

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

Case No. 3D08-3044

Lower Court Case No. 06-033881 FC 04

FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES

APPELLANT,

v.

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

APPELLEES.

On Appeal from the Eleventh Judicial Circuit,
Miami-Dade County
Honorable Cindy S. Lederman

**BRIEF OF *AMICUS CURIAE* AMERICAN COLLEGE OF
PEDIATRICIANS IN SUPPORT OF APPELLANT FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES**

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INTEREST OF AMICUS CURIAE

Amicus Curiae American College of Pediatricians (“*Amicus*” or “College”) is a national medical association of pediatricians and other healthcare professionals who specialize in the care of infants, children, and adolescents. The College was formed in 2002 to promote the welfare of children and the preservation of the natural family, and is dedicated to ensuring all children reach their optimal physical and emotional well-being. Its members believe that children are the future of our nation and should be reared in the best possible family environment and supported by physicians committed to ensuring their optimal health and well-being.

The College is dedicated to educating parents, pediatricians, policy makers, and society about factors that are most likely to enhance a child’s well-being. To that end, the College publishes position papers and policy statements on issues affecting children, families, and society using evidenced-based medical research and expert opinion to assist parents and influence childrearing.

The College recognizes that the basic father-mother family unit is the optimal setting for childhood development. Its members promote this basic family unit while pledging support for all children, regardless of their circumstances. Consistent with that goal, the College has filed briefs *amicus curiae* in cases dealing with parenting and the welfare of children.

This case involves issues of parenting and childrearing that are of particular interest to the College's mission, particularly because the lower court has held unconstitutional a law that impacts adoption and childrearing policies. The College believes that the Florida Legislature has sound scientific bases for passing § 63.042(3), Fla. Stat. (2003), and that the lower court should have deferred to the Legislature's judgment. The College thus believes this Court should reverse the lower court's decision.

SUMMARY OF ARGUMENT

The lower court applied a rational basis test in evaluating Petitioner's equal protection challenge to the constitutionality of § 63.042(3). In doing so, the court selected the appropriate test, but erred in its application. The court should have deferred to the Legislature's decision for passing § 63:042(3) because the state presented ample scientific evidence to support that law. Thus, this Court should reverse the lower court's finding that § 63.042(3) is unconstitutional.

ARGUMENT

An equal protection challenge to a statute that does not involve a fundamental right or a suspect classification is evaluated under a rational basis standard *Lofton v. Secretary of Dep't of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004). Petitioner's equal protection challenge to § 63.042(3), Fla. Stat. involves neither a fundamental right nor a suspect classification, but

rather, is based on a differential in adoption eligibility. Accordingly, Petitioners' challenge is properly reviewed under a rational basis standard. The lower court correctly decided to apply a rational basis standard to § 63.042(3). (Final Judgment of Adoption at 47.) But that court ignored valid scientific evidence in support of the statute and applied the rational basis standard in an erroneous manner, concluding that the statute violated the Equal Protection Clause. A correct application of the rational basis test, however, reveals that there are no constitutional infirmities in that statute.

I. A LAW PASSES RATIONAL BASIS REVIEW SO LONG AS ANY CONCEIVABLE STATE OF FACTS COULD PROVIDE A RATIONAL BASIS FOR THE LAW.

Rational basis analysis presumes a statute's validity. The burden is on the challenger to demonstrate its unconstitutionality; there is no burden on the state to produce evidence supporting the rationality of the statute. *Heller v. Doe*, 509 U.S. 312, 319-320 (1993). Moreover, the state need not articulate its legislative reasoning at the moment the statute is enacted; rather, the burden is on the challenging party to negate "any reasonably *conceivable* state of facts that could provide a rational basis for the classification." *Id.* at 320 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)) (emphasis added). The "extreme deference" given under the rational basis test "suggests that it takes no special talent to come up with a rational basis for any scheme; the difficult task is to

formulate a plan for which there is no rational basis.” *Martin v. Bergland*, 639 F.2d 647, 650 (10th Cir. 1981) (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)).

