

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

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

STEVEN LOFTON, DOUGLAS E. HOUGHTON, JR.; JOHN DOE and JOHN ROE, minor children, by and through their next friend, TIMOTHY ARCARO; WAYNE LARUE SMITH and DANIEL SKAHEN,

APPELLANTS,

vs.

KATHLEEN A. KEARNEY, Secretary of Florida's Department of Children and Families; and CHARLES AUSLANDER, District Administrator of District XI of Florida's Department of Children and Families,

APPELLEES.

**BRIEF OF *AMICI CURIAE* HONORABLE R. J. BALL, *ET AL.*,  
TWENTY-ONE MEMBERS OF THE FLORIDA LEGISLATURE  
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

William C. Duncan

Joshua K. Baker

MARRIAGE LAW PROJECT

Columbus School of Law

3600 John MacCormack St. NE

Telephone: (202) 319-6755

Mathew D. Staver

Erik W. Stanley

Joel L. Oster

LIBERTY COUNSEL

210 E. Palmetto Avenue

Longwood, Florida 32750

Telephone: (407) 875-2100

Counsel for Amici Curiae

**Certificate of Interested Persons and Corporate Disclosure Statement**

Pursuant to F.R.A.P. 26.1 and 11<sup>th</sup> Cir.R. 26.1-1, Appellees certify that the following is a complete list of all trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal:

Michael P. Adams

Bob Allen

American Civil Liberties Union Foundation

American Civil Liberties Union Foundation of Florida, Inc.

Ralph Arza

Charles Auslander

Carey L. Baker

Joshua K. Baker

R.J. Ball

Aaron Bean

Allan Bense

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Gus Bilirakis

Robin A. Blanton

Marty Bowen

Donald D. Brown

Frederick C. Brummer

Johnnie Byrd

Samuel C. Chavers

Professor Erwin Chemerinsky

Children First Project of Nova Southeastern University

Children's Rights, Inc.

Child Welfare League of America

Matthew Coles

Leslie Cooper

Justin A. Deabler

Marc De Leeuw

Jennifer DeSantis

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John Doe

William C. Duncan

James Esseks

Evan B. Donaldson Adoption Institute

Mike Fasano

Florida Department of Children and Families

Stacey R. Friedman

Ken Grace

Philip L. Graham, Jr.

Ruth E. Harlow

Mike Hogan

Douglas E. Houghton, Jr.

Jim Kallinger

Kathleen A. Kearney

Will S. Kendrick

Ben Kilmer

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United States District Judge James Lawrence King

Kozlowski Law Firm

Steven Robert Kozlowski

Lamba Legal Defense and Education Fund, Inc.

Liberty Counsel

Judith L. Lichtman

Ken Littlefield

Steven Lofton

Patricia M. Logue

Louis D. Brandeis School of Law - University of Louisville

Samuel A. Marcossou

Marriage Law Project

Randall Marshall

David Meador

Jerry Melvin

Moss, Henderson, Blanton, Lanier, Kretschmer & Murphy, P.A.

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Lofton v. Kearney  
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George H. Moss, II

National Center for Youth Law

National Partnership for Women & Families

North American Council on Adoptable Children

NOW Legal Defense and Education Fund

Joel L. Oster

The Puerto Rican Legal Defense and Education Fund, Inc.

John Ratliff

John Roe

Elizabeth F. Schwartz

Jeffrey T. Scott

Daniel Skahen

Wayne LaRue Smith

Evette Soto-Maldonado

Eric W. Stanley

Dwight Stansel

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Tiffany Starr

Mathew D. Staver

Sullivan & Cromwell, P.A.

Allen Trovillion

University of Southern California Law School

Casey Walker

Yolanda Wu

Christina A. Zawisza

---

William C. Duncan

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## **INTEREST OF AMICI**

Amici are state legislators for the State of Florida: R.J. Ball, Mike Hogan, Dwight Stansel, Aaron Bean, Carey L. Baker, Will S. Kendrick, Bob Allen, Ralph Arza, Donald D. Brown, Mike Fasano, Ken Littlefield, Gus Bilirakis, Frederick C. Brummer, Ben Kilmer, Jerry Melvin, Marty Bowen, Allen Trovillion, Allan Bense, Johnnie Byrd, Jim Kallinger, and David Mealor.

