IN THE SUPREME COURT OF THE STATE OF IDAHO

JANE (2013-25) DOE, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	)	Supreme Court No. 41463-2013

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho in and for the County of Ada
Honorable Cathleen MacGregor Irby, presiding

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I. STATEMENT OF CASE AND RELEVANT FACTS

A. Statement of the Case

This appeal arises from a Petition for Adoption involving two minor children. The Petitioner and the children's only legally recognized parent, have raised, nurtured and parented these two children as partners, respectively, for twelve and fifteen years. Through adoption, Petitioner wishes to legally confirm a parent and child relationship with all of its rights and responsibilities with both children. As the children's second parent, she seeks to provide them an enhanced, permanent measure of support, security and protection. The Magistrate assigned to this case dismissed the Petition *sua sponte*, with no prior notice, without written or oral argument and without hearing. It is before this Court on direct appeal pursuant to Idaho Code, Section 16-1512.

Since 1879, Idaho's adoption statutes have declared that "[a]ny minor child may be adopted by any adult person." Idaho Code, Section 16-1501 Despite this plain, unequivocal language, the Magistrate found the adoption statutes ambiguous and construed them to prohibit Petitioner from adopting because she is not married to the children's existing parent, at least not as marriage is currently defined by Idaho law. On this appeal, Petitioner contends that the Magistrate's dismissal was without authority and her construction of the applicable adoption statutes was unnecessary, erroneous and unconstitutional. To be clear, this appeal does not have anything to do with Idaho's laws pertaining to marriage. Under the facts and law that apply to this case, simply put, marriage is not a predicate requirement to adoption in Idaho and never has been.

Pursuant to this Court's Order, all persons affected by this appeal are referred to fictitiously herein. The two male children who are the subject of adoption are John Doe I and John Doe II. The prospective adopting parent, who was the Petitioner below and the Appellant here, is Jane Doe. And, the legally recognized parent of the minor children is identified as Jane Doe II.

B. The Proceedings Below

On August 30, 2013, the Petitioner-Appellant filed a Petition for Adoption of Minor Children in the Magistrate Division of the Fourth Judicial District seeking to adopt as a second parent the children of her long term domestic partner, Jane Doe II. (R0003-0006)[1] The Petition was supported by the birth certificate of John Doe I born in 1998[2] to Jane Doe II; the Findings of Fact, Conclusions of Law and Order of Adoption confirming the adoption of John Doe II by Jane Doe II on June 7, 2002; the Pre-Placement Adoptive Home Study of Lutheran Social Services recommending the adoption of John Doe II by Jane Doe II; and the Pre-Adoptive Home Study of the Idaho Department of Health and Welfare, Child and Family Services approving and recommending the adoptions of John Doe I and John Doe II by the Petitioner without terminating the parental rights of Jane Doe II.

On September 19, 2013, Magistrate Judge Cathleen MacGregor Irby entered an Order of Dismissal and Judgment summarily dismissing the Petition. (R0031-0037) The Order and

[1] All citations to the Clerk's Record on Appeal are with reference to the page numbers assigned in the Record, preceded by the letter "R."

[2] In order to maintain the anonymity of the affected parties, the reference dates mentioned in this Brief are intentionally not date specific. The precise dates, to the extent needed, can be found in the Petition or the documents attached to the Petition.

Judgment were issued *sua sponte*, without any motion or opposition to the Petition, without prior notice to any of the affected parties, without inviting legal briefing, without any apparent consideration of the Pre-Adoptive Home Study and without hearing. In essence, the dismissal was predicated upon the Magistrate's conclusion that "the petitioner must be in a lawfully recognized union, i.e. married to the prospective adoptee's parent, to have legal standing to file a petition to adopt that person's biological or adopted child." (R0033)

On September 30, 2013, the Petitioner filed a Motion to Alter and Amend Judgment and/or Motion for Reconsideration. (R0038-0047) In addition to extensive legal authority, these motions were supported by the Affidavit of Petitioner's legal counsel, advising the Magistrate of numerous unmarried, second parent adoptions which appear to have been approved by other Idaho Magistrates. (R0048-0054) Before any consideration could be given to these motions, Petitioner was compelled by Rule 12.2 I.A.R. to file a Notice of Appeal to this Court on October 3, 2013. (R0055-0058)

C. Statement of Facts

Because the Magistrate dismissed the adoption petition *sua sponte* without hearing or evidentiary consideration, the facts affecting this appeal are limited. Essentially, they are comprised of those pled in the Petition and those that can be discerned from the documents filed in support of the Petition, including most significantly the Pre-Adoptive Home Study from Child and Family Services. (R0019-0029) In reviewing such dismissal, Appellant believes the allegations of the Petition must be accepted as true, together with all reasonable inferences in favor of the Petitioner. *See, Hoffer v. City of Boise*, 151 Idaho 400, 402, 257 P.3d 1226, 1228

(2011); *Walenta v. Mark-Means Co.*, 87 Idaho 543, 547, 394 P.2d 329, 331 (1964) And, the documents referenced in the Petition and attached should be regarded as part of the pleadings. *See Jones v. Idaho Bd. of Medicine*, 97 Idaho 859, 873, 555 P.2d 399, 413 (1976) (rejecting contention that Supreme Court could not consider documents attached to the complaint).

Both of the minor children who are the subject of this adoption have lived with and been parented by Jane Doe and Jane Doe II since their infancy. (R0025) As pled in the Petition (R004) and noted by the Magistrate (R0031), Jane Doe and Jane Doe II have been in a "cohabitating, committed relationship" since 1995.[3] The Pre-Adoptive Home Study in this case reports that "[t]ogether, they planned and prepared for the birth and/or adoption of each of their sons."

John Doe I was conceived by artificial insemination and born to Jane Doe II in 1998. He is presently 15 years of age. (R0019) John Doe II is an African American male born in 2001 in another state. (*Id.*) According to the Home Study, John Doe II's birth mother selected Jane Doe and Jane Doe II as the child's adoptive family and he was placed with them in Idaho two days after being born. (R0020) He was legally adopted by Jane Doe II in 2002 and is presently 12 years of age. (*Id.*; R0008-0011)

[3] While the dismissal order suggests some uncertainty about the partners' marital status on the part of the Magistrate (R0031), the Pre-Adoptive Home Study explains that they had a Declaration of their Commitment Ceremony in Boise on May 3, 1997, obtained a Certificate of Civil Union from the State of Vermont on June 19, 2002 and were issued a marriage license by the State of California following a marriage ceremony on July 26, 2013 in Yreka, California. (R0022) However, this appeal does not involve or seek recognition of their marriage.