In applying the rational basis test to § 63.042(3), the lower court considered three possible bases supporting the statute: (1) that persons who engage in homosexual behavior are less desirable adoptive parents because they suffer from higher levels of stressors; (2) that preventing the adoption of children by persons who engage in homosexual behavior minimizes the social stigmatization endured by those children; and (3) that banning adoption by those who engage in homosexual behavior furthers society’s moral interest. The court focused only on these three bases and found them to be irrational;¹ it did not consider the eminently rational bases for § 63.042(3) discussed herein in sections II.A. and II.B. The lower court thus concluded that § 63.042(3) was unconstitutional. In so doing, the court disregarded the well-established legal principle that a statute fails the rational basis test only when there is no *conceivable* rational basis for the statute. *See Heller*, 509 U.S. at 319-320.

The rational basis test does not ask a court to evaluate scientific evidence to determine which studies it finds more persuasive or which results it prefers. Instead, the court is called upon to determine if there is any possible basis for the

¹ The lower court improperly rejected the expert testimony provided by the state to support these bases. *See* Section III, *infra*.

Legislature's policy choice. The lower court exceeded that limited role here. It weighed and evaluated the conflicting scientific evidence, selected the evidence it found more persuasive, and declared the state's contrary policy to be irrational. But the mere fact that a court is more persuaded by one side of a scientific debate does not mean that the statute lacks a *conceivable* rational basis. The court thus committed reversible error.

II. THERE ARE SCIENTIFICALLY VALID BASES FOR FLORIDA STATUTE § 63.042(3).

A. § 63.042(3) increases the likelihood that an adopted child will be raised in an optimal childrearing environment.

Whenever possible, adopted children should be placed in the optimal childrearing environment with a father and a mother. Childrearing studies have consistently shown that children are more likely to thrive emotionally, mentally, and physically in a home with married parents of differing sexes. *See* A. Dean Byrd, *Gender Complementarity and Child-rearing: Where Tradition and Science Agree*, 6(2) *Journal of Law & Family Studies* 213-35 (2004); Sotirios Sarantakos, *Children in Three Contexts: Family, Education, and Social Development*, 21 *Children Australia* 23-31 (1996); David Popenoe, *Life Without Father* 144, 146 (1996); Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* 45 (1994); Jeanne M. Hilton & Esther L. Devall, *Comparison of Parenting and Children's Behavior in Single-Mother, Single-*

Father, and Intact Families, 29 *Journal of Divorce and Remarriage* 23-54 (1998); Elizabeth Thomson *et al.*, *Family Structure and Child Well-Being: Economic Resources vs. Parental Behaviors*, 73 *Social Forces* 221-42 (1994). The veracity of this principle remains unrefuted.

These scientific results rest on the intuitive and well-supported principle that children benefit from close, daily interaction with both a male and a female. See *Hernandez v. Robles*, 7 N.Y.3d 338, 359, 855 N.E.2d 1, 7 (N.Y. 2006) (“Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.”); see also Linda Thompson & Alexia J. Walker, *Gender in Families: Women and Men in Marriage, Work, and Parenthood*, 51(4) *Journal of Marriage and the Family* 845-71 (1989); Shelley E. Taylor *et al.*, *Biobehavioral Responses to Stress in Females: Tend-and-Befriend, not Fight-or-Flight*, 107(3) *Psychological Review* 411-429 (2000). Neither can this principle be credibly challenged.

It is undisputable that persons who engage in homosexual behavior are unlikely to provide a child with two parents of differing sexes or much needed parental interaction with both a male and a female. Consequently, § 63.042(3)

rests on the rational, if not compelling, basis of placing adopted children in a premier childrearing environment.²

B. § 63.042(3) seeks to avoid the harms to children caused by same-sex parenting.

There is another rational basis for § 63.042(3): studies have shown that same-sex parenting has deleterious effects on children. A recent meta-analysis of 21 same-sex parenting studies revealed significant effects of same-sex parenting on children. While each of the 21 studies purported to show that there are no significant differences between children raised by same-sex couples and those raised by opposite-sex couples, same-sex-parenting advocates Judith Stacey and Timothy Biblarz detected serious methodological flaws in each study.