The Florida Legislature has the responsibility for adopting and retaining the statutory structure governing adoption in the State of Florida. In this case, a part of the statutory scheme regulating adoption in Florida is being challenged by some who believe that different laws would better meet the needs of Florida's children. That decision, however, is a legislative question best left to the prudence and caution of Florida's elected officials. Amici therefore come to this Court with the consent of the parties to defend the legislative prerogative that Plaintiffs and their *amici* attack in this case.

## **STATEMENT OF THE ISSUE**

This brief addresses the issue of whether the policy positions of "child welfare and mental health professional organizations" or questionable social science can justify the reversal of summary judgment in this case and the resulting judicial intrusion into the Florida legislature's prerogative to enact

social policy.

## **SUMMARY OF ARGUMENT**

This brief argues that Florida’s adoption law is not unconstitutional merely because self-styled “child welfare experts” think it is not a good idea. The suggestion that CWLA and like organizations possess expertise worthy of deference cannot be reconciled with their history of flip-flops on other adoption issues, particularly as to transracial adoption, in which their position favoring race-based adoptions has been repeatedly rejected by Congress in enacting legislation promoting color-blind adoptions.

Nor can the social science they cite support reversal. It was not presented to the district court, and as such Plaintiffs-Appellants have waived any right to rely on it on this appeal. Moreover, the social science itself is too flawed and unreliable to support any policy conclusions regarding homosexual adoption, which was unexamined by any of CWLA’s studies, which instead observed children raised by their own natural parents.

The methodological flaws in this research include researchers ignoring their own data suggesting a number of differential outcomes for children of homosexual parents, including an increased likelihood of the child’s developing a homosexual sexual orientation. Given the unfortunate correlation

of homosexual sexual behavior with increased rates of depression, substance abuse, and even suicidal ideation, CWLA's studies fail to show that the adoption law is not rationally related to the best interest of children.

If it is proper for Congress to reject the positions of CWLA and others in deciding adoption policy, it is not improper for Floridians to do so. As things stand, it appears that roughly 40% of Floridians support the adoption law, while 15% oppose it and another 40% are ambivalent. As such, the homosexual adoption issue is both controversial and contested. This is all the more reason to leave it to the people to decide through their elected representatives, whose prerogative it is to make social policy on the subject.

## **ARGUMENT**

Florida's adoption scheme reflects the Legislature's efforts to provide for children who cannot be raised by their own mother and father. In such cases, the State has the somber duty to place the child in an adoptive family as an alternative, to in effect create a family where none was before. As such, laws on adoption historically have sought "to shape the adoptive family according to the nuclear model."<sup>1</sup> Florida and other states have crafted policies that

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<sup>1</sup>Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias / Favor of Nuclear Families in American Constitutional Law and Policy Reform* 66 Mo. L.REV. 527, 606 (2001).

attempt to promote adoption of children into situations that are as much like the nuclear family as possible, and as a result “fashion adoption in imitation of procreation.”<sup>2</sup>

As the district court noted in upholding the adoption law, “the Equal Protection Clause of the Fourteenth Amendment is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” R4-142-19; *citing F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). The role of the judiciary is not to become a super legislature, merely substituting another social theory for the one chosen by the Florida Legislature in accordance with the will of the Florida electorate.

Despite the limited nature of this judicial review, CWLA, et al. claim that the adoption law should be held unconstitutional because it is inconsistent with the policies and practices of mental health and child welfare “experts” (including themselves), who think a parent’s sexual orientation is not a relevant consideration in placing a child for adoption. *Id.* at 31-34. They also suggest the statute is unconstitutional because social science research of homosexual parenting shows it to be “at least equivalent” to heterosexual parenting. *Id.* at 25-34. Neither of these claims even remotely suffices to

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<sup>2</sup> *See Id.*

justify any trespass onto the legislature's prerogative to enact social welfare legislation, particularly as to children depending on the State of Florida to replace the families they have lost.

