Recent Court Decisions Impacting Juveniles

Introduction

Journal staff selected a number of recently decided court decisions involving the interests of juveniles. The cases summarized here include decisions of the United States Supreme Court, Federal Circuit Court of Appeals, Federal District Courts, and the California Court of Appeal. Following the case summaries is a case spotlight which discusses in more detail *Lofton v. Kearney*, a case recently argued in the Eleventh Circuit Court of Appeals.

Education

Grutter v. Bollinger
2003 WL 21433492 (June 23, 2003)

The United States Supreme Court held that diversity is a compelling interest and can justify the narrowly tailored use of race in selecting applicants for admission to public universities.

The University of Michigan Law School ("Law School") had an admissions policy, which aspired to achieve diversity to enrich everyone's education and to make the law school "stronger than the sum of its parts." One type of diversity the policy was committed to achieving was racial and ethnic diversity. In particular, the policy sought to enroll a "critical mass" of underrepresented minority students: African-Americans, Hispanics and Native Americans.

Barbara Grutter applied to the Law School with a 161 LSAT and a 3.8 GPA. She was placed on the waiting list, but was eventually rejected. She filed a class action suit

against the Law School alleging that it discriminated against her on the basis of race in violation of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964,[1] and the Civil Rights Act of 1991.[2]

The district court found the Law School's use of race as a factor in its admissions decision was unlawful. The court determined that the Law School's asserted interest in a diverse student body was not a compelling interest. The Sixth Circuit Court of Appeals reversed the district court's decision. According to the court, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), established that diversity was a compelling state interest. In addition, the court found the Law School's use of race was narrowly tailored enough to pass constitutional muster. The United States Supreme Court affirmed.

Writing for the majority, Justice O'Connor cited Justice Powell's opinion in *Bakke* and endorsed the view that diversity in the student body is a compelling state interest to justify the use of race in university admissions. The Law School did not use a quota system, which would have been unconstitutional, but rather used race as a "plus factor." Justice O'Connor noted that university admission policies must also allow for an individualized consideration of each candidate, and the Law School policy did just that.

The Court also discussed the importance of education in our society, and the need for all individuals, regardless of race, to have access to education. The Court noted that diversity was important in education, because of the unique experiences minority students bring to the classroom setting. Because of the nation's struggle with racial inequality, there was a strong likelihood that minority students would not be admitted in meaningful numbers when their unique experiences are ignored. Lastly, the Court indicated that race-based admissions policies needed to be limited in time. This requirement

[1] 42 U.S.C. § 2000d (2000).
[2] *Id*. § 1981.

could be met by a sunset provision and periodic reviews to determine whether the race-based admission policy is still needed. Justice O'Connor predicted, "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Justice Ginsburg concurred and wrote separately to note that *Brown v. Board of Education*, 347 U.S. 483 (1954) was decided only fifty years ago, and that racism is still alive in the country today. She said we can hope, but not predict, that racial progress in the next twenty-five years will justify elimination of affirmative action.

Justice Scalia, dissenting, asserted that diversity is not an educational benefit, and even if it were, it is not something to be taught in a formal educational setting. He suggested that people needed to learn cross-racial understanding from a much younger age than during law school, such as in kindergarten or in the Boy Scouts.

Justice Thomas, dissenting, began his opinion with a quote from Frederick Douglass: "Do nothing with us! . . . And if the Negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone!" Justice Thomas believed that the Law School's use of race in its admissions violated the Constitution. He also went on to discuss the problems with affirmative action in general. For one, he asserted that affirmative action actually impairs learning among black students. Affirmative action gives minorities a badge of inferiority, because no one can distinguish "between those who belong and those who do not." In addition, Justice Thomas indicated that affirmative action discourages blacks from achieving. When a law school will admit a black applicant with a lower LSAT score, there is no incentive for the black applicant to work as hard to prepare for the test.

Justice Rehnquist, dissenting, looked at the Law School's admissions data and concluded that the goal of critical mass was really a "sham." What the Law School called critical mass was essentially a quota system, according to

the Chief Justice. Justice Kennedy, dissenting, agreed that the policy in effect was a quota system. While he approves of using race to pursue educational diversity, he disapproved of the policy in this case. He criticized the majority for falling short of strict scrutiny review. According to Justice Kennedy, if the Court had engaged in a more searching inquiry, schools would be compelled to seriously explore race-neutral alternatives.

Gratz v. Bollinger
2003 WL 21434002 (June 23, 2003)

The United States Supreme Court examined the use of race in the admission of undergraduate applicants at the University of Michigan's College of Literature, Science and the Arts. The policy allotted an automatic twenty points to each underrepresented minority applicant. The Court found the policy was not narrowly tailored enough to overcome strict scrutiny; therefore, it was unconstitutional.

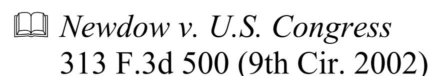
The university had changed its admissions policy several times, but the current one, the one the Court examined in this case, automatically awards any applicant from an underrepresented racial minority twenty points in a 150-point system. Petitioners Gratz and Hamacher had applied to the university but were denied admission. They filed a class action suit alleging that the university's use of race preferences in undergraduate admissions violated the Equal Protection Clause, the Civil Rights Act of 1964, and the Civil Rights Act of 1991.

The district court found that the university had a compelling state interest in achieving a diverse student body. The court then found that the university's admissions policy from 1995 to 1998 ran afoul of *Bakke*, but that the policy from 1999 to 2000, the current policy, was constitutional. When the Court of Appeals decided *Grutter v. Bollinger*, *supra*, the United States Supreme Court granted certiorari in both cases to decide the

constitutionality of considering race in university admissions.

Justice Rehnquist, writing for the majority, first found that the petitioners had standing to bring the case. Then, the Court looked at the admissions policy itself and held the automatic twenty-point system was not narrowly tailored to achieve the state's interest of educational diversity. According to the Court, the point system did not allow for the individualized consideration mandated in *Bakke*. Instead, granting twenty points to every applicant who was a member of an underrepresented minority group made race a decisive factor in the admissions decision. The policy allowed for members of the admission committee to flag an application and consider it individually. But the Court found that this ability to "flag" applications did not pass strict scrutiny review, because it was the exception, not the rule, in the admissions process. Therefore, the university's use of race in its admission of undergraduates violated the Equal Protection Clause of the Fourteenth Amendment.

Justice Ginsburg dissented, distinguishing between policies of inclusion versus exclusion. Given the country's recent history of overt racial discrimination, according to Justice Ginsburg, actions "designed to burden groups long denied full citizenship" cannot be categorized alongside actions that are taken to "hasten the removal" of the "stain of generations of racial oppression." In her view, race is an issue of continuing importance, and the Constitution allows the government to remedy the effects of centuries of law-sanctioned inequality evident in our communities and schools.