From the two pre-adoptive home studies that support the Petition, it is abundantly clear that the Petitioner has fulfilled and maintained a close, loving parental relationship with the two minor children throughout their lives. Years ago, the partners joined a parents' group for adoptive families and have maintained friendships with many parents of children from different races. (R0021) The family shares a substantial home which is well maintained and provides ample accommodations for the entire family. (R0016-17) The Petitioner has been the children's primary care giver, cares for the home and domestic chores, while Jane Doe II works outside the home and is the principal source of family income. (R0023-24) She reads to the younger boy each night (R0025) and helps the older boy with his homework. (R0024) Together, they camp, hunt, fish and attend the children's sporting events. (*Id.*)

The home studies go into much greater detail, of course, but leave no doubt about the strong parental bond between the Petitioner and the two children, who she has raised as their parent for their entire lives. Based on the information reviewed and the observations made during multiple home studies, the Child and Family Services evaluator concluded her report with the following:

> [Jane Doe] has met the requirements mandated by the State of Idaho, in regard to age, health and physical fitness, criminal clearance, education, employment, income, and the ability to parent adopted children; additionally, she has the full support of extended family members and friends. This worker approves and recommends [Jane Doe] for the adoption of [John Doe I and John Doe II].

II. ISSUES ON APPEAL

Three issues are presented by this appeal. All involve questions of law, including statutory interpretation, and are subject to this Court's free review. *Idaho Dept. of Health & Welfare v. Doe,* 151 Idaho 605, 608-09, 261 P.3d 882, 886 (App. 2011); *Hoffer v. City of Boise, supra*; *Matter of Baby Boy Doe*, 123 Idaho 464, 469, 849 P.2d 925, 930 (1993)

A. Whether the Magistrate exceeded her authority by dismissing the adoption petition *sua sponte*, without prior notice, argument or hearing.

B. Whether Idaho's adoption statutes by their plain language allow a second parent to adopt regardless of marital status.

C. If Idaho's adoption statutes are ambiguous as to whether a second parent can adopt regardless of marital status, whether the statutes should be construed to permit second parent adoptions based on legislative history and purpose and to avoid an unconstitutional result.[4]

III. ARGUMENT

In this case, the Magistrate acted without authority by dismissing this Petition *sua sponte*, without a hearing or an opportunity for briefing. Even assuming that the Magistrate had the authority to dismiss the petition *sua sponte*, for multiple reasons, the Magistrate erred in denying the petition for adoption and depriving Petitioner a hearing to determine the best interests of the

[4] A "second-parent adoption" is an adoption in which an individual who is raising children together with a non-spousal legal parent, either adoptive or biological, adopts the children without relinquishment of the existing parent's rights. Here, there is no legal parent other than Jane Doe II, who wishes to consent to the second parent adoption without relinquishing her parental rights.

prospective adoptees. First, the Idaho adoption statutes that apply to this case are not ambiguous. The plain language of the key statute clearly expresses that "any adult person" may adopt "any minor child" unless the prospective adoption fails to satisfy certain other expressed statutory requirements. Second, Jane Doe and the affected children meet all of the statutory requirements relevant to this case and there are no statutes which expressly or implicitly disallow the proposed adoption. Third, nothing in the adoption statutes limit adoptions to married spouses, and the adoption statutes specifically authorize a court to allow a second parent to adopt without terminating the rights of the existing parent regardless of the adopting parent's marital status. Fourth, even if there were any legitimate ambiguity, the legislative history and purpose, underlying policy considerations and rules of construction support Petitioner's strict interpretation. Finally, the analysis proposed by the Petitioner avoids potentially unconstitutional interpretation and application of the adoption code.

A. The Magistrate Had No Authority to Dismiss the Adoption Petition Without Allowing Argument or an Evidentiary Hearing

As a threshold matter, Petitioner questions the authority of the Magistrate to dismiss her petition for adoption on her own, without prior notice to the Petitioner, without giving the Petitioner an opportunity to submit written or oral argument or without an evidentiary hearing. Had any of this not occurred, perhaps, the result would have been the same. However, by acting unilaterally the Magistrate (1) has deprived the Petitioner of any opportunity to clarify uncertainties and arguable deficiencies in the petition and supporting documents, and to enlighten the lower court on persuasive points of law like those addressed on this appeal, (2) has

evaded any consideration of whether the best interests of the children would be promoted by the adoption and (3) has needlessly constrained this Court's fully informed appellate review. The interests of jurisprudence are not served by summary dismissals, particularly when they result in a direct appeal to this Court. *See* I.C. § 16-1512

It is unclear by what presumed authority the Magistrate took action on her own in this case. The sole ground for dismissal expressed by the Magistrate Court is standing.[5] (R00033) But, the Order of Dismissal and Judgment (R0031-0036) fail to identify any statute or civil rule which supports the *sua sponte* dismissal of an adoption petition without allowing the petitioner to present anything except the petition regarding her eligibility to adopt.

The Magistrate did not have the authority to dismiss this Petition without a hearing or opportunity for briefing. First, the Adoption Code requires the court to hold a hearing at which the person petitioning to adopt and the child to be adopted are present. I.C. § 16-1506(1) It further provides that the court "must examine all persons appearing" in the case to determine whether the best interests of the child will be promoted by the adoption. I.C. § 16-1507 The Magistrate in this case neither held a hearing nor examined any of the individuals involved.

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[5] The doctrine of standing, this Court has said, "is imprecise and difficult in its application." *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989) As typically applied, it focuses on whether the party seeking relief has "a personal stake in the outcome of the controversy as to assure the concrete adversaries which sharpens the presentation upon which the court so depends." *Id.* There are adoption cases from other jurisdictions where courts have used the term "standing" with respect to foster parents and siblings. *See Chester County Children & Youth Services v. Cunningham*, 656 A.2d 1346, 1347-49 (Penn. 1995); *Michael P v. Greenville County Dept. of Social Services*, 684 S.E.2d 211, 214-16 (S.C. App. 2009); *S.J. and I.J. v. W.L. and L. C.*, 755 So.2d 753, 755 (Fla. App. 4th Dist. 2000). However, none of these cases involve *sua sponte* dismissal.

The Idaho Rules of Civil Procedure expressly provide for *sua sponte* dismissal in only a few narrow circumstances. A court may on its own motion dismiss cases which lack subject-matter jurisdiction, I.R.C.P. 12(g)(4) ("[w]henever it appears by suggestion of the parties or otherwise..."), or which are inactive, I.R.C.P. 40(c) (upon notice and "[i]n the absence of a showing of good cause."). However, neither of these Rules apply in this case. Even if they did, these Rules do not appear to allow courts to *sua sponte* dismiss petitions on the merits without providing the parties prior notice and an opportunity to be heard. *See, e.g., Hendrickson v. Sun Valley Corp.*, 98 Idaho 133, 559 P.2d 749 (1977); *Laughy v. Idaho Dept. of Transp.*, 149 Idaho 867, 243 P.3d 1055 (2010).