Stacey and Biblarz performed a meta-analysis designed to minimize the effect of those flaws. To their surprise, the meta-analysis revealed significant differences between children raised by opposite-sex couples and those raised by same-sex couples. For example, children raised by same-sex couples were more likely than children raised by opposite-sex couples to initiate sexual activity at

² § 63.042(3) is neither underinclusive nor overinclusive in accomplishing this objective. The statute furthers its rational basis by treating persons who are more likely to provide children with a married mother-father unit differently than it treats persons who are unlikely to provide the optimal childrearing model. But even if it were underinclusive or overinclusive the law would not fail for this reason alone. *Lofton v. Secretary of Dep't of Children and Family Servs.*, 358 F.3d 804, 823 (11th Cir. 2004) (citing *Heller*, 509 U.S. at 320); *State v. Hodges*, 614 So. 2d 653, 654-655 (Fla. 5d DCA 1993) (citing *State v. Peters*, 534 So. 2d 760, 763 (Fla. 3d DCA 1988)).

earlier ages, to have more sexual partners, and to experiment with homosexual behavior. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter*, 66 *American Sociological Review* 174-79 (2001). Stacey and Biblarz also found that children raised by same-sex couples are less likely to conform to gender roles. For instance, boys raised by two women were less aggressive than boys raised by a mother and father. And girls raised by same-sex couples were more aggressive than girls raised by opposite-sex couples.

Stacy and Biblarz hailed this as a positive outcome. The state, however, could rationally conclude that this is not a positive result. The feminization of boys and masculinization of girls is a component of a medically recognized psychiatric disorder known as childhood gender identity disorder (“GID”). *Id.*; DSM IV-TR, The American Psychiatric Association (4th ed. 2000); Harold I. Kaplan & Benjamin J. Sadock, *Synopsis of Psychiatry Behavioral Sciences Clinical Psychiatry* 752 (6th ed. 1991). Avoidance of these harmful effects on children is a separate rational basis for § 63.042(3).

C. The existence of social science supporting § 63.042(3) demonstrates that the Legislature did not act irrationally.

The existence of social science supporting § 63.042(3), even if contrary evidence exists, demonstrates that the Legislature did not act irrationally. Where there is scientific disagreement about an issue addressed by the Legislature, it is improper for a court to substitute its judgment for that of the Legislature. *See*

Gonzales v. Carhart, 550 U.S. 124, 127 S. Ct. 1610, 1636 (2007) (recognizing that state legislatures have wide discretion to pass legislation in areas where there is scientific disagreement); *see also Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997); *Jones v. United States*, 463 U.S. 354, 364-65 n.13 (1983); *Lambert v. Yellowley*, 272 U.S. 581, 597 (1926); *Collins v. Texas*, 223 U.S. 288, 297-98 (1912); *Jacobson v. Massachusetts*, 197 U.S. 11, 30-31 (1905). Thus, the lower court should have shown “extreme deference” to the Legislature’s rational decision to enact legislation supporting one side of the debate concerning parenting by persons and couples engaged in homosexual behavior. *See Martin*, 639 F.2d at 650 (citing *Murgia*, 427 U.S. at 314).

The lower court did not show the “extreme deference” that must be afforded to the Legislature’s policy choice. Instead, the court, believing the scientific evidence opposing the Legislature’s policy choice to be more persuasive, declared the Legislature’s actions to be irrational. To find a rational basis violation, however, the court must determine that there is no *conceivable* basis for what the Legislature has done, *see Heller*, 509 U.S. at 320; it is not sufficient that the court favors conflicting evidence on the other side of a social policy debate.

The current state of social science research demonstrates the rationality of the Legislature’s actions. Social science observes difficult-to-measure subjects, trends, and patterns involving human behaviors and psyches. It requires a lengthy

process—one that often takes *generations* of observation and study—to grapple with subjects in all their applications and nuances. It is only after this long process that social scientists can purport to arrive at a supported, well-established theory.