Newdow v. U.S. Congress
313 F.3d 500 (9th Cir. 2002)

The Ninth Circuit Court of Appeals found that a father, who did not have legal custody of his daughter, could not file an Establishment Clause claim under his daughter's name. The court, however, found that the father had

standing to challenge the school district's pledge policy as a parent.

Michael Newdow, the father of an elementary school aged child, had brought an action that challenged on Establishment Clause grounds the constitutionality of the school district's policy requiring the teacher to lead students in reciting the Pledge of Allegiance. The United States District Court for the Eastern District of California dismissed the action. Newdow appealed. The Ninth Circuit reversed, holding that a parent has Article III standing to challenge, on Establishment Clause grounds, state action affecting his child in public schools. Addressing the merits of the case, the Ninth Circuit found that the school's pledge policy and the words "under God" violated the Establishment Clause. *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002).

Following that ruling, the mother of Newdow's daughter, Sandra Banning, challenged Newdow's standing to proceed in this suit. Banning presented a California Superior Court custody order that showed Banning had "sole legal custody" of the daughter. However, the order also stated that "both parents shall consult with one another on substantial decisions relating to non-emergency major medical care . . . [and the] psychological and *educational* needs" of their daughter.

Further facts disclosed that Newdow and Banning had an informal relationship as an unmarried couple living together part of the time and sharing informal visitation arrangements before the custody order was entered into. After Banning filed suit, Newdow filed a motion in the state court seeking joint legal custody with Banning, citing "changed circumstances." The superior court enjoined Newdow from representing his daughter as a "next friend" or unnamed party, but reserved the question of Newdow's Article III standing to the Ninth Circuit.

Relying on *Navin v. Parkridge School District 64*, 270 F.3d 1147 (7th Cir. 2001), the Ninth Circuit held that a noncustodial parent, who retains some parental rights, may

have standing to maintain a federal lawsuit. The noncustodial parent's assertion of retained parental rights under state law may not be legally incompatible with the custodial parent's assertion of rights. The Ninth Circuit upheld the superior court's decision that Newdow could not name his daughter as a party, but concluded that he had standing to continue challenging the school district's policy as a parent.

The court had two reasons for its holding. First, the court noted, it was inappropriate for courts to interfere with non-custodial parents' rights to decide how their children are educated for reasons of respecting family privacy and parental autonomy. Secondly, the Ninth Circuit found that while Newdow could not add his daughter to his suit as a party if her mother did not agree, the power of Banning's sole legal custody did not extend to her defeating Newdow's pursuit of *his own* constitutional interests. The Ninth Circuit briefly revisited the merits of their Pledge ruling, expressing concern about indoctrinating an impressionable young daughter with views that non-Christians are "outsiders." For these reasons, Newdow still has a sufficient stake in continuing the proceedings.

Judge Fernandez concurred but noted that the court had decided only the narrow issue of standing in this ruling.

Valeria v. Davis
307 F.3d 1036 (9th Cir. 2002)

The Ninth Circuit found that a law replacing bilingual education with a program to teach children English only did not violate the Equal Protection Clause.

California's Proposition 227, codified as Education Code section 33328, replaced bilingual education with a "structured English immersion" program. Students may receive a waiver from English-only immersion if they meet certain criteria: (1) the student already knows English; (2) the student is ten years old or older and the school agrees that an alternative curriculum would better

serve the student's English education; or (3) when the student has tried the immersion program for thirty days and the school agrees "that the child has special physical, emotional, psychological, or educational needs," and an alternative curriculum would better serve the student's educational development. Students must have parental consent to qualify for a waiver. Proposition 227 also restricts the circumstances under which it can be amended.

After Proposition 227 was passed, students, their parents and civil rights organizations, brought a class action lawsuit against Governor Gray Davis and the State Board of Education on equal protection grounds. After trial, the district court entered judgment in favor of defendants, and plaintiffs appealed. The Ninth Circuit Court of Appeals affirmed, rejecting the students' equal protection argument. Plaintiffs contended that Proposition 227 "unconstitutionally restructures the political process by placing decision-making over bilingual education, and only bilingual education at the state-wide level." The Ninth Circuit disagreed, reasoning that political restructuring only violates equal protection when there is sufficient evidence that the restructuring was motivated by racial animus or purposeful racial discrimination. Plaintiffs argued that Proposition 227 was motivated by discriminatory purposes because eighty-two percent of the Limited English Proficiency students were Latino. Plaintiffs also pointed to the fact that Latinos were singled out by Proposition 227 ballot material, press releases and public opinion pieces. In spite of plaintiffs' arguments, the Ninth Circuit found no racially discriminatory purpose in enacting this new program, just a desire to improve English skills so that students can participate fully in American life.

📖 *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist. 163*
315 F.3d 817 (7th Cir. 2003)

A student, who claimed to be sexually harassed by another student, filed a Title IX action against her school district. The Seventh Circuit Court of Appeals found the school's actions did not rise to the level of a Title IX violation.

Kindergarten student Gabrielle M. alleged that another kindergarten student in her class, Jason L., sexually harassed her by "bothering" her and "doing nasty stuff" to her. Over the course of approximately one month, Gabrielle's teacher and teacher's aide either saw or found out about Jason's conduct, which consisted of jumping on Gabrielle's back, leaning against her with his hands on his crotch, showing his underpants to other students and placing his hands down the pants of another girl. The other girl had placed her hands down Jason's pants as well. Initially, school officials, including Gabrielle's teacher and the school principal, tried to remedy the situation by warning Jason to desist, separating him from other students, calling his mother, and assigning him to detention. At one point, Jason was also taken to the school psychologist, who told Jason and other kindergarteners engaged in such behavior that it was inappropriate. The psychologist later reported that Jason and other kindergarteners involved were "not fully aware of the seriousness of their actions."

In response to these incidents, Gabrielle experienced problems such as bed-wetting, insomnia, loss of appetite and nightmares. At her mother's request, the principal suspended Jason and assigned him to different classrooms, lunch and recess times from Gabrielle's when he returned. However, Jason was eventually allowed to rejoin the other students, although he was still separated from Gabrielle by the playground supervisor. Gabrielle told her mother that Jason talked to her and tried to harass her even after the suspension. After being diagnosed with acute stress disorder and separation anxiety, Gabrielle finally

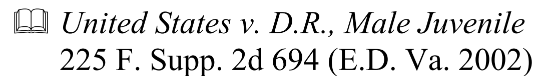
transferred to another school. Through her parents, Gabrielle sued the school district under Title IX. She also sued the school principal, George McJimpsey, for intentional infliction of emotional distress. The district court granted the school district's motion for summary judgment and consequently refused to assert supplemental jurisdiction over the state tort claim.

