreed to serve same-sex couples? One important public policy consideration is the use of taxpayer resources to place children in an environment in which they will have a smaller number of qualified prospective parents, which means that more children will wait longer and will also be deprived of an opportunity to be placed with more qualified parents altogether since same-sex couples are preemptively excluded from the pool.

C. PRIVATE CHILD-CARING INSTITUTIONS

Finding a foster family immediately upon taking a child away from the child's parents is sometimes impossible. In these cases, the child might be placed in a child caring-institution that takes care of children on a twenty-four-hour basis. In Indiana, such institutions must be licensed.[498] In November 2021, the State of Indiana had forty-two such institutions.[499] One of these institutions is Gateway Woods, where all children "are introduced

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[495] *Id.* at 542.

[496] *Id.* at 542–43.

[497] *See Certificate of Compliance*, PA. DEP'T OF HUM. SERVS., http://services.dpw.state.pa.us/Resources/Documents/Pdf/Certificates/20230317_13868.pdf [https://perma.cc/46J4-NBXG].

[498] IND. CODE ANN. § 31-27-3-1 (West 2006).

[499] IND. DEP'T OF CHILD SERVS., ACTIVE RESIDENTIAL LICENSES—CHILD CARING INSTITUTION ONLY BY COUNTY AND RESOURCE NAME AS OF 11/29/2021 (2021), https://www.in.gov/dcs/files/CCIs_Updated11.29.21.pdf [https://perma.cc/Z3KW-RSV4].

to the power of faith in Christ."[500] In Indiana, some children who are taken away from their parents are placed in Gateway Woods, where they reside temporarily until the State tries to correct the situation with the birth parents. Gateway Woods also provides foster care services, serving as "the bridge between the Department of Child Services (DCS) and you as a foster home" and "help[ing] DCS place children into homes like yours where they can get the specialized care that they need."[501] Gateway Woods further provides houseparenting services, where anyone who comes "with grit, resilience, and an open heart, on top of having a solidly firm foundation on Christ" can be a houseparent.[502] Gateway Woods also houses teenagers who are placed there by the Department of Child Services or Probation.[503] When asked about the challenges of the current foster youth, Gateway Woods says that "the biggest need for foster care in [their] area are youth between 8 and 15 years old" and that they "have a large need for foster families who are willing to take in sibling groups."[504] With such dire need for foster parents, Gateway Woods encourages all families to apply as long as they have "a Biblical calling to open their hearts" and as long as they "supply a pastoral reference."[505] Thus, as a licensed child-caring institution in Indiana, Gateway Woods houses the state-sent children in accordance with a very clearly defined Christian mission. The State takes the children away from their parents and then uses taxpayer money to send them to an institution that acknowledges on its own website that there is "a large need" for people who are willing to foster children. However, that need is not as large as the need to follow the Biblical calling. The children who are placed at Gateway Woods do not have a say in their placement. One must wonder how many of them would much rather go with a qualified same-sex couple than stay at Gateway for an undetermined period of time.

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[500] *What We Do: Residential*, GATEWAY WOODS, https://gatewaywoods.org/what-we-do/residential [https://perma.cc/5DQZ-74K2].

[501] *What We Do: Foster Care*, GATEWAY WOODS, https://gatewaywoods.org/what-we-do/foster-care [https://perma.cc/CZZ8-9KPF].

[502] *What We Do: Houseparenting*, GATEWAY WOODS, https://gatewaywoods.org/houseparenting [https://perma.cc/2HTJ-CJDN].

[503] *Id.*

[504] *What We Do: Foster Care*, *supra* note 501.

[505] *Id.*

D. TAXPAYER-FUNDED VIOLATIONS OF CHILDREN'S RIGHTS

New Hope Family Services,[506] Catholic Social Services,[507] and Gateway Woods,[508] like many other similar agencies, qualify under section 501(c)(3) for exemption from federal income tax. Under I.R.C. § 170, these organizations are also eligible to receive tax-deductible contributions.[509] In 1983, the U.S. Supreme Court wrote that "[t]ax exemptions for certain institutions thought beneficial to the social order of the country as a whole, or to a particular community, are deeply rooted in our history, as in that of England" and that "[t]he origins of such exemptions lie in the special privileges that have long been extended to charitable trusts."[510] However, even though these exemptions are "deeply rooted in our history," they are not unlimited. When organizations chose to operate as private schools that used racially discriminatory admissions policies pursuant to their religious beliefs, the Supreme Court held that these organizations were not eligible to qualify as tax-exempt organizations and contributions to such organizations were not deductible.[511]