**I. The "Policies and Practices" of CWLA, et al., advocating homosexual adoption cannot support reversal of summary judgment.**

CWLA claims that its own policies and practices favoring homosexual adoption and those of others show that Florida's adoption law is not rationally related to serving the best interest of children. CWLA Brief at 31-34. They suggest the adoption law cannot be in the best interest of children because it is inconsistent with the "uniform views of child welfare and mental health professional organizations" who favor gay adoption. The argument lacks any force even as a legislative policy matter, however, let alone as a challenge to the constitutionality of the adoption law.

These "child welfare and mental health professional organizations" can lay no claim superior to that of Floridians themselves to the development of adoption policy. And this would hardly be the first occasion on which the views of these "child welfare and mental health professional organizations" have been rejected by a legislature formulating adoption policy.

Perhaps the most recent - and infamous - example of such a rejection occurred when in the 1990's Congress curtailed the practice of race-based

adoption placements with the Multiethnic Placement Act (“MEPA”) and later amendments. In doing so, Congress rejected the views held by CWLA and other organizations championing race-based placements, whose goals included “race-matching” adoptive children to their proposed adoptive parents, while discouraging so-called “transracial” adoptions, chiefly the adoption of black children by white parents.

Ironically, the view favoring race-based adoption placements reversed a trend during the 1950's and 60's, during which changing social conditions had enhanced the acceptance of transracial adoption.<sup>3</sup> This trend was reflected in the “evolving” Standards for Adoption Service of the CWLA itself, which by 1968 provided that families with the capacity to adopt a child of a different race should be encouraged to consider that child. *Davis v. Berks County Children and Youth Services*, 465 A.2d 614, 623 n.8 (Penn. 1983).

In 1972, however, the “experts” changed their minds. The catalyst for the change was the 1972 National Association of Black Social Workers’ sudden condemnation of transracial adoption as a cultural “genocide” because black people “need our own to build a strong nation.”<sup>4</sup> The NABSW

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<sup>3</sup>Cynthia R. Mabry, *Love Alone is Not Enough! In Transracial Adoptions -Scrutinizing Recent Statutes, Agency Policies and Prospective Adoptive Parents*, 42 Wayne L. Rev. 1347, 1351 (1996).

<sup>4</sup> *Id.* at 1352; Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standards*, 59 Notre Dame L. Rev. 503, 517 (1984).

condemnation was so militant and vehement that transracial adoption fell by 39% in a single year.<sup>5</sup>

In reaction, public and private adoption agencies in many state governments deferred to the NABSW condemnation, many establishing race-based placement policies or justifying existing ones.<sup>6</sup> Likewise, the CWLA reversed course on transracial adoption, revising its Standards in 1972 to retreat from an earlier encouragement of transracial adoptions, stating a new CWLA policy that it is “preferable to place a child in a family of his own racial background.”<sup>7</sup>

By the early 1990's, however, the problem of black children languishing in foster care waiting for black families to adopt them grew so severe that it caught the attention of Congress, which in 1994 enacted the Multi Ethnic Placement Act. In the words of one of the Act's chief proponents, Senator Metzenbaum, the country faced a situation where “too many social workers prefer warehousing children in foster care homes and institutions over their placement in loving, permanent interracial homes.” They are wrong in their policy and in their acts.”<sup>8</sup>

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<sup>5</sup>Howard, 59 Notre Dame L. Rev. at 517.

<sup>6</sup>Mabry, 42 Wayne L.Rev. at 1353-54.

<sup>7</sup>Howard, 59 Notre Dame L. Rev. at 518; *See also Davis*, 465 A.2d at 623 n.8.

<sup>8</sup>Mabry, 42 Wayne L. Rev. at 1384.

By 1996, it became apparent that the MEPA's prohibition against denying or delaying an adoption solely on the basis of race did not go far enough, and Congress considered amendments which would strictly prohibit any consideration of race in making an adoption placement.<sup>9</sup> The Adoption Promotion and Stability Act of 1996 was thus enacted, and strictly prohibited any entity receiving federal funds from denying or delaying the placement of a child for adoption or into foster care on the basis of race, color or national origin of the adoptive or foster parent, or the child, involved.<sup>10</sup>

These amendments caused an outcry among the child welfare "experts," particularly when the Department of Health and Human Services interpreted the amendments as disallowing any consideration of race in adoptive and foster care placement decisions. The CWLA itself in a letter to Secretary Donna Shalala strongly urged HHS to reevaluate its position and interpret the amendments to allow for the consideration of race in making adoptive placements.<sup>11</sup>

Other "child welfare and mental health professional organizations"

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<sup>9</sup>Suzanne Campbell, *Taking Race Out of the Equation: Transracial Adoption in 2000*, 53 S.M.U. L. Rev. 1599, 1616-20 (2000).