The Seventh Circuit Court of Appeals affirmed. Under Title IX, a school district receiving federal funding may be liable for damages if it is "deliberately indifferent to sexual harassment of which it had actual knowledge, that is so severe, pervasive and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." The Seventh Circuit found that Jason's conduct did not rise to that standard, because Gabrielle's allegations of him "bothering her" and "doing nasty stuff" to her were too vague to establish that the conduct was severe, pervasive and objectively offensive harassment. Furthermore, Jason's lack of awareness about the severity of his conduct, as reported by the school psychologist, mitigated its offensiveness. The Seventh Circuit also found no deprivation of educational opportunities because the harassment did not have a "concrete, negative effect" on Gabrielle's education. Even with her psychological problems, Gabrielle's grades remained consistent and she did not suffer increased absenteeism. Finally, the Seventh Circuit found that even if Jason's conduct was severe enough to meet the standard, the school's steps in disciplining and separating Jason to prevent the misconduct were not clearly unreasonable and therefore did not constitute deliberate indifference.

Judge Rovner concurred in part and concurred in the judgment. He agreed that the evidence did not support a finding that the school district acted with deliberate indifference. However, Judge Rovner took exception with the majority's implication that the sexual harasser needs to be aware of the seriousness of his actions in order to sustain a sexual harassment claim. Judge Rovner also

disagreed with the majority finding that Gabrielle suffered no concrete, negative effect on her education. Judge Rovner argued that Gabrielle might well have suffered trauma that disrupted her educational experience no matter how resilient she appeared in her school performance.

Delinquency



United States v. D.R., Male Juvenile
225 F. Supp. 2d 694 (E.D. Va. 2002)

The district court found trying a juvenile as an adult was proper in this case, where the alleged crime was committed on federal land, the juvenile defendant had a history of criminal activity, and he was close to his eighteenth birthday.

Defendant was charged with murder on United States Park Service Land, an act of juvenile delinquency. The victim was brutally stabbed to death. Three other individuals were also charged with the crime. The Government moved to proceed under the Juvenile Justice and Delinquency Prevention Act, 18 U.S.C. section 5032, and to certify defendant for transfer to adult proceedings. Section 5032 allows certification for transfer to adult proceedings only when the government certifies to the appropriate district court of the United States that: (1) the juvenile court or other appropriate court of a state does not have jurisdiction or refuses to assume jurisdiction over the juvenile with respect to the alleged act of juvenile delinquency; (2) the state does not have available programs and services adequate for the needs or juveniles; or (3) the offense charged is a crime of violence that is a felony or an offense described in the Controlled Substance Act or the Controlled Substances Import and Export Act and there is a substantial federal interest in the case to warrant exercise of federal jurisdiction. Because a transfer hearing is not a trial on guilt or innocence, but instead a hearing to determine the minor's status, the district court must assume the offenses charged are true.

The test used to determine transferability requires the court to "balance the [rehabilitative] purposes [of the juvenile system] against the need to protect the public from violent and dangerous individuals." Section 5032 also lists several factors for the court to consider when determining whether to allow transfer: (1) the age and social background of the juvenile; (2) the nature of the alleged offense; (3) the extent and nature of the juvenile's prior delinquency record; (4) the juvenile's present intellectual development and psychological maturity; (5) the nature of past treatment efforts and the juvenile's response to such efforts; and (6) the availability of programs designed to treat the juvenile's behavioral problems. Of these factors, the court should give more weight to the nature of the alleged offense.

Defendant opposed the motion, claiming the factors listed in section 5032, as they relate to defendant, do not support a transfer. Defendant argued that the government failed to demonstrate a "substantial federal interest," which would make the certification invalid. The court found that the government had shown several "substantial federal interests." For one, the murder occurred on United States Park Service land and at the time of certification a federal grand jury had indicted two adults for the same murder, so the government had a significant interest in trying all the defendants together. Secondly, the court pointed out that the statute was amended in 1994 to lower the age at which a juvenile can be transferred to adult proceedings from fifteen to thirteen, which showed there was substantial federal interest in prosecuting these crimes. Defendant also objected to the government's motion for certification because it contained language stating only that the Commonwealth Attorney for Alexandria "has declined" to exercise jurisdiction rather than using the statutory language, "refuses to assume jurisdiction." The court held there is no legally significant distinction between "declined" and "refused." Therefore, the federal government had a substantial interest in prosecuting this minor as an adult.

The court reviewed the facts of the case in light of the statutory factors, finding: (1) at the time of the murder, the juvenile was only seventy-five hours away from his eighteenth birthday and had ties to a violent national gang; (2) the murder was pre-meditated and heinous, and the defendant played a leadership role in gang activity; (3) defendant had committed several juvenile offenses beginning at age twelve; (4) defendant was bright and had no discernible learning disabilities; (5) defendant had participated in several rehabilitative programs but still turned to crime; and (6) Alexandria did offer several rehabilitative programs, but due to defendant's age and prior record, there was not enough time to rehabilitate him. The court held the government's motion to transfer defendant to adult proceedings must be granted in the "interests of justice." The court found the government's certification was proper on its face; the factors stated in section 5032 mitigated in favor of transfer; and the risk of harm to the community posed by defendant significantly outweighed his potential for rehabilitation.

In Re Sergio R.
131 Cal. Rptr. 2d 160 (Ct. App. 2003)

The juvenile defendant had met all the statutory criteria for a deferred entry judgment, but the probation department found he was not suitable for deferred entry judgment. Taking the probation department's recommendation into account, the trial judge denied the minor's request for deferred entry judgment. The Court of Appeal affirmed, noting that the minor must be eligible and suitable for a deferred entry program.

Defendant was first brought to the attention of officers when he was seen with a suspect in a burglary case. After searching defendant's home, officers found items taken in the burglary. The next day, officers again approached defendant and searched him. The officers found two "baggies" on the defendant, which contained methamphetamine and marijuana. Defendant had also

been suspended from school and was an admitted gang member. His mother claimed that he was "beyond her control."

Defendant admitted to possession of methamphetamine and first-degree burglary and requested deferred entry judgment under California Welfare and Institutions Code section 790 et seq. Deferred entry is typically a rehabilitation program rather than punishment. The objective criteria for deferred entry judgment include: (1) the minor is more than fourteen years of age; (2) the minor has not previously been declared a ward of the court for commission of a felony; and (3) the minor has not been previously committed to custody of the Youth Authority or if the child was previously on probation, the probation has not been revoked. The trial court concluded that the statute's use of the permissive word "may" instead of the mandatory "shall" gave the trial courts discretion in deciding when to grant a motion for deferred entry of judgment, and it denied defendant's request. Defendant appealed, arguing that the juvenile court disregarded the statutory criteria for granting deferred entry of judgment. He claimed that once the objective criteria had been met, the court must grant deferred entry judgment. Defendant further stated that the trial judge's refusal was an abuse of discretion.