Inasmuch as the Petition was dismissed on the pleadings without any apparent consideration of facts beyond the allegations in the Petition, perhaps it could be assumed that the Magistrate relied upon Rule 12(b)(6), I.R.C.P. Rule 12(b)(6) dismissals have "generally been viewed with disfavor because of the possible waste of time in case of reversal of dismissal of the action, and because the primary objective of the law is to obtain a determination of the merits of the claim." *Wackerli v. Martindale,* 82 Idaho 400, 404, 353 P.2d 782, 784 (1960). In determining whether a pleading does or does not state a cause of action, the rule is the same as a summary judgment standard. *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989) "The non-moving party is entitled to have all inferences from the record viewed in his favor." *Id.* As with motions under Rule 8(a) "every reasonable intendment will be made to sustain a complaint." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (App.1992) A court may dismiss "only 'when it appears beyond doubt that the plaintiff can prove no set of

facts in support of [the] claim which would entitle [the plaintiff] to relief.'" *Id.*, quoting *Wackerli,* 82 Idaho at 405, 353 P.2d at 785. But, nowhere in her Order does the Magistrate identify pleading deficiencies which might warrant dismissal for failure to state a claim on which relief could be granted. A reading of the Petition (R003-006) certainly does not reveal any obvious pleading deficiencies.

The limited set of circumstances in which an Idaho court may dismiss a case on its own motion reflects a policy that each party should have a full and fair opportunity to present relevant facts and legal arguments before an issue is resolved. For example, in *Sirius LC v. Erickson*, 144 Idaho 38, 43, 156 P.3d 539, 544 (2007), this Court reversed a trial court's grant of summary judgment on defenses that were not raised in the summary judgment motion and that no party raised in the summary judgment stage. In *Erickson*, the defendant asserted thirteen affirmative defenses and then moved for summary judgment on one defense. The trial court granted summary judgment for the plaintiff on all defenses, including those not raised in the motion for summary judgment. 144 Idaho at 40, 156 P.3d at 541. This Court reversed, holding that the rules only permit the court to grant summary judgment on issues placed before the court by the moving party. 144 Idaho at 43, 156 P.3d at 544.

Finally, precluding the Petitioner from any opportunity to be heard on her petition to adopt also denies Petitioner the guarantee of access to courts. Idaho Constitution Article I, Section 18 provides that "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice." By preventing Petitioner from even

arguing why she is entitled to petition to adopt under the Idaho statutes, the Magistrate denied her a remedy merely because she is in an unmarried, same-sex relationship with the children's existing parent. *Cf. State Dep't of Health & Welfare v. Slane*, WL 5474149 (Idaho Oct. 2, 2013) (refusing to hear a motion to modify child custody and support because the moving parent was guilty of contempt of court violated the Idaho constitutional guarantee of access to courts.)

The Petitioner believes the Magistrate's refusal to hear her claim also violates the Petition Clause of the First Amendment to the U.S. Constitution, which "protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea, Pa. v. Guarnieri*, __ U.S. __, __, 131 S.Ct. 2488, 2494 (2011). A court's failure to follow substantive rules of procedure does not necessarily violate a petitioner's constitutional rights. However, where a party is completely denied the ability to argue the merits of her claim, as Petitioner was here, she is effectively denied access to the courts.

Because the Magistrate had no authority to dismiss the petition at this stage, and because it contravenes the important legal principle that parties should have an opportunity to be heard before their cases are dismissed, the dismissal was procedurally improper.

B. The Magistrate Erroneously Interpreted Idaho's Adoption Statutes

"Adoption was not recognized at common law and thus the right to adopt a child is a right which is wholly statutory. As such the courts are required to construe strictly the provisions relating to adoption." *Matter of Adoption of Chaney*, 126 Idaho 554, 558, 887 P.2d 1061, 1065 (1995) (citing *Vaughan v. Hubbard*, 38 Idaho 451, 457, 221 P. 1107, 1108 (1923)). When interpreting statutes the standard is well established.

> Interpretation of a statute begins with an examination of the statute's literal words. Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction. Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations.

Stonebrook Construction, LLC v. Chase Home Finance, LLC, 152 Idaho 927, 931, 277 P.3d 374, 378 (2012), quoting *Curlee v. Kootenai County Fire & Rescue*, 148 Idaho 391, 398, 224 P.3d 458, 465 (2008)

"If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation." *Doe,* 151 Idaho at 609, 261 P.3d at 886. "[T]his Court must give effect to the statute as written, without engaging in statutory construction." *In re Daniel W.*, 145 Idaho 677, 680, 183 P.3d 765, ___ (2008) Where the statutory language is unambiguous, this Court has consistently held that "legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993) "Unless the result would be palpably absurd, this Court assumes the Legislature meant what is clearly stated in the statute. *Id.* Yet, when statutory construction is necessary then there is a "duty to ascertain the legislative intent and give effect to that intent," in which "not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history." *Doe, supra.*

1. **Idaho's adoption statute plainly and unambiguously authorizes this adoption.**

Idaho Code, Section 16-1501 provides that "[a]ny minor child may be adopted by any adult person residing in and having residence in Idaho, in the cases and subject to the rules prescribed in this chapter." (emphasis added) The controlling language of this statute, proscribing that "any adult person" is eligible to adopt a minor child, has been part of Idaho's adoption statutes since their inception in 1879. Terr. Sess. 1879, p. 8, § 1; *Chaney*, 126 Idaho at 557, 887 P.2d at 1064. In 1951, the Legislature added the condition that the prospective adopting adult must reside and have residence in Idaho. 1951 Sess. Law., Chp. 283, § 1. But beyond this minor clarification, for 134 years the Idaho Legislature has not found it necessary or desirable to qualify or restrict minor adoptions by "any adult person."

Petitioner's research reveals no reported Idaho decision that has questioned or attempted to define the meaning of the phrase "any adult person" in this statute. No doubt this is because the plain, usual and ordinary meaning of this phrase is obvious and not subject to reasonable debate or confusion. The term "adult person" is not at issue in this case, but clearly means a human being who is over the age of eighteen. *Chaney,* 126 Idaho at 556-57, 887 P.2d at 1063-64. The modifying word "any" indicates without restriction, exclusion or exception. *See, Von Lindern v. Union P.P. Co.*, 94 Idaho 777, 779, 498 P.2d 345, 347 (1972), quoting *Emmolo v. Southern Pacific Co.*, 204 P.2d 427, 429 (Cal.1972) ("[t]he word 'any' is defined in part as 'Indicating a person, thing etc., as one selected without restriction or limitation of choice, with the implicate that everyone is open to selection without exception...").