In addition to benefiting as 501(c)(3) tax-exempt organizations that are able to receive tax-deductible contributions, New Hope Family Services, Catholic Social Services, and Gateway Woods, like many other similar agencies, also directly receive state and federal taxpayer money. For example, as mentioned above, CSS receives funding through contracts with the Commonwealth of Pennsylvania. In the year that ended on June 30, 2021, CSS reported receiving $7,622,595 as "governmental revenue."[512] Furthermore, under federal law, states are entitled to claim partial federal reimbursement for the cost of providing adoption and foster care services.[513] In FY 2011, states spent $12.4 billion and received federal reimbursement of $6.7 billion.[514] Part of this taxpayer money goes directly to organizations like New Hope Family Services, Catholic Social Services, and Gateway

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[506] *See Home*, NEW HOPE FAM. SERVS., https://www.newhopefamilyservices.com [https://perma.cc/ZFU3-Q2EK] (last visited Mar. 16, 2024) (listing the 501(c)(3) status).

[507] *See* CATH. SOC. SERVS. OF THE ARCHDIOCESE OF PHILA., FINANCIAL STATEMENTS AND REPORT OF INDEPENDENT CERTIFIED PUBLIC ACCOUNTANTS 20, https://catholicphilly.com/media-files/2022/03/2021-Catholic-Social-Services-of-ADP-FS_2.22.22.pdf [https://perma.cc/TH5V-UGRY] (listing the 501(c)(3) status).

[508] *See Accreditations*, GATEWAY WOODS, https://gatewaywoods.org/who-we-are/accreditations [https://perma.cc/MS42-VDME] (last visited Mar. 16, 2024) (listing the 501(c)(3) status).

[509] *See* I.R.C. § 170.

[510] Bob Jones Univ. v. United States, 461 U.S. 574, 588 (1983).

[511] *Id.* at 605.

[512] CATH. SOC. SERVS. OF THE ARCHDIOCESE OF PHILA, *supra* note 507, at 6.

[513] 42 U.S.C. §§ 601–19.

[514] CONG. RSCH. SERV., R42792, CHILD WELFARE: A DETAILED OVERVIEW OF PROGRAM ELIGIBILITY AND FUNDING FOR FOSTER CARE, ADOPTION ASSISTANCE AND KINSHIP GUARDIANSHIP ASSISTANCE UNDER TITLE IV-E OF THE SOCIAL SECURITY ACT 1 (2012).

Woods, which help states to facilitate adoption and foster care services with qualified parents as long as they have "a solidly firm foundation on Christ,"[515] "believe that the Lord designs families,"[516] and are not gay.[517]

VI. CONCLUSION

Some people might sincerely believe that placing a child with a same-sex couple is not in the best interests of the child because they believe that the couple's marriage is illegitimate or because they believe that homosexuality is a sin. Other people might sincerely believe that placing a child with a religious opposite-sex couple that espouses conservative values might not be in the best interests of the child because they believe that could make the child bigoted and full of hatred toward people who are different. However, what people sincerely believe is their personal matter. When people voluntarily decide to work with the state by providing adoption and foster care services, they become an extension of the state. In exchange for their services, they get tax benefits and taxpayer money. Further, they must abide by statutes and regulations set by the state and, most importantly, they must be guided by what is in the best interests of the children, which makes their private sincerely held beliefs irrelevant.

Fifty years ago, as a result of a limited understanding of homosexuality, many people had reservations about gay people and their parental abilities. However, over four decades of scientific research and published scholarly articles have shown that sexual orientation does not have an effect on a person's parental abilities and that same-sex couples can be as good of parents and, in some cases, even better parents than opposite-sex couples.[518] That is why experts in child welfare have long been advocating that a case-by-case determination is the gold standard to decide whether a specific placement is in the best interests of the child.[519] Categorically prohibiting gay people from becoming foster and adoptive parents reduces the pool of qualified candidates. This means that some children will wait longer until they find a home, that some children will be deprived of a better home that could be provided by gay people, and that some children will not find a home at all because they are either hard-to-

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[515] *Houseparenting*, *supra* note 502.

[516] *Adoption Services*, NEW HOPE FAM. SERVS., https://www.nhfsadoption.com/adoption-services [https://perma.cc/63ES-JETQ] (last visited Mar. 16, 2024).

[517] Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 671–72 (E.D. Pa. 2018).

[518] *See generally* Allen & Burrell, *supra* note 10, at 19; Anderssen et al., *supra* note 10; Fedewa et al., *supra* note 10; Fitzgerald, *supra* note 10; Suárez et al., *supra* note 10; Tasker, *supra* note 10.

[519] 11 RANDY K. OTTO & IRVING B. WEINER, HANDBOOK OF PSYCHOLOGY, FORENSIC PSYCHOLOGY 142 (2d ed. 2013).

place or because they will grow up and become ineligible. That is why no state currently prohibits adoption by gay people.