The Court of Appeal examined the statute and affirmed the judgment of the superior court. While the minor did meet the statutory requirements for consideration of a grant of deferred entry, he needed to be both eligible and *suitable* for a deferred entry program. Here, the facts did not support a finding of suitability. In determining whether a minor is suitable for such a program, the court may refer the case to the probation department for an investigation and report. To determine whether the minor would benefit from education, treatment or rehabilitation, the probation department considers the minor's age, maturity, educational background, family relationships, demonstrable motivation, treatment history, if any, and any other mitigating or aggravating factors. The probation

department must also determine whether any deferred entry program will accept the minor. In this case, the probation department advised the court that the minor was not suitable for a deferred entry judgment. Therefore, the trial court did not abuse its discretion in refusing to grant such a judgment to defendant.

People v. Bowden
125 Cal. Rptr. 2d 513 (Ct. App. 2002)

The California Court of Appeal found that using a prior juvenile adjudication as a "strike" for enhancing a sentence under California's "Three Strikes" law does not violate the Constitution.

Three defendants, Tennant, Bowden and Webster were convicted of committing residential burglary, home invasion robbery and false imprisonment by violence at a jury trial. The jury found Tennant had a prior juvenile court adjudication that qualified as a "strike" under the California "Three Strikes" law and had served a prior prison term. All three defendants appealed, but the published portion of the Court of Appeal's decision focused on Tennant's claim that his prior juvenile adjudication was not a "strike."

Tennant argued that the prosecution was required to prove the prior juvenile robbery involved the use of a dangerous or deadly weapon. But the court disagreed. In order for a juvenile conviction to qualify as a "strike," the conviction must be one listed in Welfare and Institutions Code section 707. Previously this section listed "robbery while armed with a dangerous or deadly weapon." Tennant's offense, however, was committed after Proposition 21 deleted the requirement of a "dangerous or deadly weapon." After Proposition 21 was enacted, simple robbery was enough to qualify as a strike.

Tennant further contended the juvenile conviction could not constitutionally qualify as a "strike" because the juvenile court did not afford him a jury trial. The court rejected this argument, following the decision reached in

People v. Fowler, 84 Cal. Rptr. 2d 874 (Cal. Ct. App. 1999). Even though defendant did not have a jury trial right at the juvenile adjudication, the Constitution does not prevent using that juvenile adjudication to increase his sentence for a subsequent adult conviction. Tennant received all the process constitutionally due at the juvenile stage; therefore, the court affirmed the lower court's ruling.

Dependency

📖 *Wash. State Dep't of Soc. & Health Servs. v. Keffler*
537 U.S. 371 (2003)

The U.S. Supreme Court found that the state did not violate the anti-attachment provision of the Social Security Act when it reimbursed itself for foster care expenditures from the children's social security benefits.

The State of Washington, through the Department of Social and Health Services ("DSHS"), provides foster care for abandoned, neglected, and orphaned children. Many of these children receive payments under two titles of the Social Security Act. Children are eligible for benefits under Title II, 42 U.S.C. § 401 et seq., the Old-Age, Survivors, and Disability Insurance plan, which provides benefits, including cash payments to elderly and disabled workers and their survivors and dependents; or Title XVI, section 1381 et seq., the Supplemental Security Income plan, which provides benefits for the aged, blind, or disabled individuals, including children, whose income and assets fall below a certain level. Some children receive payments under both titles of the Act. In some circumstances, the acts allow the appointment of a "representative payee" who must expend funds "only for the use and benefit of the beneficiary, in a way the payee determines is in the [beneficiary's] best interests." The regulations allow social service agencies and custodial institutions to serve as representative payees. The Commissioner of Social Security must be satisfied that

appointment of any payee is in "the interest of" the beneficiary.

DSHS adopted a policy to "attempt to recover the costs of foster care from the parents of [the] children, and to use 'moneys and other funds' of the foster child to offset 'the amount of public assistance otherwise payable.'" Under this policy DSHS uses Social Security benefits of the minors to "reimburse itself" for expenses it incurred in caring for these children. The children brought a class action in state court, alleging that the DSHS's use of their Social Security funds to reimburse itself violated 42 U.S.C. section 407(a) and section 1383(d)(1). Taken together these provisions require that money paid under the Social Security Act "shall not be subject to execution, levy, attachment, garnishment, or any other legal process."

The trial court ruled in favor of the children and enjoined DSHS from continuing to reimburse itself with these funds. The court also ordered restitution of previous reimbursement transfers and awarded attorney fees to the children. DSHS appealed to the state Court of Appeals, which certified the case to the Washington Supreme Court. The supreme court remanded the case for further fact finding and affirmed the trial court's finding that DSHS's actions violated the anti-attachment provision. The supreme court reasoned section 407(a) was intended to protect Social Security benefits from creditors, and DSHS was acting as a creditor in this instance.

The United States Supreme Court stayed the Washington Supreme Court's mandate, granted certiorari and reversed the state court's decision. The Supreme Court disagreed with the state court's characterization of DSHS as a creditor on several grounds. The Supreme Court reasoned that the Act itself does not specifically refer to creditors but instead "imposes a broad bar against the use of any legal process to reach social security benefits." The Court pointed out that the Act allows certain creditors to be named as payees and even allows the representative payee to use social security benefits to satisfy old debts, "so long

as current and reasonably foreseeable needs will be met and reimbursement is in the beneficiary's interest." The Court also noted DSHS is not a creditor because the children they serve are not required to repay the department for their care. The Supreme Court held that the issue was not whether DSHS acted as a creditor, but whether its actions amounted to employing an "execution, levy, attachment, garnishment or other legal process."

The Court concluded DSHS's action were obviously not executions, levies, attachments, or garnishments, because DSHS did not employ "any of these traditional procedures." Therefore, the Court focused on whether DSHS used "other legal processes" in reimbursing itself. The court concluded that although DSHS used a "legal process" in accessing these funds, it did not fall under the statutory definition. The Court interpreted "legal process" in a narrow fashion under the interpretive canons of *noscitur a sociis* and *ejusdem generis*[3] and concluded that DSHS's actions did not amount to employing "other legal processes." The Court also noted Social Security regulations allow payments to be used for "current maintenance" of the child, and DSHS's use of funds was consistent with this requirement. The Court deferred to the administrative regulations under *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

The Court disagreed with the children's assertion that the Social Security funds should be kept in trust for use after emancipation, because, under the Act, the children would lose benefits once their assets reached $2,000. The Court also noted that if the children prevailed, many foster children would lose their benefits altogether because the Act allows departments to be appointed as payees only as a last resort. If departments were not allowed to become payees, there would be no one to be payees for these children, who lack families or other responsible adults.

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[3] "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the specific words."

