IN THE SUPREME COURT OF ARKANSAS

DEPARTMENT OF HUMAN SERVICES and
CHILD WELFARE AGENCY REVIEW BOARD

APPELLANTS/
CROSS-APPELLEES

v. No. 05-814

MATTHEW LEE HOWARD, CRAIG STOOPES
ANNE SHELLEY and WILLIAM WAGNER,

APPELLEES/
CROSS-APPELLANTS

APPEAL FROM THE SIXTH DIVISION CIRCUIT COURT
OF PULASKI COUNTY, ARKANSAS

HONORABLE TIMOTHY FOX

APPELLEES/CROSS-APPELLANTS' SUPPLEMENTAL ABSTRACT AND BRIEF

David Ivers
Mitchell, Blackstock, Barnes
Wagoner, Ivers & Sneddon
1010 West Third Street
Little Rock, Arkansas 72203-1410
(501) 378-7870

Leslie Cooper
James. D. Esseks
American Civil Liberties Union
Foundation
125 Broad Street, 17th Floor
New York, New York 10004
(212) 549-2627

Griffin J. Stockley
ACLU of Arkansas
904 W. Second Ave., Suite #1
Little Rock, Arkansas 72201-5727
(501) 374-2842

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APPELLEES/CROSS-APPELLANTS' RESPONSE TO JURISDICTIONAL STATEMENT

1. Appellees/Cross-Appellants take exception to the Appellants' characterization of the issues presented on appeal.

First, we would clarify the issue raised by Appellants by stating it as follows: The appeal raises the issue of whether the categorical exclusion of foster applicants who have gay household members was outside of the scope of the Board's authority and/or an act that is contrary to the Board's legislative mandate.

Moreover, the appeal and cross-appeal raise two additional issues:

-Whether the categorical exclusion of foster applicants who have gay household members violates the right to equal protection guaranteed by the Arkansas and federal constitutions.

-Whether the categorical exclusion of foster applicants who have gay household members violates the right to privacy and intimate association guaranteed by the Arkansas and federal constitutions.

2. I express a belief, based on a reasoned and studied professional judgment, that the appeal and cross-appeal raise the following questions of legal significance for jurisdictional purposes:

-They present issues of first impression.
-They involve federal constitutional interpretation.
-They present issues of substantial public interest
-They involve a significant issue needing clarification or development of the law.

_____
Leslie Cooper
Counsel for Appellees/Cross-Appellants

POINTS ON APPEAL

1. The Circuit Court correctly held that the challenged regulation, which categorically excludes foster applicants who have gay household members, was an *ultra vires* act by the Board and contrary to the Board's legislative mandate.

   Ark. Code Ann. § 9-28-405

2. The Circuit Court erred in holding that the challenged regulation, which categorically excludes foster applicants who have gay household members, does not violate the right to equal protection guaranteed by the Arkansas and federal constitutions.

   Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002)
   Romer v. Evans, 517 U.S. 620 (1997)

3. The trial court erred in holding that the challenged regulation, which categorically excludes foster applicants who have gay household members, does not violate the right to privacy and intimate association guaranteed by the Arkansas and federal constitutions.

   Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002)
   Lawrence v. Texas, 539 U.S. 558 (2003)

TABLE OF AUTHORITIES[1]

CASES

[1] The page numbers listed all refer to pages in the Argument.

STATUTES

SUPPLEMENTAL ABSTRACT

[Abstractor's note: New material appears in bold type. Deleted erroneous material appears with strike-out.]

MARCH 23, 2004 PROCEEDINGS

DIRECT EXAMINATION OF WILLIAM WAGNER BY MR. ESSEKS

Beginning on page 1864, line 6 in Record (AB-58):

I work as an ~~Arkansas~~ **AR (anti-reflective coating)** technician.

Beginning on page 1872, line 4 in Record (AB-63):

The most recent time that my wife and I had a child stay with us that was not in our legal custody **was November 2003.**

DIRECT EXAMINATION OF DR. BERLIN BY MR. ESSEKS

Beginning on page 1906, line 12 in Record (AB-81):

I do not agree with the assertion that gay men ~~are not particularly~~ **do not feel sufficiently** masculine.

Beginning on page 1914, line 20 in Record (AB-86):

That conclusion is backed up by research. I mean, one of the reasons I mentioned earlier that homosexuality was removed as a diagnosis . . . . .

Beginning on page 1919, line 21 in Record (AB-88):

Often, the person who is attracted to boys, the second highest attraction may be little girls, the **third** highest may be adult women, and he may not even have any attraction to adult men.

EXAMINATION OF DR. BERLIN BY THE COURT

Beginning on page 1979, line 24 in the Record (AB. 120):

With respect to what causes a person to have any sexual desire or sexual orientation, there are three answers as a mental health professional. Number one, sexual orientation is not due to voluntary choice. [R. 1980] The two positives were either nature or nurture; nurture meaning life experience or the certain events in the life of an individual that may be relevant in determining sex orientation. Perhaps the reason I didn't spend a lot of time on it is there's still a lot that we don't know. I did mention, however, and we may have to break it down to particular orientations, that when it comes to pedophilia, there is evidence that one of the environmental factors, one of the nurturing factors, that can influence the possibility of developing pedophilia is if a boy has been sexually abused during childhood. We don't quite know why, but there is some evidence that in a small percentage of boys who have been sexually abused, that that seems to warp their subsequent sexual development in a way that predisposes them toward pedophilia. As far as nurture, environmental factors that play into either heterosexual or homosexual [R. 1981] development, there's very little we know. We've refuted some earlier ideas. For example, at one point, there was a theory that homosexuality was linked to a domineering mother and a weak or absent father. When the research was done, there was simply no evidence to support that. There have been a variety of other theories that at one time suggested certain kind of life events contributed to the development of homosexuality; but in each instance, when those theories have

been tested, they've not turned out to give us information that's useful.

On the biological side, which is the same as nature, so when the attorney used the word "biological," that was really, in my mind, the equivalent of nature. Again, to caution, there's still a lot to learn. It's very early on. But there had been some studies suggesting that perhaps there's something different in the brain of people with homosexuality. One of the critiques of the major study done in that area, though, is it was based on studies of cadavers. And, of course, a lot can change in the brain once somebody has died. [R. 1982]. So there's a need to try to use some of the more refined technologies that actually look at the brains of people while they're alive to see if that can be replicated. there may be, to not go too far afield, some biological factors involved in homosexuality, but the data is very early and would need to be replicated before I would be confident in saying confidently, "we've tied that down."

DIRECT EXAMINATION OF DR. LAMB BY MS. COOPER

Beginning on page 1997, line 24 in the Record (AB-126):

It is ~~well established~~ **extremely well-accepted** that these three or four, depending on how you look at them, factors are the factors that predict healthy adjustment.

Beginning on page 2015, line 16 in the Record (AB-134):

If you were to be signing up for a psychology graduate program, that is what you would be taught in ~~my~~ **your** child development class work.

Beginning on page 2023, line 19 in Record (AB-138):

I think the psychologist who has done most of the research on ~~children's adjustment~~ **the**

adjustment of children of gay and lesbian parents in this country is Charlotte Patterson, who is a professor of psychology at the University of Virginia.

Beginning on page 2026, line 11 in Record (AB-139):

No one used methodology that is atypical or unacceptable in any way. ~~® 2026).~~ **The research projects on children of gay parents yielded about 50-60 reports. There are maybe 100 articles that deal with this topic, either in the form of reviews or reports of studies. Among those reports would be studies that are more qualitative that [R. 2026] rely primarily on interviews and discussions with either the children or with the parents. And then there are the more quantitative systematically focused studies, all of which are included in the 100 or so reports.**

Beginning on page 2028, line 25 (AB-140):

In other areas outside of studies of gay parents and their children, it is not ~~common~~ **unusual** to see child development research looking at these types of sizes and samples.

Beginning on page 2035, line 16 (AB-143):

. . . Marriage Law Project is not one of those publishers. (R 2035). **The research on gay parents and children's adjustment suggests that children are as likely to be well-adjusted whether they are raised by lesbian/gay parents or by heterosexual parents.** The study shows no differences.

Beginning on page 2042, line 8 (AB-146):

I am familiar with an article by Judith Stacey and Timothy Biblarz called "How Does the Sexual Orientation of Parents Matter." That is ~~a report on a study or~~ a review article.