The Magistrate's observation that the adoption statute is silent on the marital status of the prospective adopting person and does not expressly reference adoptions by cohabitating committed partners (R0031-0032) does not render the language of "any adult person" somehow ambiguous. "[A]mbiguity is not established merely because the parties present differing interpretations." *Hayden Lake Fire Protection Dist. v. Alcorn,* 141 Idaho 307, 312, 109 P.3d 161, 166 (2005). "A statute is ambiguous where the language is capable of more than one reasonable construction." *City of Sandpoint v. Sandpoint Independent Hwy Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003). "If the language of the statute is reasonably susceptible of only one interpretation, the statute is unambiguous and there is not occasion to look beyond the text of the statute." *State v. Yzaguirre*, 144 Idaho 471, 476, 163 P.3d 1183, 1188 (2007).

I.C. § 16-1501 also does not expressly permit, disallow or otherwise limit adoptions among persons of different races, religions, national origins or genders. Nor does it qualify those persons eligible to adopt according to their health, wealth, education, politics, behaviors or orientations. Nonetheless, no one could reasonably read the absence of such expressions as an ambiguity or limitation on the meaning of "any adult person."

The phrase "any adult person" does not require construction, analysis or inquiry beyond its plain language and obvious meaning Indeed, such an inquiry would violates the principles of statutory construction historically embraced by this Court.

> A well-settled rule of construction is that the words of a statute must be given their plain, usual and ordinary meaning, in the absence of any ambiguity. *Walker v. Hensley*, 107 Idaho 572, 691 P.2d 1187. Moreover, if a statue is unambiguous, it is [the court's] duty to follow the law as enacted. If the statute is unwise, the

> power to correct it resides with the legislature, not the judiciary. *Newlan v. State*, 96 Idaho 711, 535 P.2d 1348 (1975).

State Board of Accountancy v. League Services, Inc., 108 Idaho 157, 159, 697 P.2d 1171, 1173 (1985). The language of the adoption code is broad and without exception. This intent is the only reasonable interpretation of the statutory language. By the language of Idaho Code, Section 16-1501, there is no doubt the Petitioner – an adult person – is eligible to petition for adoption of minor children. As we discuss next, had the Magistrate allowed the petition to be adjudicated, there is equally no doubt all other statutory prerequisites for the adoption would have been satisfied.

2. Jane Doe meets all of applicable statutory requirements to adopt.

Before an adoption of a child may be granted, a number of statutory requirements must be satisfied. In sum, the adoption statutes applicable to this case require that: (1) the petitioner must be an adult who has resided in Idaho for at least six months prior to the filing of the petition (I.C. § 16-1506); (2) the prospective adoptive parent must be at least 15 years older than each child to be adopted or at least 25-years-old (I.C. § 16-1502); (3) a home investigation must be completed (I.C. § 16-1506 (3)); (4) all persons required to consent to the adoptions must be noticed and give consent (I.C. §§ 16-1504, 16-1505, 16-1506(2)); and (5) the judge must examine all persons appearing in the action and determine that the adoptions promote the best interests of the children (I.C. § 16-1507).

All of these requirements are or would be met in this case. First, Jane Doe is an adult who has lived in Idaho for over six months. (R0026) Second, Jane Doe has had a substantial

parental relationship with the children for over one year (actually for 12 and 15 years in this case), and in any event, she is more than 15 years older than the children and over age 25. (R0021) Third, a pre-placement home study has been completed and submitted to this court, approving and recommending the adoptions. (R0019-0029) The only remaining requirements are for the magistrate to examine the persons appearing in this action, accept the necessary consents, and determine whether the adoption promotes the best interests of the children.[6] Jane Doe II, as the only existing legal parent, and the children, because they are over age 12, are the only persons required to be noticed and who must consent to the adoptions.[7] *See* I.C. §§ 16-1504, 16-1505, 16-1506(2). Under the plain language of all applicable statutes, Jane Doe is entitled to proceed with the adoption of John Doe I and John Doe II. She meets all the statutory requirements to adopt, and should be entitled to a hearing on whether the adoption is in the best interests of the children.

3. **Idaho's adoption statutes explicitly permit a second parent to adopt without terminating the rights of the existing parent, regardless of marital status.**

A second parent may adopt a child without terminating the rights of the original parent, regardless of marital status, under the unambiguous terms of Idaho's adoption statutes. I.C. §16-1509 provides that an adoption by another person or persons typically terminates the rights of the existing parents "[u]nless the decree of adoption otherwise provides." This language was

[6] Jane Doe submits that this adoptions clearly promotes the best interest of the children. *Infra*, Section C. 2 at 24.

[7] In cases where the child has a putative biological father, there are additional notice requirements not relevant here, as one child was conceived through an anonymous sperm donor and the other child was adopted by Jane Doe II, who is currently the only legal parent of both children.

added by the Idaho Legislature in 1969 and the statute has remained unchanged since the amendment. 1969 Sess. Law., Ch. 334, § 1

As a general matter, I.C. 16-1509 contemplates that at the time of adoption any natural parents are relieved of all parental duties and responsibilities, and all rights of the adopted child through such natural parents are terminated. However, the amending language acknowledges there may be exceptions, and places no limitation on what those exceptions might be. By its plain, permissive language, the provision allows for stepparent adoptions without termination of parental rights, as well as second parent adoptions where an existing parent maintains parental rights and obligations. Nothing in this provision qualifies the exception as applicable to certain cases and not others, and there is no basis for reading the provision to limit the application of this exception only to married spouses. Section 16-1509 plainly allows this adoption by Jane Doe without terminating the rights of Jane Doe II. Under a very similar statute, the Pennsylvania Supreme Court recognized that state's adoption statutes allowed a second parent to adopt regardless of marital status because the statute provided that an adoption terminates the rights of the existing parents unless the court "for cause shown determines otherwise." *In re Adoption of R.B.F.*, 803 A.2d 1195, 1201-1202 (Penn. 2002).

4. **There is nothing in Idaho's adoption statutes which requires an adopting parent to be married in order to adopt.**

Petitioner's eligibility to adopt in this case is controlled by Idaho Code, Section 16-1501 ("any adult person"), and the other statutory prerequisites addressed above, which she clearly satisfies. But, even looking beyond these provisions, nothing in the plain, express language of

Idaho's entire adoption code requires the Petitioner to be married to the existing parent as a prerequisite for adopting the children in this case. *See* I.C. § 16-1501-15. Some statutes provide exceptions and different procedures for cases where the petitioner is married to a birth parent. *See* I.C. § 16-1502 (age restrictions generally applicable to adoptions do not apply where the prospective adoptive parent is married to the birth parent); I.C. § 16-1503 (requiring the consent of a prospective adoptive parent's spouse, if the adopting parent is married); I.C. § 1506(3) (requiring home study only on judge's order when the prospective adoptive parent is married to the birth parent). As we discuss in the statutory construction portion of the Brief below (*infra*, Section C. 1 at 19-22), all of these statutes address a limited circumstance where the adoptive parent and birth parent are in fact married. But nothing in these provisions mandates that the petitioning adult must be married to the birth parent, and there is no provision of Idaho's adoption code whatsoever which expresses such a requirement.