📖 *Cal. Dep't of Soc. Servs. v. Thompson*
321 F.3d 835 (9th Cir. 2003)

At issue in this case was the interpretation of 42 U.S.C. section 672, which outlines the Aid to Families with Dependent Children Foster Care program ("AFDC-FC"). AFDC-FC supplements the Aid to Families with Dependent Children program ("AFDC") and serves as an incentive for families to take in foster children. A child is eligible for AFDC-FC while in foster care if he or she is eligible for AFDC before being placed in foster care. The Ninth Circuit found that it was not necessary for a child to be AFDC-eligible in his or her home of removal. If a child was living in the home of a relative at the time of removal, and he or she was AFDC-eligible in that relative's home, the child is eligible for AFDC-FC.

In the case of Anthony, he was removed from his mother's home and placed informally with his grandmother, Enedina Rosales, when he was five months old. Rosales eventually became Anthony's court-appointed foster parent. Anthony had many special needs and was hospitalized several times. Rosales had to miss several days of work in order to care for him and eventually lost her job. She applied for welfare benefits for both herself and Anthony. Rosales received TANF[4] benefits and worked part-time but still was having trouble providing for Anthony without the additional funds from AFDC-FC. Anthony qualified for AFDC while in informal placement in Rosales's home, before Rosales was officially named his foster parent. However, Anthony would not have qualified for AFDC payments in his mother's home due to her income level. The court held, in such a case, that Anthony qualified for AFDC-FC benefits, because he was eligible for AFDC while in his grandmother's home. The

[4] In 1997, AFDC was replaced with the Temporary Assistance to Needy Families Program ("TANF"); however, eligibility for AFDC-FC is still linked to eligibility for AFDC. Therefore, the court still referred to AFDC in its opinion.

Ninth Circuit's decision resulted from a series of cases in which the parties disputed the meaning of section 672.

Before May 1997, the California Department of Social Services ("CDSS") interpreted section 672 to allow AFDC-FC benefits only if the child was AFDC-eligible in the home of removal. But in *Land v. Anderson*, 63 Cal. Rptr. 2d 717 (Cal. Ct. App. 1997), the court held the CDSS regulations implementing section 672 were contrary to the plain meaning of the statute. As a result, CDSS issued proposed regulations that would allow a child to qualify for AFDC-FC if he or she was AFDC-eligible either in a parent's home or a relative's home before formal removal. The U.S. Department of Health and Human Services ("HSS") rejected the proposal.

In August 1997, Linda Allen, a foster care provider, filed a petition in state court seeking a writ of mandate to require California to provide AFDC-FC benefits to her foster children. CDSS filed a cross-petition to require HSS to pay matching funds for any payments ordered by the court. HSS moved the case to federal court. The federal court then granted HSS's motion to dismiss.

In the meantime, the California legislature enacted Welfare and Institutions Code section 11402.1 ("WIC section 11402.1"), which prohibited CDSS from making any more AFDC-FC payments pursuant to *Land* until financial participation from the federal government was obtained. As a result, in October 1999, the Ninth Circuit dismissed CDSS's appeal of Linda Allen's case as moot.

In 1999, CDSS also sought district court review of HSS's rejection of CDSS's proposed regulations. HSS had claimed that the proposed regulations did not comply with the requirements of section 642. Rosales, now Anthony's foster parent, moved to intervene. After *Land*, CDSS had granted Rosales's request for AFDC-FC benefits. But in January 1999, after enactment of WIC section 11402.1, CDSS informed Rosales she would not be receiving AFDC-FC benefits. The district court deferred to HSS's interpretation of the statute and upheld HSS's rejection of

CDSS's proposed amendments. CDSS did not appeal the decision, but Rosales did.

The Ninth Circuit found that Rosales had standing to appeal even though California chose not to appeal. In addition, the court found that HSS's interpretation of the statute was unreasonable and therefore was not entitled to deference. Lastly, the court found that a child can qualify for AFDC-FC if on the date the removal petition was filed, he lived in either the home from which he was removed or in the home of some other relative later designated as his foster parent. The court remanded the case to the district court to determine what relief should be granted to Rosales.

Exploitation and Child Abuse

Stogner v. California
2003 WL 21467073 (June 26, 2003).

The United States Supreme Court ruled that California's law extending the statute of limitations for sex-related child abuse to allow prosecution against acts for which the limitations period had already expired violates the Constitution's ex post facto clause. In a 5-4 decision, with Justice Breyer writing for the majority, the Court relied on over two centuries of precedent and most notably Justice Chase's four categories of ex post facto laws in *Calder v. Bull*, 3 U.S. 386 (1798).

In 1993, California's legislature enacted a new statute of limitations for sex-related child abuse. Under the Act, a previously committed sex-related child abuse was subject to prosecution under the new limitations period on three conditions. First, a victim of abuse must have reported the act to the police. Second, the victim's allegations must be supported by clear and convincing evidence. Third, prosecution of the victim's allegations must start within a year of his or her report. In 1996, the state's legislature clarified that the statute revived crimes for which the statute of limitations had already expired.

A grand jury indicted petitioner Marion Stogner in 1998 for sex-related child abuse. Stogner committed his crimes between 1955 and 1973, over two to four decades earlier. Prior to the enactment of California's new law, Stogner's crimes carried a three-year statute of limitations.

Following his indictment, Stogner moved to dismiss the prosecution's complaint on ex post facto grounds. The trial court agreed, but the Court of Appeal reversed, citing *People v. Frazer*, 982 P.2d 180 (Cal. 1999) as authority that the revival of time-barred criminal actions are not unconstitutional. Stogner subsequently moved to dismiss his indictment on both the ex post facto and due process clauses. The trial court and the Court of Appeal denied his motion. The United States Supreme Court reversed.

The Court reversed for three reasons. First, California's new statute of limitations for previously time-barred criminal actions affected the form of harm that the ex post facto clause aims to prohibit. Second, the Act fell directly within Justice Chase's second category of ex post facto laws; it was a new law that "inflict[ed] punishments, where the party was not, by law, liable to any punishment." Third, "legislators, courts, and commentators" agree that the revival of time-barred criminal prosecutions is a violation of the ex post facto clause.

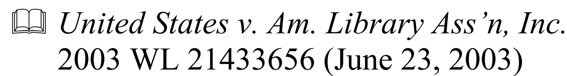
The Court's first reason for striking down California's law centered on the harm against which the ex post facto clause protects, "manifestly unjust and oppressive retroactive effects." Citing Judge Learned Hand, the Court noted that the extension of a statute of limitations after the government has assured an individual that he or she is safe from prosecution "seems to most of us unfair and dishonest." Such a law would negatively affect those who, believing they are no longer in danger of prosecution, do not preserve evidence of their innocence. Additionally, legislators can enact such extensions arbitrarily, which risks "vindictive legislation" and threatens the separation of powers between the judiciary and legislature.