CROSS EXAMINATION OF DR. LAMB BY MS. HALL

Beginning on page 2074, line 11 in Record (AB-159):

> But it's putting all the studies together that you can garner the information or garner an opinion about what works and what doesn't work. ~~(R 2074)~~ **Whether a child is in foster care or in its home environment, the same factors determine how well-adjusted that child is going to be- the quality of the relationships with the parent figures, the quality of the [R. 2074] relationship between them, and the resources available to the child.**

Beginning on page 2082, line 12 in Record (AB-162):

> I think that there's a good possibility that it could **hinder their development** to the extent that there's usually a shortage of good foster homes.

Beginning on page 1084, line 8 in Record (AB-163):

> There is **no** benefit to a child having both a mother and a father in the home . . . .

MARCH 24, 2004 PROCEEDINGS

DIRECT EXAMINATION OF DR. MARTIN BY MS. COOPER

Beginning on page 2131, line 25 in Record (AB-184):

> These are **not** considered "gay diseases."

DIRECT EXAMINATION OF JUDITH FAUST BY MS. COOPER

Beginning on page 2144, line 22 in Record (AB-190):

> Had a ~~checkered~~ **varied** career in between, and then found myself in 1991 as director of the Division of Children and Family Services here in Arkansas.

Beginning on page 2155, line 1 in Record (AB-195):

Interracial placements were **not** always permitted.

Beginning on page 2169, line 7 in Record (AB-202):

This is the only time in ~~that~~ **the** 10 years **that I've been there** that the faculty of social work ~~often submit letters~~ **submitted a letter** to **a** policymaking board~~s~~ regarding proposed legislation, regulations.

REDIRECT EXAMINATION OF JUDITH FAUST BY MS. COOPER

Beginning on page 2191, line 11 in Record (AB-212):

In my experience in the field of social work and child welfare, there is no reason that lesbian or gay foster parents would be less likely or able to facilitate a foster child's reunification with biological parents than a heterosexual foster parent could. **If the biological parent has a deeply felt, strong prejudice against gay people**, ~~W~~**w**ell, one would hope that if the system worked properly, the assessment would have shown prejudice against gay people to be a characteristic of the child's family of origin, and we wouldn't have made that placement. If we anticipated that it would be an insuperable difficulty for the parents, then it would be for the child. **The consideration of any biases on the part of the biological parents with respect to certain communities should be considered in making placements in other contexts too. [R. 2191] If a biological parent had a racial prejudice, it is certainly conceivable that a good placement decision would include as one factor that we might not want to place that child with a family of another race.**

CROSS EXAMINATION OF MATTHEW HOWARD BY MS. HALL

Beginning on page2203, line 17 in Record (AB-216):

Before ~~you~~ **I** heard about the proposal, ~~I had not desired to be a foster parent until that time.~~ **,** I was unaware that there was the need **for foster parents**.

CROSS EXAMINATION OF ROBIN WOODRUFF BY MS. COOPER

Beginning on page 2249, line 3 in Record (AB-240):

~~The religious organization,~~ "Focus on the Family" is a biblically based organization~~, I think~~.

Beginning on page 2250, line 7 in Record (AB-240):

The only difference I see **between gay couples and unmarried heterosexuals** is that there is a potential in an unmarried heterosexual home for that relationship to be formed, for a committed relationship to be formed, and for the role modeling.

CROSS EXAMINATION OF JAMES BALCOM BY MS. COOPER

Beginning on page 2276, line 22 in Record (AB-252):

I said there were three components that went into my decision to support the challenged regulation: the scientific evidence; **you're my** personal beliefs, including ~~you're~~ **my** religious beliefs; and the mores of society as expressed by members of the community that gay couples don't provide an appropriate environment for children.

RECROSS EXAMINATION OF JAMES BALCOM BY MS. COOPER

Beginning on page 2295, line 11 in Record (AB-260):

I have some ~~any~~ personal knowledge about the number of partners of gay **people** because of a nephew of mine who had multiple partners. **That is the extent of my personal**

knowledge about the number of partners gay people have.

OCTOBER 5, 2004 PROCEEDINGS

Beginning on page 2319, line 17 in Record (AB-261):

MR. ESSEKS: Yes, Your Honor, there are two preliminary matters I would like to raise to the Court. The first has to do with the scope of the evidence to be presented by the State through its expert witness, Dr. Rekers. As I believe Your Honor is aware, the defendant has made representations in a series of filings with the Court that they are not relying on or presenting- going to present [R. 2319] evidence regarding a series of topics. In their Motion in Limine prior to the first hearing in this case, the defendant said that they will not assert that gay people pose a risk of domestic violence, sexual abuse or HIV transmission. In their, one of their papers in response to plaintiff's Motion to Exclude the Testimony of Dr. Gist, defendants represented that the defendants do not rely on the exposure to domestic violence, sexual abuse, adulterous relationships, or stigma to children in homosexual homes as a rational basis for the regulation. And this past August, the defendant's Motion to Exclude Plaintiff's– those rebuttal witnesses, defendants stated that the defendants will not allege that homosexuals have a higher rate of psychiatric disorders. And so, what I ask, Your Honor, is that we have some clarification as to the scope of the evidence to be presented by the defendants.

THE COURT: Okay. Ms. Hall?

MS. HALL: Well, Your Honor, as we've said before, we're going to raise three issues regarding incidents of foster children in [R. 2320] distress involved in such

placements by virtue of being, number one, just in the foster care system, plus the added stress that is caused by being placed with homes that are headed by people who behave in homosexual activity. There will be testimony regarding instability in homosexual homes and the structural of homosexual homes with regards to the benefits of having both a mother and a father, then how this meets the needs of foster children.

THE COURT: Okay. So, let's go one at a time and I do have the State defendant's Motion, I mean, the - yeah, the State's defendant's Motion in Limine that was filed March 1, 2004. And at some point in time on the record, we had a discussion and my recollection is that there were areas that the State was not going to be able to stipulate to, but that there was not going to be any evidence produced by the State in those areas. So, that it would still – the burden would still lie with the plaintiffs to disprove those as possible rational basis. Which they put on their proof with that understanding and those areas were specifically that there would [R. 2322] be no affirmative testimony by the defendants that pedophilia was a basis for establishing or continuing the regulation; that HIV transmission was not going to be utilized as a basis for establishing or continuing the regulation; the domestic violence being more prevalent in homosexual homes would not be a basis for establishing or continuing the regulation. Now, that motion did not address psychiatric disorders. Mr. Esseks, where was that statement from that you recited?

MR. ESSEKS: Your Honor, that's in defendant's motion filed this past August, and I'll get you a copy of it.

THE COURT: Well, I'm sure I have one here.

MR. ESSEKS: It says Motion to Exclude Rebuttal Witnesses filed on the 31st of

August. I have copies of that if you would like.

THE COURT: Well, I didn't understand in Ms. Hall's response that psychiatric disorders being more prevalent was going to be something that the expert would opine to. I wrote down instability of homosexual homes. Was that it? And the structure of homosexual [R. 2322] homes. Correct?

MS. HALL: Yes.

THE COURT: Neither of which to me is the same as -

MS. HALL: Your Honor, and if we do have something regarding psychiatric instabilities, or lack of better words, homosexual homes, if I've opined that we're not going to testify to that, then we're not going to testify to that.

THE COURT: Okay. All right. I'll just address that aspect if, and when, we get to it, and Mr. Esseks, if you'll just make a note that we need to bring it back up. The latter thing that you did mention about the structure, Ms. Hall, and that the structure was better-

MS. HALL: About the structure of heterosexual homes versus the inherent structure of homosexual homes with regard to having the role of mother and the role of father present in the home.

THE COURT: Okay. Well, I just, my recollection is that the regulation propounded by the legislature established a foster home [R. 2323]as one or more adults that met the criteria. Is that correct?

MS. HALL: That's correct.

THE COURT: Okay. All right. Is there anything else preliminarily then that we need to take up?

MR. ESSEKS: Your Honor, just one last piece on this first topic, which is defendants also had said in their Response to Plaintiff's Motion in Limine to Exclude the Testimony of Dr. Gist, they listed domestic violence, sexual abuse and adulterous relationships and stigma as- so, adulterous relationships and stigma are both also areas that the defendants have just relied– it's about reliance on.

THE COURT: Ms. Hall?

MS. HALL: Well, obviously we're not relying on stigma. With regards to adulterous relationships, I guess, that it's, you know, technically and in a legal sense, if you're homosexual and you're living with somebody, I don't know whether or not that's, per se, an adulterous relationship, but I believe that the number of partners goes to the stability of a homosexual home and that's something that [R. 2324] we've always said was going to be our ground.