<sup>10</sup>Mabry, 42 Wayne L. Rev. at 1374.

<sup>11</sup>David S. Liederman, December 21, 1998 letter to the Honorable Donna E. Shalala, *available at* [cwla.org/programs/adoption/davidsletter.htm](http://cwla.org/programs/adoption/davidsletter.htm).

joining in the CWLA brief and cited in it have also gone on record as favoring race-based adoption. The North American Council on Adoptable Children (“NACAC”), who joined the CWLA brief after it was filed, is on record as advocating same race adoptions.<sup>12</sup> So is the National Association of Social Workers (NASW), which says that the 1996 amendments “discredit the profession and the inherent value of social work expertise in the provision of adoption services.”<sup>13</sup> Given this history, any retreat by CWLA may make from its history of advocating race-based adoptions will have been inspired by Congress, not the other way around.

In short, the “expertise” of “child welfare and mental health professional organizations” goes only so far.<sup>14</sup> If there is no constitutional impediment to

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<sup>12</sup>Shelly M. Park and Sheryl Evans Green, *Is Transracial Adoption in the Best Interests of Ethnic Minority Children?: Questions Concerning Legal and Scientific Interpretations of a Child’s Best Interests*, *Adoption Quarterly* 3:4, p. 9 (2000). North American Council on Adoptable Children, *Policy Statements: Race and Ethnicity and Child Welfare*, (February 13, 1999); *Policy Statements: Race and Permanency* (April 14, 2002), available at [www.nacac.org/about/policy statements.html](http://www.nacac.org/about/policy%20statements.html).

<sup>13</sup>Karen Caplan, ACSW, *Inter Ethnic Adoption Provisions of the Small Business Job Protection Act of 1996* (P.L. 104-188): Implications for Social Work Practice, *avail. at* [ww.socialworkers.org/practice/children/adopt.asp](http://www.socialworkers.org/practice/children/adopt.asp)

<sup>14</sup>Notably, the same American Psychological Association CWLA relies on in support of gay adoption (CWLA brief at 32) has recently published in its official journal a study which argues that young children are not necessarily harmed by having sex with adults. Stacey Burling, *Group Drops Plans for Review of Controversial Child Sex-Abuse Study*, *DALLAS MORNING NEWS* 51A (Dec. 3, 1999). Only after intense public pressure did the APA repudiate this

Congress rejecting the positions of CWLA and others favoring race-based adoptions, there can be no constitutional impediment to the Florida Legislature's rejection of their policies regarding homosexual adoption. This is particularly true given the serious flaws pervading the social science research on which they claim to rely in support of their policy favoring gay adoption.

## **II. CWLA's Social Science Does Not Support Reversal of Summary Judgment.**

CWLA's brief also offers a collection of social science research on homosexual parenting to support its claim that the adoption law is unconstitutional. This research is claimed to show that there is no "child welfare basis" to discourage homosexual adoptions, and that homosexuals are "at least equivalent" to heterosexuals in parenting. This body of research cannot support reversal of summary judgment, however, because (1) it was not presented to the district court, (2) it is too methodologically flawed to yield dispositive or even persuasive conclusions, and (3) it may in fact show significant differences in child outcomes as between heterosexual and homosexual adoption.

### **A. Plaintiffs waived any right to rely on social science on appeal by failing to present any to the district court.**

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study. *Id.*

Plaintiffs did not present any social science research to the district court on the issue of whether it is in the best interests of children generally to be raised by a mother and a father who are married. Nor did they present any social science research regarding any aspect of homosexual parenting or the impact of a parent's sexual orientation on a child. As they stated:

[DCF] points to an interest in providing children with both a mother and a father. They suggest that their analysis of any harms posed by the denial of both a mother and a father are undisputed by the Plaintiffs. Plaintiffs do not see the need to get into that expert discussion in this Motion because the fact is that still wouldn't explain the classification.