The Court's second justification for invalidating California's law rested on Justice Chase's four categories of ex post facto laws, specifically the second category: "Every law that aggravates a crime, or makes it greater that it was, when committed." The Court found Stogner's punishment under California's law fell under this second category of ex post facto laws. Absent the new statute of limitations, Stogner was no longer liable for his crimes. Additionally, though the Court found it unnecessary to decide, the Act might also fall into Justice Chase's fourth category, laws that "alter the legal rules of evidence [from those] required at the time of the commission of the crime."

The Court's third reason for reversing the California Court of Appeal was the substantial number of courts, commentators, and legislators who agree that the ex post facto clause prohibits the revival of a time-barred prosecution. The Court cited a number of authorities, including a rejected bill in 1867 that sought to revive time-barred prosecutions for treason of Southern congressmen who supported the Confederacy. According to the legislative record, many in the legislature at the time believed the law violated the ex post facto clause. The Court also relied on countless state supreme court decisions, with only the California decision, *Frazer*, ruling to the contrary. Additionally, courts and commentators make a clear distinction between the extension of statutes of limitations for crimes that are not yet time-barred and those for which the limitations period has already run.

Justice Kennedy, joined by Chief Justice Rehnquist, and Justices Scalia and Thomas, dissented, employing a historical attack on the majority's reasoning. Further, the dissent highlighted that the Act's extension of the statute of limitations was hardly "unjust or unfair" in light of the state's compelling interest in prosecuting sex-related child abuse, which possesses high levels of culpability and affects serious social harms.

The majority found the dissent's use of historical arguments problematic. Additionally, in spite of California's important interest in prosecuting against sex-related child abuse, the constitutional protection instilled by the ex post facto clause trumps such concerns. As a consequence, the Court reversed the California Court of Appeal's decision to uphold Stogner's indictment, because California's law reviving time-barred criminal prosecution for sex-related child abuse violated the Constitution.



United States v. Am. Library Ass'n, Inc.
2003 WL 21433656 (June 23, 2003)

The United States Supreme Court ruled that the Children's Internet Protection Act ("CIPA") does not violate the First Amendment.

CIPA prevents public libraries from receiving federal funds unless they install software to prevent minors from accessing obscenity, child pornography and other material harmful to children. The federal funds most directly affected by CIPA's limitations are those available under the E-rate program of the Telecommunications Act of 1996 and those available under the Library Services and Technology Act ("LSTA"). The Telecommunications Act provides internet access to public libraries at a discount and the LSTA provides financial assistance to public libraries in a number of other technology and internet related arenas.

A group of libraries, library associations, library patrons, and website publishers challenged CIPA as a violation of the First Amendment. They based their argument on the fact that the software necessary to implement CIPA's filtering often blocks material that does not fall into the category prohibited under the Act. A federal district court held that CIPA was facially unconstitutional and enjoined its implementation by agencies and officials responsible for withholding federal dollars until library compliance. The district court reasoned that Congress exceeded its powers under the Spending Clause in enacting CIPA

because any library that complies with the Act automatically violates the First Amendment of the Constitution. Additionally, libraries' provision of internet access to the public constituted a designated public forum and was also analogous to traditional public forums promoting First Amendment values. As a result, CIPA's filtering was a content-based restriction on the public's access to speech in a public forum, and thus was subject to strict scrutiny. Under strict scrutiny, the government had a compelling interest in preventing children's access to harmful material, such as obscenity and child pornography. But CIPA's software filtering system was not narrowly tailored to meet that interest, and therefore, the government's interest was insufficient to trump the First Amendment.

The Supreme Court granted certiorari, and reversed. Speaking for a four justice plurality, with two other justices concurring in the judgment, Chief Justice Rehnquist noted that the Court must determine whether CIPA induced libraries to violate patrons' First Amendment rights to access to speech. In doing so, the Court first reviewed the roles of libraries in society. Libraries "[facilitate] learning and cultural enrichment." To meet this goal, libraries have never provided a "universal coverage" of information, but rather "provide materials 'that would be of the greatest direct benefit of interest to the community.'"

In context similar to libraries, the Court has twice held that the government can make content-based decisions on what private speech to make available to the public. The first case related to a public television station's editorial judgments on what private speech to make available. The second case related to funding decisions by the National Endowment for the Arts. In each case the Court found that the public forum First Amendment analysis was not appropriate. Journalists' editorial determinations and aesthetic artistic judgments are inherently content-based and outside the traditional forum framework. Public

libraries and their necessary discretion to fulfill their public missions fall into the same category.

In addition, internet access has no historical foundation to support its categorization as a traditional public forum. In the arena of traditional public forums, a historical context and justification for such a categorization is necessary. Defining internet access in a public library as a designated public forum also fails. The government must make an affirmative opening up of a non-traditional public forum to fall into the designated forum box. This case, according to the Court, is distinguishable from a past case in which the Court found a university created a limited public forum where viewpoint discrimination is unconstitutional. Libraries' acquisition of computers for internet access is not founded on the hope of providing a forum for web publishers, just as they do not purchase books to create a public forum for authors. Consequently, libraries' judgment as to what internet material to make accessible is no different from choosing to acquire certain books and is fully within the libraries' discretion.

The plurality additionally noted that the potential of "over-blocking" by the filtering system is unproblematic because patrons can request the filter be disabled or to unblock specific material. It is this point, the ability for libraries to alter the filter blocking on certain material, that Justices Kennedy and Breyer highlighted when they concurred in judgment. Because of this point, the concurring justices emphasized that the validation of CIPA on its face does not exclude an as-applied challenge to the law if libraries refuse to unblock protected speech that the filtering systems affect.

Two separate dissents noted that there are less restrictive alternatives than CIPA's filtering systems and that there is no guarantee libraries will implement the Act in a constitutional fashion. Even so, by a 6-3 margin, the Court held that CIPA on its face does not force libraries to violate patrons' First Amendment right to access free speech. As a result, the libraries must conform to CIPA or

risk losing federal funding under the E-rate program and LSTA.

Case Spotlight: Lofton v. Kearney

157 F. Supp. 2d 1372 (S.D. Fla. 2001)

CHRISTINE KIM*

Life has been extremely difficult for the children in *Lofton v. Kearney*,[1] a case now being contested in the Eleventh Circuit Court of Appeals.[2] Consider the situation of Steven Lofton's three foster children, who were all HIV positive at birth. Two of them eventually developed AIDS. The third child is John Doe, a plaintiff in this case. Besides being HIV positive, Doe also suffered from cocaine and marijuana in his system as a baby.[3] However, he successfully sero-converted during infancy and does not test HIV positive now.[4] The children's foster parent, Lofton, is a registered pediatric nurse who has raised all three children since infancy with his long-time partner Roger Croteau, also a registered nurse.[5] For over ten years, Lofton and Croteau took care of

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[1] 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

[2] Sherry F. Colb, *The Family That Dare Not Speak Its Name: Florida's Ban on Gay Adoption Reaches the U.S. Court of Appeals for the Eleventh Circuit*, FINDLAW'S WRIT LEGAL COMMENTARY (Mar. 12, 2003), *at* http://writ.news. findlaw.com/colb/20030312.html.