THE COURT: Okay. Well, to the extent that, for the record, we need a ruling on that, Mr. Esseks, at this time I'm going to take it under advisement, because there are clearly certain aspects of that, that I believe the plaintiffs have been on notice that the defendants were going to raise. Now, it may be that there's some subset of that, that you all believe is out of bounds based upon what you thought was going to happen. So, we'll just address that at the time then.

DIRECT EXAMINATION OF DR. REKERS BY MS. HALL

Beginning on page 2345, line22 in Record (AB 266):

MS. COOPER: Objection, Your Honor. Would the witness be reading from

something?

THE WITNESS: I've got my notes.

MS. COOPER: We would request to see those notes. [R. 2345]

THE WITNESS: Sure.

THE COURT: Certainly.

MS. HALL: Sure. In fact, I'm sure I have a copy of them.

BY MS. HALL:

Q. Are those notes that you have in front of you notes that you have made?

A. Yes, I typed this myself in my work processing computer and printed it off.

Q. Do you plan on testifying about every single thing in those notes today?

A. No, I don't. Just certain aspects of the notes.

THE COURT: Do the plaintiffs have copies of this?

MS. HALL: No, Your Honor.

MR. ESSEKS: No, we didn't until this moment.

THE COURT: So –

MR. ESSEKS: But we do now.

THE COURT: All right. So, I mean— all right. Well, so which page are you on then, Doctor?

THE WITNESS: Page one.

THE COURT: They're on page one, if you'd like to follow along. Well, he can [R. 2346] either refresh his recollection and we can do that probably repeatedly through the testimony, or we can take a short break when he's finally through for you guys to have a

chance to – or somebody can go through it, I guess, while somebody listens to the testimony. I assume that he did this as a manner of organizing his thoughts to expedite his testimony.

THE WITNESS: That's right.

THE COURT: Okay. So is there an objection to him proceeding this way, Mr. Esseks?

MR. ESSEKS: Well, no. I mean, it would seem to me, Your Honor, that he's an expert and he can – he would know what his opinions are without looking the curriculum. That said, if this is the way you want to proceed, that's okay. But it's just another reason that plaintiffs are going to renew at the end of this our motion to be able to continue cross examination past today - -

THE COURT: Okay.

MR. ESSEKS: – because getting this morning, this seventy-five page document, [R. 2347] that purports to summarize his– writing his views is not adequate notice and does not give opportunity for us to prepare for it.

THE COURT: All right. Well, you're not seeking to introduce the notes into evidence?

MS. HALL: No, I'm not seeking to introduce it into evidence. I'm just– I just – he just wants that there, and I believe that he's entitled to have it to refresh his memory regarding the questions that I'm about to ask him.

THE COURT: Okay. Please proceed.

CROSS EXAMINATION OF DR. REKERS BY MS. COOPER

Beginning on page 2432, line 25 in Record (AB-306):

On direct I talked about the work of **Rafkin** and Safran.

Beginning on page 2462, 1ine 22 in Record (AB-314):

In these books I ~~did not~~ merge**d** Christian advice with some insights from psychology ~~and~~ **but not** social work. ~~(R 2641)~~ **(R 2461)**.

Beginning on page 2462, line 22 in Record (AB-315):

I've never thought through the proposition that if sound scientific studies meeting my criteria found that children of homosexual parents are doing just as well as other children, whether I as a private citizen, based o my personal views of ethics and morality, would still personally favor the exclusion of homosexuals from fostering. (R 2462) **If sound scientific studies meeting my criteria found that children of homosexual parents are doing just as well as other children, then, as a private citizen, based on my personal views of ethics and morality, I would still personally favor the exclusion of homosexuals from fostering, but I wouldn't favor it as a professional.**

DIRECT EXAMINATION OF DR. LAMB BY MS. COOPER

Beginning on page 2522, line 25 in Record (AB-342):

~~There studies that I'm aware of~~ **I am not aware of studies** going into mid and later adulthood establishing that children raised by people, say of the Muslim faith, are just as well adjusted as other children.

Beginning on page 2542, line 9 in Record (AB-351):

I do not agree with Dr. Rekers' testimony that if a child is in foster care with a gay foster

parent, ~~he would generally favor~~ ~~removing~~ that child **should be removed** because of the foster parent's sexual orientation in order to place the child in a family with heterosexual parents**, even in the case of a child who has been with that family over ten years. I think it is an extraordinary suggestion**. It flies in the face of all that we know about the importance of relationships between children and parent figures.

Beginning on page 2543, line 11 in Record (AB-351):

The fact that the child is a foster child as opposed to a **biological** child ~~in a biological~~ could exacerbate the reaction ~~of~~ **to** separation, because children in foster care will have experienced the loss of a loved one earlier in their lives prior to being placed in that situation.

CROSS EXAMINATION OF DR. LAMB BY MS. HALL

Beginning on page 2553, line 10 in Record (AB-357):

~~A longitudinal study is a~~ **It would not be feasible to conduct a longitudinal** forty to fifty year follow-up of children raised by gay and lesbian foster parents in a national representative sample

Beginning on page 2554, line 9 in Record (AB-357-58):

I'm saying that nobody's been able to do that. ~~I'm not sure which studies compared lesbians to heterosexual moms.~~ . . . You know, there are multiple studies that have looked at relationships between lesbians and their ~~parents~~ children. (R 2555) ~~Research comparing relationships between children and their parents has particularly focused on relationships between the mom's characteristics and behavior and the adjustment of the children. That's what I've been talking about,~~ **I've been talking about research**

comparing relationships between children and their parents broken down into lesbian versus heterosexual mothers that particularly focused on relationships between the mom's characteristics and behavior and the adjustment of children. **T**he studies of adjustment include the Von Fraussen study and Brewaeys, Chan, Raboi, and Patterson.

DECEMBER 20, 2004 PROCEEDINGS

DIRECT EXAMINATION OF DR. SCHWARTZ BY MS. COOPER

Beginning on page 2638, line 17 in Record (AB-388):

In the course of my research, I ~~meet~~ **have met** and interview**ed lots of** same-sex couples who have been together for say 20 or more years.

Beginning on page 2641, line 11 in Record (AB-389-90):

There's some good research to indicate that if one or both partners are not out and open about their sexual preference or just open as what they are in a couple that's same sex, that that causes a lot of anxiety and stress and can affect the durability of a relationship, particularly if they have two different ideas about what it should be. **Couples are more likely to live openly as a couple than back when I did my research in the 70's. The fact that** ~~H~~**h**alf a million plus gay couples would register with the government, ... (R 2641). Gay people **who** are now in the typical parenting age of 20 through say 40's ~~and~~ **are** more focused on being in committed domestic relationships than older lesbians and gay men were.

Beginning on page 2673 (AB-407)- Abstractor's note: From the first full paragraph through the

end of the page repeats the text on page 407 of the Abstract.

EVIDENTIARY DEPOSITION OF DR. SUSAN COCHRAN (submitted to Court on December 20, 2004)

DIRECT EXAMINATION OF DR. COCHRAN BY MS. COOPER

Beginning on page 2719-6, line 20 in Record (AB-416):

~~(R 2719-6)~~. **I was a clinical assistant professor for a year at the University of Southern California School of Medicine. Then, I joined the faculty at California State (R 2719-6) Northridge, where I was employed for about 11 years before joining UCLA. I was also a research psychologist at UCLA. I went through the research psychology series there.** I spend my time doing research, teaching and service administration. **I teach introductory statistics and typically I also teach courses in psychiatric epidemiology, science writing, and managing complex databases**. . . . I've done studies**, including epidemiological studies,** looking at alcohol and drug abuse **including** among lesbians and gay men.

Beginning on page 2719-9, line 8 in Record (AB-417):

I have been published in about 60 peer-reviewed journals in general and a number of book chapters, abstracts and professional ones. **The more prestigious academic journals that have published my work are the New England Journal of Medicine, the Journal of Consulting and Clinical Psychology, the American Journal of Epidemiology, and the American Journal of Public Health.** (R 2719-9) My published studies include reports of my research on the health of **ethnic minority communities and**

lesbians and gay men. Those publications include reports on my research that specifically addresses substance abuse among gay people. Others in my field make use of my work on the health of lesbians and gay men. I know that because they cite my work, they reprint my work in different contexts like book chapters and by recognition by my peers. I have also received awards for my research. ~~(R 2719-10).~~ **I received the Distinguished Contribution to Research and Public Policy Award from the American (R 2719-10) Psychological Association in 2001. That was an award recognizing my research on different populations, including lesbian and gay populations. This is an award that is given to a single psychologist every year.** have been invited by public health organizations to give presentations**, including the Institute of Medicine, the National Institute of Mental Health, and international public health meetings such as the International AIDS meetings that are held every two years. I presented at the AIDS meeting in Thailand, and before that, Barcelona.** (R 2719-11).