The Idaho legislature has not chosen to restrict unmarried adults like Jane Doe from adopting, and in fact, has created an adoption scheme that plainly allows Jane Doe to adopt upon an ultimate determination by a magistrate that the adoption is in the best interests of the affected children. By creating a requirement that the petitioner be married to the birth mother, the lower court erroneously inserted "terms and provisions that are obviously not there," and was "infringing on the legislature's power to determine important public policy questions," contrary to the rules of statutory construction. *See Chaney*, 126 Idaho at 558, 887 P.2d at 1065.

C. Even Assuming That the Statutes Are Ambiguous, Allowing Petitioner to Adopt Is Supported by the Overriding Policy and Purpose of the Adoption Statutes and Avoids a Potentially Unconstitutional Result.

As we have addressed above, that Idaho's adoption statutes do not expressly mention "the adoption of a person's adopted and/or biological children by that person's cohabitating, committed partner" (R0031-32), does not make the statutes subject to two or more reasonable interpretations on the adopting person's marital status, so as to render the law ambiguous. (*Supra,* Section B.4 at 17-18) However, even if this court were to agree that silence on this narrow issue presents an open invitation for judicial construction, the Magistrate misapplied the rules of constructions and failed to adequately and properly analyze the entire statutory scheme, legislative history and policy of the adoption statutes in denying Jane Doe's petition. A correct analysis of these considerations further support Petitioner's interpretation of the adoption statutes. Moreover, Petitioner's plain interpretation and strict construction avoids potential constitutional defects in the statutes which would be promoted by the judicial insertion of a marriage pre-requisite.

1. The Magistrate misinterpreted and misapplied the rules of statutory construction.

Without identifying any specific provision or language believed to be ambiguous, or any interpretive result that would be "palpably absurd," *see In re Daniel W*, 145 Idaho at 680, 183 P.3d at 768, the Magistrate concluded "[t]his case presents an issue of statutory interpretation." (R0032) Based on the decision from the Court of Appeals quoted, *Smith v. Smith*, 131 Idaho 800, 802, 964 P.2d 667, 669 (App. 1998), and relied upon (R0032), the Magistrate was

apparently under a misunderstanding that every question of statutory interpretation opens the door to consideration of matters extrinsic to the statute's literal words. If so, such analysis is clearly contrary to the more recent expressions of this Court. *See, Stonebrook Construction,* 152 Idaho at 931, 277 P.3d at 378 ("[o]nly where the language is ambiguous will [a court] look to rules of construction"); *Doe,* 151 Idaho at 609, 261 P.3d at 886 (absent ambiguity, "there is no occasion for the court to resort to legislative history or rules of statutory interpretation"); *City of Sun Valley,* 123 Idaho at 667, 851 P.2d at 963 ("legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clear intent of the legislature"). It was, we submit, error.

In her efforts to interpret whatever unidentified statute she might have found unclear, the Magistrate looked at other statutes she regarded as in *pari materia.* (R0032-33) The rule of construction she followed instructs courts to consider statutes which relate to the same subject matter for the purpose of construing all related provisions "in harmony with each other." *Grand Canyon Dorieu v. Tax Commission*, 124 Idaho 1, 4, 855 P.2d 462, 465 (1993); *Christensen v. West,* 92 Idaho 87, 88, 437 P.2d 359, 360 (1968) However here, once again, the lower court misapplied the rule.

In her dismissal order, the Magistrate relied upon I.C. §§ 16-1503 and 16-1506(1) to support her conclusion that "the petitioner must be in a lawfully recognized union." (R0033) These statutes neither express nor imply anything to that effect. Nor are they in *pari materia* or disharmony with Idaho Code, Section 16-1501. Both provisions merely address a circumstance where the petitioner is married and impose certain conditions on such cases, and only to such

cases. In this particular circumstance, the code says both spouses must consent to the adoption unless lawfully separated or incapable of giving consent, I.C. § 16-1503, and "the spouse of the petitioner, if a natural parent of the child" must appear before the court at the adoption hearing. I.C. § 16-1506(1) While I.C. §§ 16-1501, 16-1503 and 16-1506(1) are all part of the adoption code, the subject of the pertinent language of Section 16-1501 is who is eligible to adopt a minor child. To the contrary, the subject of Sections 16-1503 and 16-1506(1) is procedural, with application only to certain situations. Sections 16-1503 and 16-1506 (1) do not express that a petitioner under any set of circumstances must be married. And, a plain reading of Section 16-1501 as allowing second parent adoptions irrespective of marriage is not in disharmony with either of the other statutes.[8]

Similarly, other states have also recognized that the mere fact that their adoption statutes provide some rules that apply only to married spouses does not mean that only married parents are allowed to adopt. For example, the highest court in the District of Columbia held that a provision requiring that if the adopting parent is married, his or her spouse must join the petition – a provision similar to Idaho Section 16-1503 – did not mean that the legislature intended to limit adoption only to married spouses. *M.M.D. v. B.H.M*, 662 A.2d 837, 844 (D.C. 1995). The court explained that just because the statute provides "special rules" for married adopting

[8] The Magistrate's reliance on provisions of Idaho Code, Title 32, Chapter 2, "Marriage – Nature and Validity of Marriage Contract" under the *pari materia* rule (R0033) is also incorrect. The provisions cited by the court below have no bearing on an adoption statute which is silent on marriage and permits adoption of minor children by "any adult person." And, unless this Court intends to read these provisions broadly as a legislative directive to discriminate against same-sex parents in adoptions, there is no disharmony with I.C. § 16-1501.

parents, "[these rules] are not necessarily exclusive descriptions limiting adoptions to couples who are married." *Id.* at 847-48. *See also, In re Petition of K.M. & D.M.*, 653 N.E.2d 888, 893-94 (Ill. App. Ct. 1995) (adoption statute allowing a "person" or a "husband and wife" to adopt does not exclude an unmarried person or an unmarried couple from adopting, and this interpretation is consistent with the purpose of the adoption statutes); *In re Adoption of M.A.*, 930 A.2d 1088, 1098 (Me. 2007) (same); *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (same).

2. **The overriding policy of promoting the best interests of the child supports allowing Petitioner to adopt**

To the extent any ambiguity can be found, Idaho's adoption code should be construed to support Petitioner's plain, strict interpretation because it is squarely in, and clearly promotes, the children's best interests.