The best-available, time-tested social science demonstrates that children are more likely to thrive cognitively, emotionally, and physically when raised by a mother and father. That evidence has been well established over time. Individuals who engage in homosexual behavior are unlikely to provide a child with both a mother and a father. Thus, the Legislature, in enacting § 63.042(3), has decided to follow the time-tested research. That decision cannot be characterized as irrational.

Furthermore, the scientific evidence concerning parenting by persons and couples engaged in homosexual behavior is admittedly in its infancy. Much further study and critique must occur before the scientific community can fully rely upon this developing area of study. Indeed, at this early stage, there is no consensus—but only disagreement—on this issue in the scientific community. Therefore, it is inappropriate for a social scientist—not to mention a trial court—to declare as conclusive one side of the evidence in this area.

But the lower court did just that in this case. In its written decision, the court recognized that there was no scientific consensus as of five years ago, stating that, in 2004, the Federal Court of Appeals for the Eleventh Circuit found

insufficient information to declare a “correct” scientific position on same-sex parenting. (Final Judgment of Adoption at 46.) The lower court nevertheless declared, based on its reading of a few intervening studies, that the parenting issue was scientifically settled and that the Legislature’s actions were irrational. (*Id.* at 47.)

A five-year period is but a moment in the development of social science. While a few relevant studies were released during the last five years, they have not come close to establishing the effectiveness or propriety of parenting by persons or couples who engage in homosexual behavior. On the whole, there are still *very few* studies available on this issue.³ And there are serious methodological problems with the available studies. The studies suggesting neutral or favorable results by children raised by two parents of the same sex have critical flaws such as non-longitudinal design, inadequate sample size, biased sample selection, lack of proper controls, or failure to account for confounding variables. *See* Robert Lerner & Althea K. Nagai, *No Basis: What the Studies Don’t Tell Us About Same Sex Parenting* (2001).

This current body of research demonstrates uncertainty and disagreement concerning parenting by persons engaged in homosexual behavior. This

³ Importantly, no study has purported to show that a household comprising two parents of the same-sex is *preferable* to the time-tested model of a male-female parental unit.

developing area of scientific study is not the place for a court to substitute its policy preference for that of the Legislature. *See Carhart*, 127 S. Ct. at 1636. The Legislature enacted legislation supported by one side of the scientific evidence, deciding not to allow adopted children to be placed in an unproven childrearing environment. The Legislature without question had a rational basis for acting as it did. And, thus, it was clear error for the lower court to hold that that the Legislature had no *conceivable* rational basis to support § 63.042(3).

III. THE COURT IMPROPERLY DISCREDITED THE TESTIMONY OF THE STATE'S WITNESSES.

In addition to the lower court's error in misapplying the rational basis test, it also improperly discredited the state's evidence in support of § 63.042(3). The state presented the testimony of two expert witnesses, Dr. George Rekers and Dr. Walter Schumm. But the lower court discredited their expert testimony, at least in part, because they have religious motivation for their work as social scientists. Their testimony did not rely on their religious beliefs; instead, they cited legitimate studies applying valid scientific methodology and resulting in well-supported conclusions. The court nevertheless improperly focused on the experts' religious views, rather than addressing the scientific merit in their testimony. And it used the experts' religious views to support its conclusion that they were unfit to provide testimony on scientific matters. (Final Judgment of Adoption at 18, 23.)

Expert witnesses should be discredited only if they lack requisite expertise or education. Fla. Stat. Ann. § 90.702; Fla. R. Civ. P. 1.390. They must not be discredited merely because they hold particular religious beliefs. Experts should be judged on the merits of their testimony and not on their particular faith. So long as their methodologies are supportable, they are no less credible simply because their studies are motivated by religious belief.