As part of my work as a epidemiologist and psychologist, I routinely keep up with my colleagues' research. I read the literature. I am also a reviewer of journal articles that are submitted to peer review publications. I also serve on scientific review panels **for the National Institute of Health**. The research I keep up with includes research that explores the correlation of demographic variables such as racial background, sexual minority, gender, and immigrant ~~health~~ versus health outcomes. (R 2719-12) **Some of the journals I review for are the American Journal of Epidemiology, the Journal of Consulting and Clinical Psychology, most recently Archives of General Psychiatry. I do probably two reviews a month for a number of different journals. I have done**

peer review for journals that focus on alcohol and drug abuse- The Journal of Studies on Drug and Alcohol Dependence. I have done peer review for journals that focus on the health of particular populations- the Journal of Black Psychology, for women in health, women's health, research on gender, behavior and policy, Journal of Homosexuality.

Beginning on page 2719-16, line 5 in Record (AB-418):

In the field of psychiatric epidemiology, ~~substance abuse includes two things.~~ **there are two substance related diagnoses that are of relevance.**

Beginning on page 2719-17, line 24 in Record (AB-419):

Generally, men are more likely to be diagnosed than women with substance abuse. ~~Another~~ **Other demographic characteristics that correlate with higher rates of substance abuse are** ~~is~~ age, education, employment status, race, urbanicity, religiosity. The Substance Abuse Mental Health Services Administration, which is a wing of the Federal Government, collects data annually on patterns of substance use in the population. (R 2719-18). ~~From the 2003 survey, I think,~~ **The estimates from the most recent survey, which is, I think the 2003 survey, suggested that** about 12.2% of men meet the criteria for substance dependency and/or abuse versus 6.2% of women.

Beginning on page 2719-20, line 24 in Record (AB-420):

The prime drinking and drug use years are up **to** about age 25 (R 2719-20). There's less disparity among people under age 25. But the major disparity **between men and women** starts to appear later.

Beginning on page 2719-22, line 7 in Record (AB-420):

Regarding age, ~~T~~**t**he highest rate of substance abuse is among young people SAMSHA, the Substance Abuse and Mental Health Services Administration, estimates that about 23.6% of 21 year olds could be diagnosed with substance dependency and/or abuse disorder. **After age 26, the rate drops to about 7%. As for race,** the highest rate of substance abuse is among American Indians. . . . Some of it has to do with culture. **American Indians often live in environments where there's lower rates of employment.**

Beginning on page 2719-25, lin 6 in Record (AB-421):

For the most part, the samples were gathered by surveys that were conducted for purposes other than looking at sexual orientation and health outcomes. **The federal government routinely collects data on the population**.

Beginning on page 2719-27, line 6 in Record (AB-421):

Some of the surveys are asking about sexual partners in the last year, some in the last five years, some are asking about a lifetime. **Since the rate of partner change for women is about 1.1 per year on average. So a very short time frame may bias your classifying someone being bisexual because to be classified you'd have to have 2 partners.**

Beginning on page 2719-35, line 19 in Record (AB- 423):

The ~~arte~~ **rate** of alcohol abuse among homosexually classified men is 12.9% and among heterosexually classified men it's 12%.

Beginning on page 2719-36, line 3 in Record (AB- 424):

Neither of those rates is statistically significant. ~~The rate of alcohol and drug abuse~~ **Regarding alcohol and drug abuse among women, the rate among homosexually**

classified women was 13.9%. Among heterosexually classified women, it was 4.6%. For alcohol abuse and drug abuse, the rate among homosexually classified women was 1.8% and among heterosexually classified women it was 1.2%. Those are not statistically significant. (R 2719-36). **None of the differences found in the rates of drug or alcohol abuse or dependency among homosexual men and heterosexual men were statistically significant. But among women, there was a statistically significant difference in the rates of alcohol and drug dependency, but not abuse, . Drug and alcohol dependency among homosexually classified women were similar to the rates among the male groups, both homosexual and heterosexual.**

(R 2719-37) There have been a couple of studies**, one of which I co-wrote, looking at factors that might influence rates of problematic alcohol use among homosexually classified women.** ~~exploring who it is within the group of homosexually classified women who account for the higher rates. (R 2719-37).~~ . . . We know that sexual activity is correlated with alcohol and drug use in general in the whole population. (R 2719-38). **To be classified as bisexual in the studies, you had to have at least two partners within the past year, whereas the rest of the subjects could have had only one partner, and that may account for the difference.** The disparity between homosexual and heterosexual women shows up after age 25. That's the same ~~gender pattern when you look at heterosexual men and women~~ **age where you start to see the disparity between heterosexual men and women.** (R 2719-39) . . . .

So what you see for heterosexual women is although their rates might be very similar to men in college years, they're showing what's considered to be a normal age-

related decline. In contrast, we know that lesbians are less likely to have children. They're less likely to be heterosexually married. Because they are less likely to have children and probably less likely to be raising all children, we know they're more likely to be employed full-time.

So they are remaining in the employed work force. They're not engaged in activities that we know are associated with reductions in rates of alcohol and drug [R. 2729-40] dependency and abuse. That's probably why they're showing patterns more similar to men. Their life styles are more similar to men's. The disparity between homosexual and heterosexual women does not persist significantly throughout the lifespan. The major point of departure between two groups is that 25 to 35-year-old age range. After 35 the disparity is less pronounced. [R. 2719-41]

Based on my research on lesbian and gay men and other minority communities, there is nothing that would make the individualized screening for substance abusers ineffective as applied to lesbians and gay men.

If a state is seeking to protect children from being placed in foster care with foster partners or are alcohol or substance abusers, excluding gay and lesbian people from fostering is not a rational way to achieve that goal

If you excluded all groups who had elevated rates of substance abuse or dependency, probably most people would be excluded from fostering. If you did it on an individual attribute, sure. There are very few groups who would not be excluded. If you're doing it on individual risk factors, you would have to exclude men because they have higher rates. You have to exclude younger people [R. 2719- 42] because they have

higher rates. You have to exclude Whites because they have higher rates than Asian Americans.

CROSS-EXAMINATION BY MS. HALL

I have not read the Arkansas Foster Parenting Manual

There have been very few papers on substance abuse. If you try to rank -- I will answer your question. But one of the things to consider with any point estimate is that the point estimates vary by sampling.

A point estimate might be you go down to a Baptist Church, and you ask people, "How often do you come to services?" You calculate the mean, the number of times they come to services. That's a point estimate. Researchers tend to view point estimates as imprecise. Not exact. Because they reflect a combination of chance in who you asked, which might vary from time to time in your sample. They can also vary for reasons that you might be interested in as a researcher. Researchers tend to think of point estimates as imprecise. And that level of imprecision is quantified oftentimes by what's called a standard error, which is kind of an estimate of how much we would expect that point estimate to vary simply due to chance. That's like in the presidential poles, there would be a margin error of 30 percent. That's a standard error. As with the presidential polls, when they said [R. 2719-44] Kerry 48 percent, Bush 47 percent, that's within a margin of error, it means that you don't look exactly at the 47, 48. You consider the range of values around there. So in that frame and considering the point estimates in the study where abuse was reported had very wide standard errors for the homosexually classified groups reflecting the fact that the calculation of the standard error – in the denominator is the size of the

sample. The size of that particular group. These are relatively small groups of people. So when you have a sample size that is very small, because it's one over N (the sample size) in the denominator, the point estimates have a wide standard error when you are ranking them. Alcohol abuse, in the Gilman article, was highest amongst homosexually classified women, 13.9 percent. I don't have here in my notes the actual standard error for that. But I would bet it's around five percent. So you have to really put a wider interval on that 13.9 percent. [R. 2719-45] It's probably going to be closer to the13.9 percent because you have more certainty in the middle of the range. But it's an imprecise estimate. It's unreliable in the context you would want more studies to be firmly convinced of exactly where in that range it is.