R5-153-(Transcript of Oral Argument at 27).

Based on their disavowal of "expert discussion" on summary judgment, the district court found that "Plaintiffs did not object to nor disagree with Defendants' statements that married heterosexual families provide children with a more stable home environment, proper gender identification, and less social stigmatization than homosexual homes [either] in their memorandum or during oral arguments." R4-142-16. Accordingly, with that disavowal Plaintiffs "concede[d] that categorically barring homosexuals from adoption in the best interests of Florida's children is on its face a legitimate purpose." *Id.* at 15-16.

After they lost the case, Plaintiffs revisited this strategy, belatedly placing expert affidavits and depositions into the record. R4-144, 14-18. The

district court struck the expert affidavits and depositions as untimely, however, and as an “unfair attempt to change the record for purposes of appeal.” R4-155-3. At this time, Plaintiffs disavow any reliance on the expert affidavits and depositions on this appeal, and do not argue that the district court erred in striking them. Initial Brief, p.6 n.6; Reply in Support of Motion to Correct or Modify the Record on Appeal, p.5. As such, CWLA’s social science cannot support reversal in this case.

**B. CWLA’S Social Science Is Too Unreliable and Flawed to Inform Legislative Policy, Let Alone Constitutional Analysis.**

In its Brief, CWLA asserts that social science evidence shows (a) that homosexual persons have the same parenting skills as heterosexual persons; (b) that children are not adversely affected if raised by homosexual parents; and (c) that the well-being of children is not affected by the sexual orientation of their parents. CWLA Brief at 25-28. Close examination of their sources, however, show this is not so. To the contrary, reviewers approaching the gay parenting issue from a variety of perspectives agree that the body of literature is too flawed and unreliable to be conclusive on such issues.

These flaws and unreliability is typified in many respects by the work of Charlotte Patterson, who wrote several of the studies CWLA relies on in its

brief. *Id.* at 26, 27. The last time Charlotte Patterson testified in a case challenging Florida’s adoption law she was sanctioned by the court for refusing to turn over any data supporting her gay parenting studies, even to the ACLU attorneys who hired her as an expert witness. *Amer v. Johnson*, 4 Fla.L.Wkly.Supp. 854b (Fla. 17<sup>th</sup> Cir. 1997). Questioning Ms. Patterson’s impartiality as a scientist, the trial court excluded her studies from evidence in the case.

Reviews of Ms. Patterson’s studies have revealed “deeply flawed quantitative studies using non-probability samples,” meaning the study participants were not randomly selected.<sup>15</sup> The subjects in Dr. Patterson’s studies have been self-selected, raising the problem that “when either or both the study and comparison groups know the purpose of the study and have a large stake in the substantive outcome, one almost inevitably introduces very serious sample selection biases into a study. The participants have every incentive to paint themselves in the best possible light.”<sup>16</sup> In addition, Dr. Patterson’s studies have relied on a small samples of children, as few as 35.<sup>17</sup>

The rest of CWLA’s studies do not fare much better. In fact, respected

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<sup>15</sup> Robert Lerner & Althea K. Nagai, *NO BASIS: WHAT THE STUDIES DON’T TELL US ABOUT SAME-SEX PARENTING* (2001) at 69.

<sup>16</sup> *Id.* at 74.

<sup>17</sup> *Id.* at 103.

criticism of the studies has prompted even some advocates of homosexual parenting to abandon the “no difference” argument with respect to parenting by same-sex couples.<sup>18</sup> This criticism has come from a number of reviewers evincing a variety of perspectives on the issue of homosexual adoption.

One such critique was made in 1995 by prominent Berkeley sociologist Diana Baumrind, who reviewed among others the work of Charlotte Patterson and David Flaks, evaluating the claim that among other things children of homosexual parents suffered no adverse outcomes, and were not any more likely to develop a homosexual sexual orientation than children not raised in such homes.<sup>19</sup> Problems Baumrind found with the research she reviewed included the use of small, self-selected convenience samples, reliance on self-report instruments, and biased study populations consisting of disproportionately privileged, educated, and well-off parents. *Id.* at 134. Due to these flaws, Baumrind questioned these conclusions on both “theoretical and empirical grounds.” *Id.*

In another such review, University of Southern California sociology

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<sup>18</sup> See, e.g., David Crary (AP), *Kids of Gay Parents Arguably Different, 2 Say; More Likely To Explore Homosexuality*, THE COMMERCIAL APPEAL (Memphis, TN), June 17, 2001, at A17.