Florida law prohibits evidence of religious belief to impugn a witness's credibility. Fla. Stat. Ann. § 90.611 ("Evidence of the beliefs or opinions of a witness on matters of religion is inadmissible to show that the witness's credibility is impaired or enhanced thereby"); 1 Fla. Prac., *Evidence* §611.1 (West 2008).⁴ Thus, the use of such inadmissible evidence is not a legitimate reason to discredit expert testimony. But that is exactly what the lower court did. In introducing Dr. Rekers, the court unnecessarily underscored his religious background:

[T]he Department offered Dr. George Rekers, a Clinical Psychologist and Behavioral Scientist from Miami, Florida, as an expert in clinical psychology and behavioral science to include the stressors of homosexual adults. *Dr. Rekers is also an ordained Baptist minister.*

⁴ Evidence of religious beliefs can be introduced only to show to show bias, *e.g.*, to show church affiliation when a church is a litigant. 1 Fla. Prac., *Evidence* §611.1 (West 2008). There is no issue of bias here, because if there is, it is a bias that afflicts *every* expert who has a personal opinion on parenting by persons who engage in homosexual behavior.

(Final Judgment of Adoption at 18) (emphasis added).⁵ Then, the court highlighted quotations from nonacademic works that Rekers wrote “in his role as an ordained Baptist minister” where he describes a religious view on homosexual behavior. (*Id.* at 21-22.)⁶ The court then linked Dr. Rekers’ religion with his academic work: “Dr. Rekers’ beliefs are motivated by his strong ideological and theological convictions that are not consistent with the science.” (*Id.* at 23.) Lastly, the court concluded that Dr. Rekers could not testify as an expert because he not only holds religious motivations, but he holds religious views apparently disapproved by the court: “Based on his testimony and demeanor at trial, the court can not consider his testimony to be credible nor worthy of forming the basis of public policy.” (*Id.*) The lower court’s consideration of Dr. Rekers’ religious beliefs is clearly improper under Florida law.

The court also considered irrelevant and inadmissible religious beliefs when analyzing Dr. Schumm’s testimony. The court introduced Dr. Schumm as a suspicious character whose opinion was based on his religious faith:

The Department also tendered Dr. Walter Schumm, Associate Professor of Family Studies, Kansas State University, as an expert in

⁵ Dr. Rekers explicitly testified that, although he has a degree in theology and has published Christian books, he would not be testifying about conclusions derived from his religious beliefs. (Trial Transcript (Tr.) at 824, 995, 1005.) The lower court nevertheless mentioned his irrelevant religious beliefs.

⁶ These works were not the materials upon which Dr. Rekers based his trial testimony. In fact, he testified that he has since disavowed several positions expressed in those works. (Tr. at 1049-1054.)

family child development, empirical and theoretical family studies and research methodology. *Dr. Schumm also integrates his religious and ideological beliefs into his research.*

(Id. at 23) (emphasis added).

The court should not have considered the expert witnesses' religious beliefs. Such consideration plays no proper role in evaluating the accuracy of the material that an expert witness presents. The only role such consideration does play is in discouraging the free exercise of religion—a violation of the Constitutional rights of religious believers. Therefore, the court erred by using the expert witnesses' religious beliefs to discredit their testimony.

CONCLUSION

The Florida Legislature had scientifically valid bases for enacting Florida Statute § 63.042(3). The lower court should have considered all of the conceivable bases for that statute. But it did not. As a result, it erred in its decision, which should be reversed.

Respectfully submitted this the 3rd day of March, 2009.

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CERTIFICATE OF SERVICE

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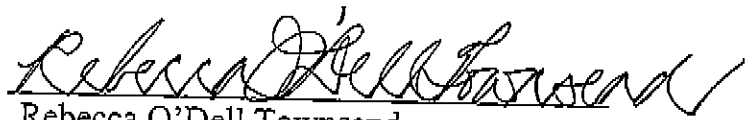
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type style requirements of Fla. R. App. P. 9.210(a)(2) because this brief has been prepared in a proportionally spaced typeface using Word 2007 Times New Roman 14 point font.



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