Ninety years ago, this Court observed that any construction of Idaho's adoption statutes should be "in harmony with the spirit of the law." *See Vaughan v. Hubbard, supra,*, 38 Idaho at 461, 122 P. at 1109. Consistently since then, both the case law and the adoption code have repeatedly said that the overriding purpose of the adoption statutes is to protect the best interest of children by providing them with permanency and stability in their family relationships. *See,* I.C. § 16-1501A (2)(a) (providing that "[t]he state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children."); *Petition of Steve B.D.,* 111 Idaho 285, 290, 723 P.2d 829, 834 (1986) (stating that the primary

purpose of Idaho's adoption act is "the promotion of the welfare of children"); *Vaughan*, 38 Idaho at 461, 221 P. at 1109 (stating that "whether the proposed adoption will promote the best interest of the child" is the purpose for which the adoption law was enacted) (emphasis added). *See also* I.C. § 2001(2) (stating in termination of parental rights statute that "wherever possible family life should be strengthened and preserved..."); *Roberts v. Roberts*, 138 Idaho 401, 404, 64 P.3d 327, 330 (Idaho 2003) (stating that "in any court decision affecting children, the best interests of the child should be the primary consideration"). Indeed, after the eligibility requirements of the adoption code are satisfied, under I.C. § 16-1507, this is the magistrate court's final, dispositive consideration.

> The judge must examine all persons appearing before him pursuant to this chapter, each separately, and any report of the investigation provided pursuant to the last section and if satisfied that the interests of the child will be promoted by the adoption, he must in the adoption of all foreign born persons make a finding of facts as to the true or probable date and place of birth of the foreign born child to be adopted and make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.

A full evidentiary evaluation of the best interests of the children in a given case is not required until the eligibility requirements are met. But, if there is any legal uncertainty on a petitioner's eligibility under statutes regarded as ambiguous, the purpose and policy behind the statute must be given great weight. In the absence of a more compelling justification, the ambiguity should be resolved in favor of protecting the best interests of the child. *See Doe,* 151 Idaho at 609, 261 P.3d at 886 (on ambiguous statutes demanding construction, "the public policy behind the statute" must be considered); *Fuhrman v. Wright*, 125 Idaho 421, 424, 871 P.2d 838,

841 (App. 1994) (same). *See also, In re Adoption of M.A.,* 930 A.2d 1088, 1096 ("Although statutes adopted in derogation of the common law are to be strictly construed, we...construe our adoption statutes to protect the rights and privileges of the child being adopted").

Any idea that the interests of any children are best served by a statutory construction that deprives them of the permanency, support, security, protection and continuity of a second parent is incomprehensible. Where a parent has been raising children from infancy to age 12 and 15, as Petitioner has raised the children here, allowing her and the children to secure their relationship through an adoption protects the best interests of the children by providing legal certainty and security to their existing parental relationships. If the Magistrate read the Pre-Adoption Home Study in this case, she would have appreciated that the Petitioner and her partner have both parented the children who are the subject of the Petition virtually since birth. Petitioner's parental relationship, whether legally recognized or not, is tangible, extensive and stable. But, if something tragic and unforeseen were to happen to Jane Doe II, all of this would be in jeopardy of serious disruption, if not termination.[9] Any construction of the adoption statutes which ignores this reality is incongruous with the public policy and contrary to the children's best

[9] As long as Jane Doe and the children have no legally recognized relationship, their bond and the benefits the children receive from Jane Doe are at risk. *See Petition of Steve B.D.,* 111 Idaho 285, 290, 723 P.2d 829, 834 (1986) (noting that "where the child has been delivered to and has been for some period of time in the custody of the prospective adoptive parents, emotional ties and bonds are established between the child and the adoptive parents, the severance of which will be as traumatic, if not more so, than the severance of the ties between the child and the natural parents"). If Jane Doe's petition is not approved, the children would be in danger of being separated from her if something happened to Jane Doe II, or if the parents separated, which would further contravene I.C. §16-1501A.

interests. Any perceived ambiguity in this case should be construed consistent with the overriding policy and purpose of the adoption code.

3. Second-parent adoptions by same-sex parents promotes the best interests of the children.

For the very reasons discussed here, every major child welfare and health organization in the United States supports second parent adoptions by same-sex couples. *See, e.g., Id.;* Am. Psychoanalytic Ass'n, Position Statement on Gay and Lesbian Parenting (May 16, 2002), http://www.apsa.org/About_APsaA/Position_Statements/Gay_and_Lesbian_Parenting.aspx; Nat'l Ass'n of Social Workers, Social Work Speaks: National Association of Social Workers Policy Statements 220 (8th ed. 2009); Child Welfare League of Am., Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults (2005), http://www.cwla.org/programs/culture/glbtqposition.htm; N. Am. Council on Adoptable Children, Position Statement: Gay and Lesbian Adoptions and Foster Care (2005), http://www.nacac.org/policy/lgbtq.html. These policies recognize that second parent adoptions protect children of same-sex parents from the psychological and emotional trauma of losing one of their parents simply because the law may not acknowledge their parent-child relationship. As the American Academy of Pediatrics has recognized, "[d]enying legal parent status through adoption to coparents or second parents prevents these children from enjoying the psychologic and legal security that comes from having 2 willing, capable, and loving parents." Comm. on Psychosocial Aspects of Child and Family Health, Am. Acad. of Pediatrics, Policy Statement: Coparent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics at 339.

The overwhelming social science research demonstrating that sexual orientation is irrelevant to parenting ability, and that the bonds that a child forms with two same-sex parents are just as loving, real, and critical to the child's well-being as the bonds formed between children and two heterosexual parents. *See, e.g.,* Task Force on the Family, Am. Acad. of Pediatrics, Family Pediatrics: Report of the Task Force on the Family, 111 Pediatrics 1541, 1550 (2003) ("[R]esearch has found that parental sexual orientation per se has no measureable effect on the quality of parent-child relationships."). There is no reason why same-sex parents should not be allowed to adopt, and because of the acute harms children face when their parent-child bonds are severed, allowing co-parents to adopt protects the best interests of children by providing them with legal permanence and security.

4. Legislative history supports interpreting the statutes to allow Petitioner to adopt

The legislative history that might assist a reasoned resolution of the perceived ambiguity in this case has been mentioned above. It may be summarized succinctly.

First, the threshold criteria for who is eligible to adopt a minor child in Idaho has always been "an adult person." This was the language chosen by Idaho's Territorial Legislature. 1879 Sess. Law 1987, p. 8, § 1 It is clear, precise and inclusive without exception. Whatever bias, prejudices, preferences and inclinations may have been represented in the Idaho Legislature over the past 134 years, this solitary criteria has remained unaffected.