<sup>19</sup>Diana Baumrind, *Commentary on Sexual Orientation: Research and Social Policy Implications*, 31 DEVELOPMENTAL PSYCHOLOGY 130, 133-134 (No. 1, 1995).

professors Judith Stacey and Timothy Biblarz reviewed 21 studies from the body of research purporting to examine homosexual parenting.<sup>20</sup> Stacey and Biblarz found serious problems with both the methodology and the conclusions of the studies, notwithstanding their personal support for parenting by homosexual couples.<sup>21</sup> Notably, the authors acknowledge that “there are no studies of child development based on random, representative samples of [same-sex couple headed] families.”<sup>22</sup>

Yet another review of the gay parenting literature was recently commissioned by the Marriage Law Project at the Columbus School of Law in Washington, D.C. The study, performed by statistics consultants Robert Lerner and Althea Nagai, examined 49 of the studies comprising the body of gay parenting research. Due to the deeply flawed methodologies prevalent in every study, Lerner and Nagai were forced to conclude “that the methods used in these studies are so flawed that the studies prove nothing.”<sup>23</sup> Their exhaustive survey revealed that every one of the studies reviewed failed in at least one of ten critical areas tested for scientific rigor.<sup>24</sup> Common problems

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<sup>20</sup>Judith Stacey and Timothy Biblarz, *(How) Does The Sexual Orientation of Parents Matter?*, 66 AM. SOCIOLOGICAL REV. 159 (2001).

<sup>21</sup> *Id.* at 174.

<sup>22</sup> *Id.* at 166.

<sup>23</sup> Lerner and Nagai, NO BASIS at 6.

<sup>24</sup> *Id.*

with the studies included:

1. Failure to use a testable hypothesis or attempt to prove a negative hypothesis.<sup>25</sup>
2. Lack of control methods, such as failure to control for group variables like income and education, or even the complete failure to use any comparison group.<sup>26</sup>
3. No references to the measures used to establish the validity of the studies.<sup>27</sup>
4. Absence of representative samples including self-selected sample groups.<sup>28</sup>
5. Failure to show that the results are not a function of chance factors.

These types of severe flaws pervade the studies on which CWLA relies—none of which even attempt to observe children who are adopted by homosexuals as opposed to the natural children of homosexuals. As a result, the body of social science upon which CWLA relies is not sufficiently well-developed to justify even a change in legislative policy, let alone support a constitutional challenge to the adoption law.

### **C. The Results of CWLA's Own Studies Indicate Differences Between Children Raised in Homosexual versus Heterosexual Homes.**

Among the fundamental flaws pervading gay parenting research is that researchers anxious to confirm that there is “no difference” between children

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<sup>25</sup> *Id.* at 13-16.

<sup>26</sup> *Id.* at 27.

<sup>27</sup> *Id.* at 66.

raised in homosexual versus heterosexual homes routinely ignore their own findings to the contrary. Other serious flaws aside, many studies relied upon by CWLA indicate such differences, although the authors do not admit it.

The surprising part about ignoring such differences, particularly as to the sexual orientation of children of homosexual parents, is that they would be predicted by the major theories of the psychology of child development. As Baumrind stated in questioning the work of Charlotte Patterson, for example, “[t]heoretically, one might expect children to identify with lifestyle features of their gay and lesbian parents.”<sup>29</sup> As well, one “might also expect gay and lesbian parents to be supportive . . . of their child’s nonnormative sexual orientation.” *Id.* As a result, Baumrind said, “[i]t would be surprising indeed . . . if children’s own sexual identities were unaffected by the sexual identities of their parents.” *Id.*

The existence of such differences is not just theoretically predicted, but also reflected in actual study results. As Stacey and Biblarz wrote in their study:

A significantly greater proportion of young adult children raised by lesbian than heterosexual mothers in the Tasker and Golombok

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<sup>28</sup> *Id.* at 75-77.