When people apply to become foster or adoptive parents, their applications should not be evaluated on a whim or based on someone's personal beliefs. Instead, applications should be evaluated on an objective set of factors that will be in the best interests of the child who needs services. Not only does refusing to consider otherwise qualified candidates solely based on their sexual orientation go directly against the best interests of the child, but it also places someone's personal beliefs and convictions above those interests, which violates the child's right to permanency.

Many state and federal laws require that all dependent children be provided with a permanent home.[520] Courts have recognized that states have a compelling interest in achieving that goal.[521] As such, categorically excluding otherwise qualified gay people from consideration violates these statutes because it "infringes on the foster child's right to be free from undue restraint and to be expeditiously placed in an adoptive home that serves the child's best permanency interests."[522] Further, children, just like adults, have fundamental interests that are constitutionally protected.[523] The "child's right to an adoptive home when the child is available for adoption is a fundamental right," and violations of this right must be subject to strict scrutiny.[524] Laws and policies that allow exceptions for people to use their personal beliefs to categorically exclude otherwise qualified gay applicants burdens children's liberty interests by restraining them in state custody while at the same time denying them a permanent placement that is in their best interests. These exceptions are not narrowly tailored to achieve any compelling state interest. Entities that choose to work with the state in providing adoption and foster care services are effectively operating on behalf of the state and thus should be held to the same strict scrutiny test, which would likely not be satisfied.

The First Amendment has always played an important role in society which is full of people with different views and opinions. Forcing a devout Christian to make a wedding cake for a same-sex couple might well be as violative of the First Amendment as forcing a gay person to make a cake that states that true marriage is between one man and one woman. Similarly, forcing a devout Christian to make a website celebrating same-sex marriage might be as violative of the First Amendment as forcing a gay person to make a website stating that homosexuality is a sin. In these cases, a

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[520] *See, e.g.*, FLA. STAT. § 39.001(1)(h) (West 2019); 42 U.S.C. § 671.

[521] *See, e.g.*, G.S. v. T.B, 985 So. 2d 978, 982–83 (Fla. 2008).

[522] *In re* Adoption of Doe, 2008 WL 5006172, at *22 (Fla. Cir. Ct. Nov. 25, 2008).

[523] *See In re* Jasmon O., 878 P.2d 1297, 1307 (Cal. 1994) ("Children, too, have fundamental rights—including the fundamental right to be protected and to 'have a placement that is stable [and] permanent.'") (quoting *In re* Marilyn H., 851 P.2d 826, 833 (Cal. 1993)).

[524] *In re* Adoption of Doe, 2008 WL 5006172, at *24 (Fla. Cir. Ct. Nov. 25, 2008).

compromise might be necessary to protect the interests of two different groups that are arguably similarly situated. However, the First Amendment cannot be used both as a sword and a shield when children's rights are on the line. Children who need homes are one of the most vulnerable populations in society. When people, based on their personal beliefs, exclude otherwise qualified candidates solely based on their sexual orientation, they are acting against the best interests of the children. Thus, they are using the First Amendment as a shield to protect themselves and promote their personal beliefs while at the same time using the First Amendment as a sword to harm children.

The states and the federal government must continue acting in the best interests of children by passing measures that above everything else prioritize children's right to permanency. This includes amending I.R.S. regulations to no longer give a tax-exempt status under section 501(c)(3) to entities that do not act in the best interests of the children by denying otherwise qualified gay applicants.[525] Further, constitutional amendments at both the state and federal levels should be considered to strengthen a child's right to permanency and prohibit states from working with entities that do not act in the best interests of the children. Cause lawyers should also refocus their arguments on the children's rights instead of gay rights. A different framing will help to move away from the heated conflict between the gay community and the religious community post-*303 Creative*.

Finally, the courts must start reevaluating people's allegedly sincerely held religious beliefs. When evaluating the beliefs of New Hope Family Services, the court simply accepted that the agency's sincerely held religious beliefs did not allow them to place a child with otherwise qualified gay people.[526] Perhaps someone's announced conviction that a Biblical marriage is a sacred bond between a man and a woman could in fact be a sincerely held religious belief that implicates First Amendment protections. However, denying an otherwise qualified gay person the ability to adopt a child is not a logical extension of that belief, especially when that belief goes against the best interests of the children. Even if one accepts that the optimal Biblical placement is with an opposite-sex married couple, the courts need to evaluate why placing a child with a less optimal placement, such as a gay couple, is also a sincerely held religious belief. Alternatively, the courts could consider siding with the children and refusing to accept any belief as a sincerely held religious belief if it goes against the best interests of the children.

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[525] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (holding that non-profit private schools that operate under racially discriminatory admission standards based on their announced religious beliefs do not qualify as tax-exempt entities 501(c)(3)).

[526] New Hope Fam. Servs., Inc. v. Poole, 493 F. Supp. 3d 44, 51 (N.D.N.Y. 2020).