In my opinion, as an expert, I think there has been enough studies done on alcohol and drug abuse and dependence to make these numbers statistically reliable if you want to know the neighborhood in which that estimate is going to be, but if you want to know what the precise value is, there has not been enough studies. So if one's concern is that maybe we've missed something and the rate is really 60 percent, I think there's been enough studies to rule that out.

The second group would be homosexually classified men, 12.9 percent for alcohol abuse. But, again, that probably has a standard error of five, [R. 2719-46] around there. The third group is heterosexually classified men of 12 percent. That probably has a standard error of -- I would bet it's about .5. It's a pretty big group. So we can be pretty certain that the rate among heterosexually classified men is somewhere around 11, 13 percent. I feel really confident about that. The rate among heterosexually classified women

is 4.6 percent in the Gilman article. That probably also has a standard error of .5. So we can be really confident that the rate among heterosexually classified women is around that rate.

The 13.9 percent for homosexual women versus the 4.6 for heterosexual women was not statistically significant because of that size of that standard error. So we cannot rule out that the difference that we're seeing between those two point estimates is simply due to chance. Just chance in sampling out the population.

With drug abuse the Gilman article reported [R. 2719-47] about 10.7 percent of homosexually classified men met the criteria for drug abuse. The next rate is 4.4 percent for heterosexually classified men. The next group is homosexually classified women at 1.8 percent. And the heterosexually classified women is at 1.2 percent.

There is a difference between the dependency versus the abuse of alcohol and drugs. But I think that ranking point estimates is -- I guess, as a scientist [R. 2719-48] I would say that's not a way in which -- as a scientist, I would consider these particular numbers. It really doesn't have meaning. If you ask the question another way, like is there evidence for difference between these groups, that I could handle. But ranking point estimates doesn't make a lot of sense.

We use estimates because they anchor us. In the sense of if you were to go shopping and you didn't know exactly where Macy's was because you don't have the address, but if you know what shopping center it is, you have a sense of kind of where it's located. That's what I mean by they anchor us. They give us a sense of where the estimate is. So, for example, we can conclude from all these studies that it's a minority group of people who

meet the criteria of the diagnosed disorders of alcohol and drug dependency and abuse. So we kind of know the location. And then the [R. 2719-49] question is: Are these groups different? And that we determine by statistical testing.

A minority of the entire population has alcohol or drug dependency abuse. And out of that minority, heterosexually classified men, homosexually classified men, and homosexually classified women compared to -- you always have to have a comparison – compared to heterosexually classified women, have the highest risk of being alcohol dependent.

The datasets that I've used -- I've used the [R. 2719-50] 1996 National Household Survey on Drug Abuse which was conducted by SAMHSA which is a federal agency. I've also used the National Comorbidity Survey which was a National Institute of Mental Health funded survey conducted by Ron Kessler who is at Harvard University. And I've used the MIDUS, the Midlife Survey on Adult Development which was conducted by a consortium of researchers, including Kessler from Harvard University. I have also used the National Health and Nutrition Examination Survey, the 3rd NHANES, which is a federal study. [R. 2729-51]

Bisexuals would have a minimum of two partners to be identified as bisexual in the surveys and you would have a minimum of one sexual partner to be identified as homosexual or heterosexual. If one hadn't identified having any sexual encounter, say, for example, on the survey that was asking about the previous 12 months, you would throw those out. Some of those surveys asked the number of partners that the person had within the last 12 months, and some didn't. [R. 2719-52]

The research that I reported on demographic factors like age, unemployment, that was not research that I conducted.

The best predictor of meeting the criteria for drug abuse and dependency would be age, gender, unemployment. Those are probably where you see the greatest disparities. Now, in race, there are variety of disparities. One of them which is large is among the American Indians.

STATEMENT OF THE CASE

Undisputed background facts

Arkansas evaluates all foster parent applicants on an individualized basis. All applicants and members of their households must submit to child maltreatment and criminal records checks, a home study and physical exam. (Add.740-41, 750-51). Foster parents must demonstrate "stability" and be "physically, mentally and emotionally capable of caring for children." (Add.751). This screening process ensures that only those individuals capable of providing stable, nurturing, safe, healthy homes will be approved. (Add.728). This process was in place before the challenged regulation was enacted and it remains so today. (Add.726-728).

The only exception from this system of case-by-case evaluation is that applicants who have gay household members may not be evaluated at all; they are automatically disqualified at the outset. The challenged regulation provides:

> No person may serve as a foster parent if any adult member of that person's household is a homosexual. Homosexual, for purposes of this rule, shall mean any person who voluntarily and knowingly engages in or submits to any sexual contact involving the genitals of one person and the mouth or anus of another person of the same gender, and who has engaged in such activity after the foster home is approved or at a point in time that is reasonably close in time to the filing of the application to be a foster parent.

(Add.751).

Until this regulation was enacted in 1999, foster applicants who were gay or had gay household members were subjected to the same individualized screening process applied to all other applicants. (Add. 728). The State[2] is aware of gay people who have served as foster

[2] Because the Appellants, the Department of Human Services and the Child Welfare Agency Review Board, litigated this case jointly, we will refer to them collectively as the State.

parents, but is not aware of a single child whose health, safety or welfare was endangered by the fact that his or her foster parent was gay. (Add.728).

Before the Child Welfare Agency Review Board (the "Board") enacted the challenged regulation, it was advised by its attorney that there was no need to enact the exclusion because the preexisting regulations already addressed the Board's concerns and adequately protected children. (Add.727). The Board voted to pass the regulation over her advice. Several Board members who voted for it have expressed their personal moral objections to gay people. (Add.726-27) (Ab.239-45, 252-55; Supp. Ab.7; R.2247-60, 2277-83).

Lesbians and gay men are not excluded from adopting children in Arkansas. (Add.727). Gay applicants seeking to adopt are subjected to the same screening process as every other applicant. (Add.727-28). DCFS does not question the sexual orientation of persons wishing to be approved for adoption. (Add.727).

Arkansas needs more qualified foster parents. The shortage in some parts of the state requires children to be placed far away from their parents, siblings and schools. (Add.365).

The Plaintiffs

Matthew Howard is a former pastor who now works with families with children who have developmental disabilities. (Add.875)(Ab.211-12; R.2193-94). He and Craig Stoopes, who works at the public library in Little Rock, have lived together in a committed relationship for 19 years and are raising two young children. (Add.875)(Ab.212-13; R.2194-97).

Anne Shelley, 41, is a lesbian and has been in a relationship with her partner since 1999. (Add.874)(Ab.226; R.2221).

Bill and Carolyn Wagner have been married for over 30 years and have two grown

children. (Add.874)(Ab.58-59; R.1863-64). Bill is an optical lab technician. (Add.874)(Ab.58; R.1864). He and his wife founded a "Fulfill a Dream" foundation for sick children and are founders and volunteers at a camp for children with cancer. (Add.874)(Ab.59; R.1864-65). They have also opened their home to at least 80 teenagers, many of whose parents kicked them out because of their sexual orientation. (Add.874)(Ab.59-63; Supp. Ab.1; R.1865-72). While the State is aware that the Wagners take in children in need, it will not allow them to be considered as foster parents because their son, who sometimes stays at home, is gay. (Add. 874)(Ab.63; R.1872-73).

All of the Plaintiffs sought to be considered as foster parents and were rejected because of the exclusion. (Add.874-75)(Ab.63, 214-15, 226-27; R.1872-73, 2199-2200, 2221-23).

Case history

Howard, Stoopes, Shelley and Wagner challenged the blanket exclusion under the equal protection and due process guarantees of the Arkansas and federal constitutions. They further claimed that the regulation is outside the scope of the Board's authority under Ark. Code Ann, § 9-28-405 to enact laws that promote the health, safety and welfare of children, and in violation of that statute.

Prior to trial, the Circuit Court rejected Plaintiffs' contention that the regulation implicated their constitutional privacy/intimate association rights and held that the applicable constitutional standard was the rational basis test rather than heightened scrutiny.