<sup>29</sup>Baumrind, 31 DEVELOPMENTAL PSYCHOLOGY at 134.

sample reported having had a homoerotic relationship (6 of the 25 young adults raised by lesbian mothers—24% compared with 0 of the 20 raised by heterosexual mothers). . . .

Relative to their counterparts with heterosexual parents, the adolescent and young adult girls raised by lesbian mothers appear to have been more sexually adventurous and less chaste. . . .

[P]arental sexual orientation is positively associated with the possibility that children will attain a similar orientation, and theory and common sense also support such a view. Children raised by lesbian co-parents should and do seem to grow up more open to homoerotic relationships.<sup>30</sup>

Such indications of differences, especially as related to a child's developing sexual orientation, were also noted by Baumrind in her reviews of the literature.<sup>31</sup> The significance of these differences can be a matter of opinion, but they are predicted by psychological theory as well as reflected in some of the CWLA studies despite their other flaws.

This kind of evidence may provide a reason why Florida should be hesitant to adjust its current statutory scheme, since other research points to potential problematic outcomes for those who identify themselves as homosexual.<sup>32</sup> For instance, one study indicated that “[s]ame-gender sexual

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<sup>30</sup> Stacey and Biblarz, 66 AM. SOCIOLOGICAL REV. at 170.

<sup>31</sup> Baumrind, 31 DEVELOPMENTAL PSYCHOLOGY at 134.

<sup>32</sup> Richard Herrell, et al., *Sexual Orientation and Suicidality: A Co-twin Control Study in Adult Men*, 56 ARCHIVES OF GENERAL PSYCHIATRY 867 (Oct. 1999). See also Gary Remafedi, *Suicide and Sexual Orientation*, 56 ARCHIVES

orientation is significantly associated with each of the suicidality measures” gauged in the study.<sup>33</sup> Specifically, “gay, lesbian, and bisexual young people are at increased risk of mental health problems, with these associations being particularly evident for measures of suicidal behavior and multiple disorder[s].”<sup>34</sup> A study from New Zealand singled out major depression, anxiety disorder, conduct disorder, nicotine dependence, and other substance abuse as areas in which young people who identified themselves as having a homosexual orientation were at greater risk.<sup>35</sup> A commentary on this research noted that “homosexual people are at a substantially higher risk for some forms of emotional problems, including suicidality, major depression, and anxiety disorder.”<sup>36</sup>

Nor would it appear that any social stigma regarding homosexuality is to blame for this. In the Netherlands, where same-sex couples are allowed to marry, adopt children, and are generally treated more sympathetically in the

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OF GENERAL PSYCHIATRY 885 (Oct. 1999); Richard C. Friedman, *Homosexuality, Psychopathology, and Suicidality*, 56 ARCHIVES OF GENERAL PSYCHIATRY 887 (Oct. 1999).

<sup>33</sup> David M. Fergusson, John L. Horwood, & Annette L. Beautrais, *Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?*, 56 ARCHIVES OF GENERAL PSYCHIATRY 876 (Oct. 1999).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> J. Michael Bailey, *Homosexuality and Mental Illness*, 56 ARCHIVES OF GENERAL PSYCHIATRY 883 (Oct. 1999).

law and culture, an important study still concluded that “[p]sychiatric disorders were more prevalent among homosexually active people compared with heterosexually active people” and that “people with same-sex sexual behavior are at greater risk for psychiatric disorders.”<sup>37</sup> Under the circumstances, the CWLA studies cannot show that there is no “child welfare basis” for the adoption law, and in no way support a reversal of summary judgment.

**III. Florida’s adoption law is a proper exercise of the legislative prerogative to implement social policy.**

Just as Congress rejected the positions of CWLA and others opposing race-neutral adoptions, the Florida Legislature would be correct to reject their position on homosexual adoption and the conclusions of the flawed social science on which they rely. Critically, even if this rejection were in some way mistaken as a policy matter, it could not be irrational under the circumstances where people of good faith in the social science community can come down on both sides of the issue. CWLA is not entitled to wrap its mere policy preferences in the mantle of the Constitution, but must instead resort to argument and persuasion at the legislative level if it believes the adoption law should be changed.

