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March 11, 2015

Governor Rick Scott
The Capitol
Tallahassee, FL 32399-0001

Senator Andy Gardiner
Senate President
The Capitol
Tallahassee, FL 32399-1100

The Honorable Steve Crisafulli
Speaker
Florida House of Representatives
The Capitol
Tallahassee, FL 32399-130

Re: CS/HB 7013

Gentlemen:

This letter provides a legal opinion regarding the constitutional status of Fla. Stat. § 63.042(3), prohibiting adoption by practicing homosexuals, which is the subject of a proposed amendment in the above-referenced bill. As explained in the **Analysis** section below:

- The only court decision regarding the constitutionality of the statute with statewide binding application is the decision of the Florida Supreme Court, holding the statute constitutional under both the Florida Constitution and the United States Constitution. The Florida Second District Court of Appeal had reached the same conclusion, and the United States Court of Appeals for the Eleventh Circuit subsequently agreed the statute is constitutional under the U.S. Constitution.
- The Florida Third District Court of Appeal is the lone court to hold the statute unconstitutional, in disagreement with the Second District, and on grounds which were not reached by the Florida Supreme Court.
- There has been no statewide binding court decision holding the statute unconstitutional, and **there is no court decision or other legal mandate requiring the Florida Legislature to introduce, amend, or repeal any legislation on the subject matter.**

Analysis

The Florida Adoption Act provides, in pertinent part, "No person eligible to adopt under this statute may adopt if that person is a homosexual." Fla. Stat. § 63.042(3).

In 1993, Florida's Second District Court of Appeal held the statute constitutional on both due process and equal protection grounds, under both the Florida Constitution and the United States Constitution. *Florida Dep't of Health & Rehabilitative Servs. v. Cox*, 627 So. 2d 1210 (Fla. 2d DCA 1993). The Florida Supreme Court approved the decision on due process grounds,

but remanded the case for the development of an evidentiary record as to equal protection. *Cox v. Florida Dep't of Health & Rehabilitative Servs.*, 656 So. 2d 902 (Fla. 1995). No further proceedings occurred, however, leaving the Florida Supreme Court opinion undisturbed.

In 2004, the federal Eleventh Circuit Court of Appeals upheld the statute on both due process and equal protection grounds, under the U.S. Constitution. *Lofton v. Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004.). The *Lofton* court concluded:

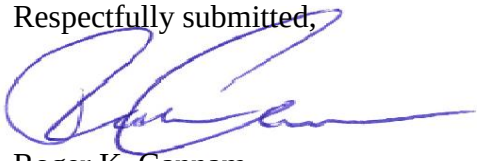
> The State of Florida has made the determination that it is not in the best interests of its displaced children to be adopted by individuals who engage in current, voluntary homosexual activity, and we have found nothing in the Constitution that forbids this policy judgment. Thus, any argument that the Florida legislature was misguided in its decision is one of legislative policy, not constitutional law. The legislature is the proper forum for this debate, and we do not sit as a superlegislature to award by judicial decree what was not achievable by political consensus.

358 F.3d at 827 (internal quotations and citations omitted).

In 2010, the Florida Third District Court of Appeal held the statute unconstitutional, on equal protection grounds only, under the Florida Constitution. *Florida Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. 3d DCA 2010). The court's equal protection analysis disagreed with the Second District's opinion in *Cox* and the federal Eleventh Circuit's opinion in *Lofton*. However, because the Florida Supreme Court had remanded the equal protection issue in *Cox* (for further development of an evidentiary record) without deciding the issue, the *X.X.G.* decision did not conflict with the binding Supreme Court ruling. Governor Charlie Christ elected not to appeal the decision, leaving the issue undecided for statewide purposes.

It is axiomatic that the ruling of one Florida District Court of Appeal is not binding on any of the other four District Courts of Appeal in the state, and of course not on the Florida Supreme Court. Thus, the Third District's lone decision holding Fla. Stat. § 63.042(3) unconstitutional is not the final word on its constitutionality, particularly since it is in the minority. As such, it could never be a mandate to the Florida Legislature to take any action with respect to the statute, which could be held constitutional (and has been) by another District Court of Appeal or the Florida Supreme Court. Likewise, the Executive Branch decision not to defend the law duly enacted by the Legislature carries with it no mandate to the Legislative Branch. Accordingly, any amendment of the statute by the Legislature would be a policy decision by the Legislature, and could not credibly be justified as a judicially-compelled act.

Respectfully submitted,



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