Over the course of this litigation, the State offered a variety of justifications for the exclusion, which fall into three categories. First, it asserted that gay people are more likely to pose a variety of threats to children: domestic violence, sex abuse, diseases that present a risk to

children, instability, drug abuse and child neglect. Second, it asserted that the exclusion is justified because children may face the stress of social stigmatization, including moral disapproval, if they are placed in foster families with gay members. Third, it contended that children are best off in families with married mothers and fathers. (Add.348, 354-56; *see also* Add.299-300, 304-13, 324-25).[3]

Before trial, the State significantly narrowed its justifications for the regulation (Ab.293; Supp.Ab. 8-11; R.2319-25, 2400) and offered evidence at trial regarding only four rationales: I) the assertion that gay people are more likely to be substance abusers, ii) the assertion that they are more likely to have unstable relationships, iii) the stress of exposure to societal prejudice against gay people,[4] and iv) the assertion that children are best off in married mother/father families. However, since the court held prior to trial that the applicable constitutional standard was rational basis review, the Plaintiffs put on evidence at trial addressing all of the rationales that the State has asserted throughout the course of this litigation, even those that it has abandoned.

During five days of trial, the Court heard testimony from experts about whether the State's assertions about gay people are based in fact or mere stereotypes, and whether there is any child welfare justification for the automatic exclusion of families with gay members from fostering.

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[3] The State raised substance abuse and the purported superiority of married heterosexual parents at trial, although it never identified them in its responses to discovery requests asking it to identify all state interests that justify the challenged regulation. *Id.*

[4] The State put on testimony regarding this interest even though it was one of the interests it had expressly abandoned before trial. (Supp.Ab. 11; R.2324).

After trial, the Court found that "[t]he testimony and evidence overwhelmingly showed that there was no rational relationship between the Rule 200.3.2 blanket exclusion and the health, safety and welfare of the foster children." (Add.888). The Court held that because the challenged exclusion is not rationally related to the protection of the health, safety or welfare of foster children, it is "contrary to the statutory obligation of the Board" under Ark. Code § 9-28-405(c). The Court found that the Board was attempting to legislate public morality, and this was not within the authority the legislature delegated to the Board. (Add.888). The Court then held that the regulation does not violate the right to equal protection because it may be rationally related to an interest in preserving "public morality," which the Court held to be a "stand alone legitimate state interest" for purposes of the equal protection rational basis test. (Add.895). And it held that the regulation does not violate the right to privacy or intimate association, although it noted that the disqualification of plaintiff William Wagner, who has an adult gay son at home, might unconstitutionally restrict Wagner's right to privacy and association. (Add.895).

The State appealed the Court's decision striking down the regulation and the Plaintiffs cross-appealed the portions of the judgment in which the Court held that the exclusion does not violate the right to equal protection, privacy or intimate association under the United States Constitution or the Arkansas Constitution.

APPELLEES' ARGUMENT

Standard of review: This Court reviews the Circuit Court's findings of fact for clear error. *See, e.g., Weiss v. McFadden,* 2004 WL 2823335 (Ark. 2004); *Farm Credit Midsouth, PCA v. Reece Contracting, Inc*, 2004 WL 2407456 (Ark. 2004). "Disputed facts and determinations of credibility are within the province of the fact-finder." *Id.* This Court reviews the Circuit Court's legal conclusions de novo. *See, e.g., Murphy v. City of West Memphis*, 352 Ark. 315, 320-21, 101 S.W.3d 221 (Ark. 2003).

SUMMARY OF FINDINGS AND EVIDENCE ABOUT THE STATE'S ASSERTED RATIONALES FOR THE EXCLUSION

Central to both the appeal and cross-appeal are the Circuit Court's findings of fact regarding the State's asserted justifications for excluding applicants who have gay family members from being considered as foster parents. Therefore, as a predicate to the legal issues presented in these appeals, the following is a summary of the Court's findings of fact and the evidence on which they were based.

A. The Circuit Court found that being raised by gay parents or living in a family with a gay member is not harmful to children in any way.

The Court found that being raised by lesbian and gay parents does not increase the risk of any adjustment problems for children, and that children raised by lesbians and gay men are just as well-adjusted as children of heterosexual parents. (Add.868-69). It specifically found that children in such families are not at an increased risk of having psychological, behavioral, academic or gender identity problems, or difficulty in forming healthy peer relationships. (Add.868). The Court further found that there is no factual basis for saying that heterosexuals might be better able to guide their children through adolescence than gay parents. (Add.868). In

sum, the Court found, there is no factual basis for making the statement that the sexual orientation of a parent or foster parent can predict children's adjustment, or that being raised by lesbian or gay parents has a negative effect on children's adjustment. (Add.868-69).

These factual findings, not one of which the State contests on appeal, were based on a wealth of scientific evidence presented at trial. Plaintiffs presented the expert testimony of Dr. Michael Lamb, a developmental psychologist with 30 years of experience who specializes in the effects of different child rearing circumstances—including a variety of "non-traditional" family settings—on children's adjustment. (Ab.121-23; R.1984-92). Until 2004, Dr. Lamb was a senior research scientist for the federal government at the National Institute of Child Health and Human Development, where he was chief of the Section on Social and Emotional Development. He is now a professor of psychology at Cambridge University in England. (Ab.121, 342; R.1984-85, 2522). The Court found Dr. Lamb to be "[t]he most outstanding of the expert witnesses" who appeared in the case. (Add.886). In its memorandum decision, it noted that Dr. Lamb showed no hint of bias for or against any of the parties and provided full and complete answers to questions put to him by all counsel and the Court. *Id.* The Court commented that "[o]f all the trials in which the court has participated, whether as a member of the bench or of the bar, Dr. Lamb may have been the best example of what an expert witness is supposed to do in a trial, simply provide data to the trier of fact so that the trier of fact can make an informed, impartial decision." *Id.*

Dr. Lamb testified that a vast body of child development research over the last 40 to 50 years has identified the factors that predict children's healthy adjustment: I) the quality of the child's relationship with the parent(s)—a relationship characterized by warmth, closeness, and

parental sensitivity and guidance promotes healthy adjustment; ii) the quality of the relationship between the parents (if there are two)—harmonious relationships support healthy adjustment of children while significant conflict impedes it; and iii) adequate resources. (Ab.125-26; R.1995-97). It is well-established within the child development field that these are the factors that correlate with children's adjustment, and that this is the case regardless of the type of family. (Ab.125-27, 129-31; Supp. Ab. 3; R.1995-2000, 2003-07). Dr. Lamb, as well as Dr. Pepper Schwartz (a sociologist who is an expert on couple relationships (Ab.378-85; R.2621-33)), testified that research on couples shows that there is no difference in the level of conflict experienced by same-sex and heterosexual couples. (Ab.151, 163, 387-88; R.1054-55, 2083-84, 2636-39. Thus, before considering the research examining children of gay parents, Dr. Lamb testified, there would be no basis to expect a parent's gay orientation to have an adverse effect on children. (Ab.137; R.2021-22).

But when researchers did study children who were raised by gay parents, Dr. Lamb testified, they consistently found that these children are just as well-adjusted as their peers. (Ab.137-38, 142; R.2021-25, 2034-35). Numerous studies have been conducted on children of all age groups by a variety of researchers over the past 25 years and their findings were uniform: parental sexual orientation had no impact on children's adjustment. (Ab.137-38; Supp. Ab.4; R.2021-25, 2033-36).[5] Not a single one of the studies that compared children of gay parents to children raised by heterosexuals found an elevated rate of any sort of adjustment problem among

[5] Dr. Frederick Berlin, a psychiatrist who is an expert on human sexuality (Ab.66-71; R.1881- 1890), testified that there is no evidence that parental sexual orientation determines a child's sexual orientation. (Ab.77; R.1900).

the children of gay parents. *Id.*[6]

The State's expert witness, Dr. George Rekers, whom the Circuit Court specifically did not credit,[7] did not offer any studies reaching contrary conclusions about the adjustment of children raised by gay parents; nor did he dispute Dr. Lamb's description of the findings of these studies. He merely quarreled with their methodology. (Ab.275-76 ; R.2368-70). As Dr. Lamb explained, Dr. Rekers' criticism is baseless. These studies, which were conducted by developmental psychologists at universities in the United States and Europe, followed standard

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[6] Dr. Lamb testified that he is aware of only one study purporting to show that gay parents are harmful, a survey conducted by Paul Cameron. (Ab.143; R.2037). The Court necessarily rejected that survey as part of its rejection of the State's contention that gay people pose a threat to children. The State's expert witness specifically excluded that survey from his consideration. (Ab.297; R.2410). Dr. Lamb explained that although Cameron says his study assesses individuals raised by gay parents, he did not ask most of the subjects if they had gay parents in the first place (Ab.95-96, 143-44; R.1931-33, 2036-38), making the findings "bogus." (Ab.143; R.2037). Dr. Berlin referenced an article noting that Cameron had been by dropped by the American Psychological Association and censured by other professional associations for misrepresenting data. (Ab.100; R.1938). *See also Baker v. Wade,* 106 F.R.D. 526, 536 (N.D. Tex) (referring to Cameron's sworn statement that gay people pose a risk of child sex abuse as a "total distortion" of the scientific data), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985).