Second, seven Idaho Legislatures have considered and amended the provision of the code which addresses who may adopt children, currently embodied in I.C. § 16-1501. *See* 1951 Sess.

Law., Ch. 283, § 1; 1953 Sess. Law Ch. 150, § 1; 1972 Sess. Law, Ch. 147, § 1; 1991 Sess. Law, Ch. 39, § 1; 1996 Sess. Law, Ch. 195, § 1; 2002 Sess. Law Ch. 233, § 4; 2013 Sess. Law, Ch. 138. But, none has tinkered with the words "any adult person." The only substantive modification has been clarification that the petitioning adult must be an Idaho resident. 1951 Sess. Law, Ch. 283, § 1.

5. Allowing Jane Doe to adopt avoids constitutional defects

Even assuming that the adoption statutes are ambiguous, they should be interpreted to allow Petitioner and other parents to adopt regardless of their marital status in order to avoid an unconstitutional result. "Where a statute is capable of two interpretations, the one constitutional and the other unconstitutional, the court should adopt the construction which would uphold the validity of the act." *Hindman v. Oregon Short Line R. Co.*, 32 Idaho 133, 178 P. 837, 841 (1918). Any perceived ambiguity regarding marital status should be interpreted to allow Petitioner adopt in order to avoid violating the equal protection and due process rights of unmarried adopting parents and their children.

Allowing only married parents to adopt, while excluding similarly situated unmarried parents seeking to formalize an existing parent-child relationship, would violate the equal protection rights of both children and adopting parents under the Idaho and federal constitutional guarantees of equal protection, U.S. Const., amend. XIV, §1, and Idaho Const. art. I, §§ 1, 2. The U.S. Supreme Court has held that states may not disadvantage children based on the circumstances of the child's birth or family structure, in recognition that children should not be punished for factors over which they have no control and that the State cannot rationally "burden

. . . children for the sake of punishing" their parents. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Laws that disadvantage children because their parents are unmarried are presumed to be invalid and must be subjected to heightened judicial scrutiny. *Id.* (statute limiting child support actions against only unmarried parents but not against married parents violated the child's equal protection rights); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619, 621 (1973) (state program cannot deny benefits to children of unmarried parents that it provides to children of married parents); *cf. Plyler v. Doe*, 457 U.S. 202, 219-20 (1982) (state cannot discriminate against children based on parents' immigration status; "imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.") (quoting *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972)) Prohibiting Petitioner from adopting because her marriage is not respected under Idaho law or because the she is in a same-sex relationship would violate the equal protection rights of the children by excluding them from the benefits of adoption based on their parents' marital status, sexual orientation, and gender—factors over which the child has no control and which have no relationship to the statute's purpose of protecting the best interests of children being raised by these parents.

Prohibiting Petitioner from adopting would also violate her equal protection rights as an adopting parent based on marital status and, if the adoption statutes were construed to bar only same-sex partners from adopting, based on her sexual orientation and gender as well. First, restricting the ability to adopt a partner's child only to married parents would constitute facial discrimination based on marital status, which is subject at least to rational basis review. *See*

Eisenstadt v. Baird, 405 U.S. 438, 447-48 (1972) (striking down a ban on providing contraception to unmarried partners under rational basis review). Here, there is no rational basis for prohibiting adoption by an adult person who has raised a child for years, assumed full parental responsibility for the child, established a strong parent-child bond with the child, and lives with the child and the child's existing legal parent in a stable family unit—solely because she is not married to the child's parent.[10] The children in these families already exist, so such a rule would serve only to deprive them and their parents of legal security and stability.

Second, construing the adoption statutes to bar only same-sex partners from petitioning to adopt, while permitting unmarried opposite-sex partners to do so, would constitute impermissible discrimination based on sexual orientation and gender. Currently, adoption statistics maintained by the Idaho Department of Health and Welfare demonstrate that a certain percentage of adoptions in Idaho are granted to unmarried couples and unmarried individuals. (R0048-0054) If the adoption statutes were construed to permit opposite-sex couples to adopt regardless of their marital status but to prohibit Petitioner from doing so merely because she is in a same-sex relationship with the children's existing parent, that interpretation would disadvantage Petitioner because of her sexual orientation. Such an interpretation would fail under any level of

[10] In this case, the irrationality of such a rule is further underscored by Idaho's refusal to permit same-sex couples to marry or to recognize marriages of same-sex couples that are entered into in other states. A state cannot, consistent with the requirement of equal protection, simultaneously restrict adoption only to married persons, while categorically excluding an entire class of persons who are otherwise similarly situated in their fitness to adopt and their need to formalize existing parent-child bonds from the ability to marry. To be clear, the Petitioner here does not seek to challenge Idaho's marriage ban, but rather to make clear the irrationality of an interpretation of Idaho law that would exclude unmarried persons from the eligibility to adopt.

constitutional scrutiny because it would not serve any legitimate goal. The Magistrate's dismissal below cited Idaho's policy of limiting marriage to opposite-sex couples as a reason for denying Petitioner the ability to adopt. (R0033) Allowing opposite-sex couples to adopt regardless of marital status but prohibiting same-sex couples from adopting bears no relationship to limiting marriage to opposite-sex couples or to encouraging marriage between opposite-sex couples, and it serves only to disadvantage children being raised by same-sex couples.

Laws that serve only to disadvantage a particular group cannot survive a rational basis review. *See Romer v. Evans*, 517 U.S. 620 (1996). The U.S. Supreme Court has also made clear that laws that discriminate based on sexual orientation may not be justified based on tradition or moral disapproval. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Prohibiting only same-sex couples from adopting would also violate equal protection because it would discriminate based on gender by permitting a unmarried male partner to petition to adopt his female partner's child, while barring a similarly situated female partner from doing so. Such a construction would not rationally further any legitimate purpose, much less meet the heightened level of scrutiny applied to laws that discriminate based on gender. *See United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (statutes that discriminate based on gender must be "substantially related" to an "important governmental objective"); *Murphey v. Murphey,* 103 Idaho 720, 723, 653 P.2d 441, 444 (1982) (statutes that discriminate based on sex stereotyping violate equal protection unless they satisfy heightened scrutiny).

Finally, construing the adoption statutes to permit only an opposite-sex married spouse of a legal parent to adopt would violate the due process rights of families headed by unmarried

parents and families headed by same-sex parents. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972) (under due process clause, state may not presume that unwed parents are unfit). The U.S. Supreme Court has recognized that in families headed by unmarried couples, "familial bonds...[are] often as warm, enduring, and important as those arising within a more formally organized family unit." *Stanley*, 405 U.S. at 652. All family members have the fundamental right to associate with and preserve their family in its chosen form; the government may not "intrude[] on choices concerning family living arrangements" without establishing that its manner of doing so is narrowly tailored to achieve a compelling government interest. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977). As explained above, this exclusion cannot meet even the lowest level of constitutional scrutiny.