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<sup>37</sup> Theo G. M. Sandfort, et al, *Same-Sex Sexual Behavior and Psychiatric Disorders: Findings from the Netherlands Mental Health Survey and Incidence*

Such attempts have been made a number of times. Three bills have been introduced in the Florida Legislature over the last ten years; two in the House and one in the Senate. 1993 FL H.B. 1461; 1995 FL S.B. 752; 1995 FL H.B. 349. At the time of this writing, however, a poll of likely Florida voters shows that 40% of them would be less likely to vote for a governor who supported repealing the law. “Gay-Rights Laws Opposed in Poll,” *Knight Ridder Tribune*, (July 2, 2002). Another 40% said the issue would not affect their vote, while only 15% said they would be more likely to vote for a candidate in favor of gay adoption. *Id.*

The mere fact that persuading the legislature may be difficult is no justification to remove the issue from the democratic process. Indeed, despite continual complaints from the ACLU and Plaintiffs’ amici about Anita Bryant’s role in the adoption law’s passage 25 years ago, they have pressed one of America’s best-known celebrities into service to garner public support to repeal the law.<sup>38</sup>

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*Study (NEMESIS)*, 58 ARCHIVES OF GENERAL PSYCHIATRY 867 (Jan. 2001).

<sup>38</sup>“Rosie O’Donnell Works with ACLU Overturning Adoption Ban,” *Gay Today*, (Feb. 18, 2002) available at [gaytoday.badpuppy.com/garchive/events/021802ev.htm](http://gaytoday.badpuppy.com/garchive/events/021802ev.htm)

Given the evolving nature of the science of homosexual parenting and public attitudes regarding it, it is a particularly inopportune moment to remove the issue from the democratic process. CWLA presents no constitutional justification to do so, and there is thus no reason to reverse the summary judgment in this case.

### **CONCLUSION**

The Florida Legislature has adopted a comprehensive adoption Statute which reasonably reflects a concern for well-being of the children of Florida. For the reasons stated above, Amici urge this Court to affirm the decision below.

Respectfully Submitted,

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William C. Duncan  
Utah Bar No. 8174  
Joshua K. Baker  
California Bar No. 207593  
MARRIAGE LAW PROJECT  
Columbus School of Law  
3600 John MacCormack St. NE  
Telephone: (202) 319-6755  
Telefacsimile (202) 319-4459

Mathew D. Staver  
Florida Bar No. 0701092  
Erik W. Stanley  
Florida Bar No. 0183504  
Joel L. Oster  
Kansas Bar No. 18547  
LIBERTY COUNSEL  
210 E. Palmetto Avenue  
Longwood, Florida 32750  
Telephone: (407) 875-2100  
Telefacsimile: (407) 875-0770

Counsel for Amici Curiae

## **CERTIFICATE OF COMPLIANCE**

Amici's brief is in compliance with the requirements of Rule 29(d), incorporating the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. It contains 4673 words, excluding the materials referred to in 11th Circuit Rule 28-1(a) through 28-1(n), according to the word count program in Microsoft Word which was used to prepare the brief.

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William C. Duncan

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent via Federal Express, this \_\_\_\_\_ day of July, 2002, to:

Casey Walker, Moss, Henderson, Blanton, Lanier, Kretschmer & Murphy, P.A. 817 Beachland Boulevard Vero Beach, FL 332964-3406

Matthew Coles, Leslie Cooper, James D. Esseks, The American Civil Liberties Union Foundation 125 Broad Street, 18th Floor New York, NY 10004-2400

Randall C. Marshall, American Civil Liberties Union Foundation of Florida, Inc. 4500 Biscayne Boulevard, Suite 340 Miami, FL 33137-3227

Steven Robert Kozlowski, The Kozlowski Law Firm 927 Lincoln Road, Suite 208 Miami Beach, FL 33139

Elizabeth Schwartz, 407 Lincoln Road, Suite 4-D Miami Beach, FL 33139

Christina A. Zawisza, Children First Project Nova Southeastern University Shepard Broad Law Center 3305 College Ave., Ste. 325 Ft. Lauderdale, FL 33314-7721

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William C. Duncan