[7] The Court found, "Dr. Rekers' willingness to prioritize his personal beliefs over his function as an expert provider of fact rendered his testimony extremely suspect and of little, if any, assistance to the court. " (Add.886-87).

methodologies that are commonly used and well-accepted in the field of psychology, and were published by reputable academic journals after being subjected to the rigorous peer review process. (Ab.138-41; Supp. Ab.3-4; R.2025-31).[8]

Dr. Lamb testified that 25 years of research on children of gay parents establishes that these children develop just as well as other children. This is a well-settled scientific question, not an issue about which there are disparate findings or disagreement in the field. (Ab.146-47; R.2043). It is a topic of consensus within all of the relevant professional fields—psychology, social work and child welfare. The major national professional associations in those fields—including the American Psychological Association, the National Association of Social Workers and the Child Welfare League of America—have taken public positions against restrictions on gay people parenting, adopting or fostering. (Ab.198-200; R.2161-65). Within

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[8] Dr. Rekers complained that the research did not use nationally representative samples of thousands of foster children followed through adulthood. (Ab.275-76, 306; R.2368-70, 2439). But Dr. Lamb testified that this is true of most of the research in the field of psychology, which typically involves intensive studies of a small number of subjects collected through convenience sampling as opposed to large-scale representative survey research used in other disciplines. (Ab.139-41; Supp. Ab.4; R.2027-31). He also noted that there is no need for representative surveys following thousands of subjects into adulthood to know the impact of parental sexual orientation on foster children's adjustment, and such a study would not be possible. (Ab.140, 342-43; 357; Supp. Ab.15; R.2030, 2522-24). Indeed, he is not aware of any longitudinal studies following any groups of foster children into adulthood. (Ab.342, 357; Supp. Ab.14-15; R.2523, 2553-54).

Arkansas, the Arkansas Psychological Association advised the Board that the scientific research shows that parents' sexual orientation does not impact children's development. (Ab. 171-73; R. 2102-06). And the University of Arkansas at Little Rock faculty of social work submitted a letter to the Board opposing the exclusion as lacking any basis in science. (Ab.201-03; Supp. Ab.6; R.2166- 69).

Dr. Lamb testified that contrary to the characterization of the research in this area by a panel of the Eleventh Circuit in *Lofton v. Sec., Dep't of Children and Families*, 358 F.3d 804, 819 (11th Cir. 2004), *reh'g en banc denied*, 377 F.3d 1275, *cert. denied*,125 S.Ct. 869 (2005), which had no scientific evidence in the record, the research on children of gay parents is not in its "nascent stage," it is not "inconclusive," it does not reach "conflicting results," and it is not considered methodologically flawed by members of the field. (Ab.146-47; R.2031, 2041-43).

The Court also found that there is no reason the health, safety or welfare of a foster child might be negatively affected by being placed with a heterosexual foster parent who has a gay family member. (Add.869). This finding was amply supported by the record. While the scientific research on the impact of gay household members on children has focused exclusively on the impact of having gay parents, both sides' experts seemed to agree on the lack of evidence suggesting that children would be adversely affected if placed with heterosexual foster parents who have a gay family member in the home. Dr. Lamb testified that he is not aware of any reason the health, safety or welfare of a child would be negatively affected by the presence of a gay sibling or other gay family member residing in a foster home headed by heterosexual foster parents. (Ab.169-70; R.2096-98). Dr. Rekers conceded that there is "less evidence to know one way or the other" whether placements with heterosexual couples with gay household members

would generally be harmful to children. (Ab.335-37; R.2506-10).

B. The Circuit Court rejected the State's asserted child welfare rationales.

1. The State's assertion that gay people pose a risk to children because they are more prone to domestic violence, child sex abuse, drug abuse, disease, instability and child neglect.

In defending the blanket exclusion, the State has offered a list of dangerous characteristics that it attributes to gay people. At various points, the State has said that lesbians and gay men are a risk to children because they are more prone to domestic violence, child sex abuse, drug abuse, diseases that put children at risk, instability and child neglect. The Circuit Court rejected the State's characterization of gay people. (Add.868-69). All of its findings are amply supported by the testimony at trial. Of all of the harms cited by the State prior to trial, the only ones that were even mentioned by the State's expert witness were substance abuse and relationship instability, and the Court rejected each of these.

Drug abuse. Dr. Rekers asserted at trial that gay people have higher rates of alcohol and substance abuse than heterosexuals. This assertion was refuted by Dr. Susan Cochran, a psychologist and epidemiologist at UCLA's Department of Public Health who has conducted many of the studies that examine the rates of substance abuse among gay people and heterosexuals. (Ab.416-18, 422-24; Supp. Ab.17-22; R.2719-5 to 2719-16, 2719-29 to 2719-40). Dr. Rekers identified Dr. Cochran as a leading researcher in this field. (Ab.310; R.2446). The Circuit Court made factual findings based on Dr. Cochran's testimony (Add.869) and specifically discredited that of Dr. Rekers. (Add.886-87).

Dr. Cochran also testified that there are other groups that in fact do have higher rates of substance abuse– e.g., men are twice as likely as women to abuse drugs or alcohol (Ab.419-20;

R.2719-18 to 2719-20); there are significant ethnic differences in rates of substance abuse – the highest rate is among Native Americans (17.2%), the lowest rate is among Asians (6.3%), and whites, blacks and Hispanics fall in between (Ab. 420; R. 2719-22 to 2719-23); and younger people have dramatically higher rates of substance abuse than older people (Ab.420; Supp. Ab. 20; R.2719-21). None of these groups are excluded from fostering. Dr. Rekers acknowledged that there are variations among ethnic and religious groups with respect to rates of substance abuse, noting specifically that Native Americans and conservative Baptists have higher rates of alcoholism than the general population. (Ab.310-11; R.2446-47). Indeed, if all demographic characteristics that correlate with elevated rates of substance abuse were a basis for exclusion from fostering, Dr. Cochran testified, probably most people would be barred. (Supp. Ab.22-23; Ab.419-20; R.2719-18 to 2719-23, 2719-42).

Instability. The Court's rejection of the State's assertion that gay people are more likely to have unstable relationships is also well-supported by the evidence. The only contrary evidence offered by the State was Dr. Rekers' reference to a study that found that the mean number of sexual partners (over the lifetime and over the past five years) was higher for gay men than heterosexual men, and for lesbians than heterosexual women. (Ab.276-77; R.2371-72). Dr. Pepper Schwartz, a sociologist who is an expert in couple relationships (Ab.378-85; R.2621-33), testified that the study referred to by Dr. Rekers says nothing about relationship stability because it did not evaluate couples, it looked only at individuals. (Ab.402-03; R.2665-67). The average number of sexual partners over time for individuals in a particular group says nothing about the stability of the couple relationships they ultimately form. *Id.* Dr. Schwartz further testified that if the average number of sexual partners for individuals within a group were a basis to disqualify

a group from fostering, then according to the same source relied on by Dr. Rekers, men, African Americans and Jews, among others, would also have to be excluded because they also have greater numbers of sexual partners on average than the general population. (Ab.406-07; R.2672-73). The Circuit Court made factual findings based on Dr. Schwartz's testimony (Add.869) and specifically discredited Dr. Rekers. (Add.886-87).

Dr. Schwartz testified that contrary to the State's contention, the scientific research on couple relationships shows that sexual orientation is not a proxy for relationship stability. She testified that lesbian and gay couples often have stable, committed, enduring relationships that play the same central role in their lives as they do for heterosexuals.[9] (Ab.385-96; Supp. Ab.16; R.2634-54). Dr. Lamb also testified about the scientific research demonstrating that gay couples have stable relationships. (Ab.149, 151, 163; R.2049, 2054-55, 2083-84). Drs. Schwartz and Lamb both noted that heterosexual couples are not necessarily stable, as evidenced by the 50% divorce rate. (Ab.149, 396-97; R.2050, 2654-55).