[3] Appellants' Brief at 8, Lofton v. Kearney, 157 F. Supp. 2d 1372 (S.D. Fla. 2001) (No. 01-16723-DD), http://www.lethimstay.com/pdfs/Lofton Appeal.pdf.

[4] Lofton v. Kearney, 157 F. Supp. 2d at 1375.

[5] Complaint Class Action at 1, Lofton v. Butterworth, 93 F. Supp. 2d 1343 (S.D. Fla. 1999) (No. 99-10058), http://archive.aclu.org/court/loftonv butterworth_complaint.html.

these children, with Lofton giving them their medication and looking after them full time.[6]

Although biologically unrelated, all three children have become very close to their foster parents and each other, as the only family they have ever known. In addition to calling Lofton and Croteau "Dad," they refer to each other as brothers and sisters.[7] The Children's Home Society in Florida created a "Lofton-Croteau" award to recognize outstanding foster parenting, and Lofton and Croteau were the first recipients.[8] When Doe was freed for adoption, Lofton submitted an adoption application.[9]

Then, consider the situation of John Roe, whose biological father was an alcoholic unable to retain consistent

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[6] *Id.* Perhaps Steven Lofton's own words best illustrate his life with John Doe:

> John is my son. I am committed to caring for him and providing for all his needs. I have been his parent in every way. For example, every day, I wake him up in the morning and help him get dressed and ready to go to school; I help him with his homework when he comes home from school; we have a family dinner together every night, cooked by Roger; and we spend our evenings engaged in a variety of family activities. I take care of John when he is sick. I am a parent volunteer in John's class once a week and an active P.T.S.A. member. I try to expand his horizons by taking him on trips. I encourage him to pursue the positive, healthy activities that he enjoys, such as swim team and drama. I provide a child-friendly home. I include John's friends in our family, inviting them over for dinner and having them join us on family outings to the beach or park. Roger and I teach John household responsibilities such as yard work, car maintenance and cooking. I discipline him appropriately when he misbehaves. I hug and comfort him when he is upset. I teach him manners, respect and other values that I consider important. I make sure he is safe. He calls me "Dad."

Appellants' Brief, *supra* note 3, at 8.

[7] *Id.*

[8] *Id.*

[9] *Id.*

employment.[10] Douglas Houghton, a clinical nurse specialist, got to know Roe as a patient.[11] When Roe was four years old, his biological father voluntarily left him with Houghton a few days before Christmas and later agreed to terminate his own parental rights.[12] Houghton became Roe's legal guardian and decided to try to adopt Roe.[13]

Lofton's and Houghton's decisions to adopt their children would not seem problematic given these caretakers' medical skills and knowledge, their dedicated parenting, and the close relationship they have formed with their children. In reality, however, they were precluded from adopting because they are homosexual. Florida Statute section 63.042(3) categorically bans all homosexuals from adopting children.[14]

Lofton, Houghton and other gay foster parents brought a class action lawsuit against Florida Attorney General, Robert Butterworth; Secretary of Florida's Department of Children and Families, Kathleen Kearney; and other Florida family services administrators in the United States District Court, Southern District of Florida in 1999. In *Lofton v. Butterworth*, the court found that apart from Lofton, these caretakers lacked standing to bring suit because they had not actually applied for adoption.[15] After these parents amended their complaint to indicate that they had tried to adopt but were denied because of their sexual orientation, the court found standing and proceeded to rule on the merits of their Fourteenth Amendment equal protection and due process claims in *Lofton v. Kearney*.[16] The court then granted Florida's motion for final summary judgment.[17]

In addressing the fundamental rights claim under the due process clause, the court did not deny the deep emotional

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[10] Lofton v. Kearney, 157 F. Supp. 2d 1372, 1375 (S.D. Fla. 2001)
[11] Appellants' Brief at, *supra* note 3, 10.
[12] *Id*.
[13] *Id*.
[14] FLA. STAT. ch. 63.042(3) (1995) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").
[15] Lofton v. Butterworth, 93 F. Supp. 2d 1343, 1348 (S.D. Fla. 2001).
[16] Lofton v. Kearney, 157 F. Supp. 2d 1372, 1377 (S.D. Fla. 2001).
[17] *Id*. at 1385.

attachments that have developed between the foster parent and the child.[18] Indeed, the court "does not doubt that the emotional ties between Lofton and Doe and between Houghton and Roe is [sic] quite close—as close as those between biological parents. Nor does the Court deny that a deeply loving and interdependent relationship between Lofton and Doe and Houghton and Roe exists."[19] The court, however, found that these bonds did not warrant extending the fundamental rights of family privacy, intimate association and family integrity to Lofton's and Houghton's families.[20] Relying on the United States Supreme Court decision in *Smith v. OFFER*,[21] the court found that the Constitution only protects social units with an expectation of permanency.[22] Unlike biological families, foster parents do not have justifiable expectations of permanency with their children.[23] The relationship between a foster parent and child is a short-term arrangement that is directly created by the state, and thus, subject to its approval and oversight.[24] By entering into this contract with the state to be foster parents, people such as Lofton and Houghton acknowledge that they can neither expect to keep their children permanently, nor expect the state to stay out of their family lives.[25] Furthermore, the court found no fundamental right to adopt because that, too, is created by state statute.[26]

The court also rejected the equal protection claim.[27] To justify its homosexual adoption provision, Florida asserted two interests.[28] The first was grounded on public morality, as Florida argued that the provision reflects social disapproval of

[18] *Id*. at 1379.
[19] *Id*.
[20] *Id*.
[21] Smith v. Org. of Foster Families for Equal. & Reform ("OFFER"), 431 U.S. 816, 844 (1977).
[22] *Lofton v. Kearney*, 157 F. Supp. 2d at 1379-80.
[23] *Id*. at 1380.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*. at 1380-85.
[28] *Id*. at 1382.

homosexuality based on prevailing Judeo-Christian ethics.[29] The court rejected this justification, since the equal protection clause does not allow the government to single out a group simply because of disapproval.[30] Florida's second asserted interest was based on the best interests of the children.[31] In the legislature's judgment, it is in the best interest of children to be raised by a home with a married mother and father, thus promoting proper gender role identification and minimizing social stigma.[32] Applying rational basis level of review, the court did not probe into the truth of such statements.[33] Instead, the court deferred to the state's judgment because the foster parents, as the party challenging the provision, did not meet their burden of negating these assertions and negating plausible bases for this law.[34]

On appeal, the ACLU and the other lawyers representing the appellant parents took issue with both Florida's policy, and the district court's ruling.[35] Regarding the due process claim, the appellants contended that the district court erred in interpreting and applying *Smith v. OFFER*.[36] The appellants pointed to language in the *OFFER* opinion strongly suggesting that foster families could be constitutionally protected in some circumstances where strong emotional attachments have developed in the family.[37]

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[29] *Id*.
[30] *Id*.
[31] *Id*. at 1383.
[32] *Id*.
[33] *Id*. at 1384.
[34] *Id*. at 1383-1385.
[35] Appellants' Brief, *supra* note 3, at 8.
[36] *Id*. at 41.
[37] In fact, the exception noted in *OFFER* is perfectly analogous to John Doe's situation:

> At least where a child has been placed in foster care as an infant, has never known his natural parent, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.