Children, like their parents, have their own, independent right to be free from undue state interference and discrimination in forming family bonds. Prohibiting their parents from adopting based on marital status, gender, or sexual orientation violates the children's liberty interest in maintaining these relationships. Since at least *Prince v. Massachusetts*, 321 U.S. 158 (1944), the U.S. Supreme Court has recognized that a relationship between a child and an adult who has acted as a parent may be constitutionally protected. *Id.* at 159, 164 (child's aunt, who had raised child from birth, was entitled to be treated as a parent for constitutional purposes). *See also* Barbara B. Woodhouse, *Waiting for* Loving*: The Child's Fundamental Right to Adoption*, 34 Cap. U.L. Rev. 297, 309-18 (2005) (showing that children have a constitutional right to adoption which includes protecting existing parent-like relationships).

The children in this case unequivocally have two parents, who share the joys and responsibilities of raising them. Despite the reality of their family and the child's best interests, Idaho currently recognizes only one as their legal parent. An adoption is the only way this family can ensure that the child's relationship with both of his parents will be legally recognized. Denying this family the ability to protect their relationships through adoption would violate their liberty interest in the integrity of their family relationships.

6. Numerous other jurisdictions have recognized that a second parent may adopt regardless of marital status

Other states with adoption statutes similar to Idaho have recognized that their statutes allow a second person to adopt without terminating the existing parent's rights, regardless of whether the adopting parent is married to the existing parent. For example, the Pennsylvania Supreme Court held that a birth mother's same-sex partner could adopt without terminating the birth mother's rights because the plain language of the Pennsylvania statutes allow second person to adopt in this manner, without any marital status restrictions. *In re Adoption of R.B.F., supra*, 803 A.2d at 1201. Using language that is very similar to Idaho Code, Section 16-1509, the Pennsylvania statute provided that "[u]nless the court for cause shown determines otherwise, no decree of adoption shall be entered unless the natural parent or parents' rights have been terminated . . . ." 23 Pa. Consolidated Stat. Section 2901. The Court explained that nothing in the statute limited its application to stepparent adoptions by a married spouse. *Id.*

Numerous other states have also held that an unmarried partner of an existing parent can adopt without terminating the existing parent's rights under their statutes. *See, e.g., In re*

Adoption of K.S.P., 804 N.E.2d 1253 (Ind. Ct. App. 2004); *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003); *In re Adoption of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *In re the Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re Jacob, In re Dana,* 660 N.E.2d 397, 402-405 (N.Y. 1995). All of the other state cases have stressed that because the purpose of adoption statutes is to protect the best interests of children and to provide stable homes for children, it would be contrary to the purposes of these statutes to prevent a second parent who is already functioning as a child's parent from adopting merely because that person is not married to the existing parent. *See, e.g., Jacob,* 660 N.E.2d 397, 399 (adoption statutes must be "strictly construed" as to both "legislative purpose as well as legislative language" and thus "must be applied in harmony with the humanitarian principle that adoption is a means of securing the best possible home for a child")

Only a few states have refused to allow an unmarried partner of an existing parent to adopt without terminating the rights of the existing parent. These cases all relied on an interpretation of adoption provisions that do not exist in Idaho; providing that an adoption terminates the rights of an existing parent unless the adopting parent is the spouse of an existing parent. *In re Adoption of K.R.S.,* 109 So.3d 176, 177, n.1 (Ala. Ct. App. 2012) (quoting Ala. Stat. § 26–10A–29(b), providing that "the natural parents of the adoptee, except for a natural parent who is the spouse of the adopting parent are relieved of all parental responsibility"); *Boseman v. Jarrell,* 704 S.E.2d 494, 499-500 (N.C. 2010) (holding that the only exception in the code to the requirement of terminating the birth parents' rights in N.C. Gen. Stat. Ann. § 48-1-106 is "adoption by a stepparent"); *S.J.L.S. v. T.L.S.,* 265 S.W.3d 804, 818 (Ct. App. Ky. 2008) (citing

Ky. Rev. Stat. § 199.520(2), which provides that upon adoption, "all legal relationship between the adopted child and the biological parents shall be terminated except the relationship of a biological parent who is the spouse of an adoptive parent."); *In re Adoption of Luke*, 640 N.W.2d 374, 379-81 (Neb. 2002) (explaining that the only exception to the provision requiring termination of the birth parents' rights upon adoption is when "an adult husband or wife may adopt a child of the other spouse" under Neb. Rev. Stat. § 43-101(1)); *In re Adoption of Doe*, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998) (citing Ohio Rev. Code § 3107.15, which provides that an adoption terminates the rights of the birth parents "[e]xcept with respect to a spouse of the petitioner and relatives of the spouse"); *In Interest of Angel Lace M.,* 184 Wis. 2d 492, 511, 516 N.W.2d 678, 683 (1994) (citing Wis. Stat. § 48.92(2), providing that the effect of an adoption is to sever the rights of the birth parents except in cases where the birth parent is the "spouse" of the adoptive parent) By contrast, the language of I.C. § 16-1509 does not restrict the exception to the termination of parental rights to cases where the existing parent and adopting parent are married. Rather than providing an exception just for a "spouse," Section 16-1509 provides that an existing parent's rights are not terminated by an adoption if "the decree of adoption otherwise provides."

IV. CONCLUSION

The magistrate erred in dismissing the petition *sua sponte* without any prior notice, argument or hearing on the matter, because there is no statute or civil rule that gives her such authority. The magistrate further erred in interpreting Idaho's adoption statute to prevent the adoption in this matter because (1) the plain and unambiguous language of the statute allows for

the adoption by any adult person who meets the statutory requirements; (2) Jane Doe meets the statutory requirements; (3) nothing in the adoption code limits adoptions to married spouses and the statutes authorize adoption without terminating the rights of existing parents; (4) the overriding policy considerations, legislative history and purpose rules of construction further support Jane Doe's plain interpretation of the statute; and (5) Jane Doe's plain interpretation and strict construction will avoid potential constitutional defects raised by the insertion of marriage as a pre-requisite that bars second parent adoptions.

For each and all of these reasons, the Order of Dismissal should be reversed, the Petitioner should be found eligible to adopt irrespective of her marital status and the case should be remanded to the Magistrate with instructions to accept the Petition for Adoption and proceed with all pertinent and necessary adoption proceedings as set forth in Title 16, Chapter 15, Idaho Code.

Respectfully submitted this 6th day of November, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of November, 2013, I served two (2) true and correct copies of Appellant's Opening Brief as follows:

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/s/
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