In addition, the Supreme Court in *OFFER* also considered the parties' expectations of continuity, and whether a biological parent has a competing interest.[38] In short, the appellants contended that *OFFER* called for a case by case analysis of every family to see if it warrants constitutional protection.[39] Therefore, the appellants argued the district court erred by holding that foster families are *per se* not constitutionally protected, instead of performing a case-specific analysis.[40]

The appellants also refuted the district court's holding that there was no reasonable expectation of continuity in this case.[41] Rather, the district court should have given the Loftons and Houghtons the opportunity to show their reasonable expectations of family continuation.[42] The families, in fact, submitted additional evidence of such an expectation after receiving the district court's ruling by making a Motion to Alter or Amend the Judgment.[43] The Houghtons argued that since Roe's biological father had asked Doug Houghton to look after Roe and had agreed to terminate his parental rights, and since Roe's mother was dead, it was reasonable of the Houghtons to expect Roe to stay with them indefinitely.[44] The Loftons went further to contend that not only was there a reasonable expectation of continuity, but that Florida created that expectation to begin with.[45] Florida had repeatedly assured the Loftons that it would allow them to keep Doe as long as possible and did not recruit other adoptive parents so that Doe could stay with them.[46]

As for the equal protection claim, the appellants argued that Florida's ban was not a genuine attempt to look after the

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Id. at 43 (citing Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977)).
[38] *Id*. at 42.
[39] *Id*. at 43-44.
[40] *Id*. at 45.
[41] *Id*. at 47.
[42] *Id*.
[43] *Id*. at 48.
[44] *Id*. at 49-50
[45] *Id*. at 49.
[46] *Id*.

child's best interests, but a pretext for invidious discrimination against gays and lesbians.[47] When Florida's ban was passed in 1977, Senator Peterson, who sponsored the bill, had stated that the purpose of the law was to tell gays that "we're really tired of you. We wish you'd go back into the closet."[48] The appellants contended that this anti-gay animus is still the true motivation behind this legislation.[49]

The appellants argued that even under rational basis review, this ban should still fail because it has no real relationship to looking after children's best interests.[50] To begin with, keeping gays and lesbians out would not somehow bring more heterosexual parents into the adoptive pool.[51] Given the extreme shortage of adoptive homes for Florida's children, this would decrease the overall number of families wanting to adopt children. Lofton and Houghton did not prevent willing heterosexual parents from adopting their children. Rather, they were alone in wanting to adopt very sick children whom no one else wanted to adopt.[52]

Furthermore, the appellants pointed to evidence on the record showing that Florida does not really believe that gay parents pose a unique and inherent threat to children.[53] Some state welfare officials had admitted that there was no real reason to believe that there was any harm in children associating with gay parents.[54] In addition, Florida's actions show that it does not really believe gay parents are so harmful to children. Florida places children in foster care with gay parents, sometimes even long-term, and without any state supervision.[55] Therefore, if Florida has made a judgment that gay parents do not serve children's best interests, then it certainly has not shown it through its actions.

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[47] *Id*. at 17.
[48] *Id*. at 14.
[49] *Id*.
[50] *Id*. at 26.
[51] *Id*. at 27.
[52] *Id*. at 30.
[53] *Id*.
[54] *Id*. at 31.
[55] *Id*.

The "best interest of the child" justification is all the more dubious considering that Florida does not categorically ban other groups that would pose a far greater inherent risk to children. Although abusive adults and substance abusers would be dangerous to a child's welfare, those groups are taken on a case by case basis under Florida's laws.[56] This inconsistency demonstrates that Florida's ban has no rational relationship to the best interests of the children justification.

Therefore, appellants argued, Florida's interest really rests on expressing moral disapproval of gays and lesbians, or in promoting "proper gender identification." The Supreme Court has established that expressing moral disapproval of a politically unpopular group is not a legitimate state interest.[57] In addition, the Supreme Court has held that perpetuating traditional gender roles is an illegitimate concern.[58] Florida later tried to claim that it was not expressing its own disapproval, but trying to protect the children from the stigma and disapproval of others.[59] This, too, has been found illegitimate. [60]

This case raises important questions about how the state should determine children's best interests and parental fitness. As such, the Eleventh Circuit's ruling will implicate difficult policy concerns about placing children into adoptive homes. This case is especially important in light of the passage of the Adoption and Safe Families Act of 1997 ("ASFA").[61] ASFA seeks to increase the placement of children into good, safe adoptive homes, and to give children a sense of stability. The law implements, among other things, shorter deadlines for permanency plans and hearings[62] and

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[56] *Id*. at 37.
[57] *Id*. at 18-25 (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) and Romer v. Evans, 517 U.S. 620, 633-35 (1996)).
[58] *Id*. at 38 (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729-30 (1982).
[59] *Id*. at 35.
[60] *Id*. at 23.
[61] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).
[62] 42 U.S.C. § 101 (1997).

termination of biological parents' rights if they commit criminal acts.[63] If Florida's section 63.042(3) is upheld, however, the potential pool of good adoptive homes available for children can be reduced if gay parents are automatically eliminated, regardless of their individual parenting abilities. Award-winning parents, such as Lofton and Croteau, will not even be considered. Furthermore, the stability of children like Doe and Roe could be jeopardized if they are taken away from gay parents, with whom they have a stable, loving relationship, to live with heterosexual strangers. Furthermore, Florida's ban might have national consequences as other states, like Arkansas, Idaho, Indiana, Oklahoma and Texas also consider similar gay adoption bans.[64] While Lofton, Houghton, Doe and Roe all await the Eleventh Circuit's decision, the lives of many other children also hang in the balance.[65]

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[63] *Id*. §103.

[64] ACLU, *Gay Foster Parents Sue for Right to Adopt*, http://archive.aclu.org/news/2001/w081201a.html (Aug. 12, 2001).

[65] The Eleventh Circuit will have to consider the recent United States Supreme Court ruling in *Lawrence v. Texas*, 2003 WL 21467086 (June 26, 2003), and decide what it means to this case. After the ruling, the petitioner in *Lawrence* said, "Not only does this ruling let us get on with our lives, but it opens doors for gay people all over the country to be treated equally." CNN.com, *Supreme Court Strikes Down Texas Sodomy Law* (June 27, 2003), *at* http://www.cnn.com/2003/LAW/06/26/scotus.sodomy/index.html.