Dr. Schwartz also testified that there are various demographic characteristics that correlate with greater or lesser relationship longevity. For example, African Americans, poor people, less religious people and those who married at a young age (none of whom are excluded from fostering) have less relationship longevity on average. (Ab.397-400; R.2655-61). Finally, Dr. Schwartz testified that gay couples offer more family stability than single heterosexuals (who are not excluded from fostering). (Ab.400; R.2662).

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[9] Indeed, Matthew Howard and Craig Stoopes have been together for 19 years, and no couple could be more stable or committed than this one. Craig has moved with Matthew several times as Matthew's church transferred him to new parishes. (Ab. 212; R.2194-95).

The Court's rejection of the State's pre-trial suggestions that gay people pose a special danger of domestic violence, sexual abuse, diseases that pose a risk to children, and child neglect are also based on extensive evidence in the record, none of which was contested by the State.

Child neglect. As discussed above, Dr. Lamb testified that the research on children of gay parents shows no greater incidence of maladjustment among this group. Such findings contradict any assertion that there is a higher level of neglect by gay parents.

Domestic violence. The Court's finding that gay people do not pose a heightened risk of domestic violence is supported by the uncontested testimony of Dr. Lamb, who testified that the research on family violence has identified a number of risk factors that predict domestic violence and child abuse (e.g. parental substance abuse and stress), but having a gay or lesbian parent is not among them. (Ab.149; R.2048).

Child sex abuse. The Court's finding that gay people do not pose a higher risk of child sexual abuse is supported by the uncontested testimony of Dr. Frederick Berlin, a psychiatrist who is a professor at Johns Hopkins University School of Medicine and the director of the National Institute for the Study, Prevention and Treatment of Sexual Trauma and a nationally recognized expert on pedophilia. (Ab.66-71; R.1881-90). Dr. Berlin testified that gay men are no more likely than heterosexual men to sexually abuse children, and that child sex abuse by women (regardless of sexual orientation) is rare. (Ab.86, 91, 95; R.1916, 1924, 1929-30). The undisputed testimony was that the myth of gay people as sexual predators of children is baseless.

Diseases. The Court's rejection of protection against diseases as a justification for the regulation is supported by the uncontested testimony of Dr. Rebecca Martin, a physician who specializes in treating infectious diseases, including HIV, and who has directed the infectious

disease clinics at the University of Arkansas for Medical Sciences and the VA hospital in Little Rock for 15 years. (Ab.177-79; R.2117-20). Dr. Martin testified that children are not at risk of contracting HIV from HIV+ household members of any sexual orientation. (Ab.179-82; R.2120-27). Moreover, she testified that the medication available to treat HIV has made it a chronic illness like diabetes, not necessarily a terminal disease, and that people with HIV can live healthy lives and be unimpaired in their ability to care for children. (Ab.182-83; R.2127-34). Dr. Martin also testified that being gay is not a proxy for having HIV (especially for women, as sex between women is not a means of HIV transmission like sex between men and heterosexual sex), and that other groups that are not categorically barred from fostering are disproportionately affected by this disease—e.g., the rate of HIV infection is 8 times greater for African Americans than whites and almost 2/3 of all women with HIV are black. (Ab.180-81; R.2122-26). She also testified that other sexually transmitted diseases that can be contracted by sex between men can also be contracted heterosexually, and these diseases affect both gay men and heterosexuals. (Ab.183-84; Supp. Ab.5; R.2131-33).

Finally, the Court, in concluding that the exclusion has no rational connection to promoting children's welfare, also pointed to its findings that Arkansas foster care regulations already provide for individual screening of all applicants, subjecting them and their family members to physical exams and child maltreatment and criminal record checks, and mandate that children be placed with the family that is found to be best matched to meet their individual physical and emotional needs. (Add.867, 869-70). The State stipulated that the individualized screening process ensures that only those individuals capable of providing stable, nurturing, safe, healthy homes will be approved. (Add.728).

2. The State's assertion that children do best with a mother and a father.

The Court also rejected the State's assertion that the exclusion is justified because, it says, children develop best in families in which there is a married mother and father. First, the Court ruled that the State's asserted preference for married couple placements is not relevant to this case because the legislature has stated that single people may foster. (Ab.280-81, 284-87; R.2378-79, 2384-89). The Court pointed out that State law defines "foster home" as a private residence of "one (1) or more family members." Ark. Code Ann. § 9-28-402(13). And the Court noted that the Board's attorney advised the Board of this at the time the challenged regulation was being considered and explained that they could not enact a regulation based upon the presumption of a two-adult household. (Ab.285-86; R.2387).

The Court also rejected this asserted justification as a factual matter, finding that I) children develop equally well in families with lesbian or gay parents (Add. 868-70)), and ii) while there are benefits to children's adjustment in having two parents as opposed to one, and children in single-parent families are more likely to have adjustment problems than children in two-parent families, both men and women have the capacity to be good parents and there is nothing about gender, per se, that affects one's ability to be a good parent. (Add.868).

These findings were amply supported by the expert testimony of Dr. Lamb, who has conducted a great deal of research and written volumes on the role of fathers in children's development. (Ab.121-22; R.1984-89). In addition to testifying about the equivalently healthy development of children raised by gay parents, he also testified that it is well established in the field of developmental psychology that both men and women have the capacity to be good parents and that children do not have to have one of each as parents for healthy adjustment.

(Ab.130-34, 155, 360-63; Supp. Ab.3; R.2006-16, 2066, 2565-66).

Dr. Lamb testified that while two-parent families tend to better promote adjustment than single-parent families, it is clear that it is not the gender of the parents or the absence of a male figure that accounts for the difference. (Ab.130-34; R.2006-16). He testified that the scientific research shows that the higher rate of maladjustment among children in single-parent families compared to children in two-parent families (30% vs. 15%) is attributable to family conflict, the loss of a relationship with one parent, and the loss of resources that typically accompany divorce. (Ab.133; R.2013). Thus, he explained, there is no evidence to support the notion that a child needs a male and female parent or role model in the home to develop healthily. (Ab.134; R.2014). Indeed, he pointed out, most children who grow up in a single-parent family without a father in the home (about 2/3) have no adjustment problems at all. (Ab.132; R. 2011). Moreover, Drs. Lamb and Rekers agreed that research shows that when single heterosexual mothers find new partners, their children tend to do worse. (Ab.312, 364; R.2453, 2568-69).

The Circuit Court properly refused to credit the assertion by Dr. Rekers that children's healthy adjustment requires having a mother and a father. Dr. Lamb refuted all of Dr. Rekers' testimony as a mischaracterization or selective presentation of the research, or not supported by the research and a departure from the established view in the field. (*See, e.g.*, Ab.134, 281-84, 352-55, 360-64; R.2016, 2379-83, 2545-50, 2552-68). Moreover, Dr. Rekers conceded that he did not favor excluding heterosexual single men and women from fostering. (Ab. 311; R.2448).

3. <u>The stress of social stigmatization.</u>

The Circuit Court rejected the State's assertion that excluding families with gay members is justified in order to protect foster children from social prejudice against gay people. It found

that children raised by gay parents are no more likely than their peers to have difficulties in forming healthy peer relationships. (Add.868). This finding is well supported in the record.

First, the undisputed evidence showed that children can experience negative peer reactions to all sorts of things about them or their families that are perceived as differences, e.g. their race or the fact that their mother is overweight. (Ab.149-50, 347-48; R.2050-51, 2534-35). As Dr. Rekers agreed, children could be teased or rejected by peers for anything, *e.g.* if they are placed with single foster parents or foster parents of a different race. (Ab.306; R.2430-31).

But the evidence showed that the adjustment of children raised by gay parents is not compromised by societal prejudice against their parents. The scientific research discussed by Dr. Lamb showed that these children are just as well-adjusted socially and just as likely as their peers to have good relationships with friends and extended family members. (Ab.346-47, 350; R.2532-34, 2540). And they are no more likely than other children to experience peer rejection. *Id.* Some studies showed that children of gay parents are not subjected to a greater amount of teasing than their peers, but <u>if</u> they are teased, it is more likely to be about their families. *Id.* The State's expert witness said nothing about the scientific studies discussed by Dr. Lamb. Although Dr. Rekers asserted that many children of gay parents experience problems due to societal prejudice against gay people (Ab.272-74; R.2363-66), he could not identify any scientific studies to support that statement. (Ab.306, 340-41, 348-50; R.2433, 2516-17, 2536-40).

Dr. Rekers also speculated that if a child's biological parents disapprove of gay people, being placed with a gay foster parent might impede reunification for that child. (Ab.271-72; R.2361-62). But he acknowledged, and Dr. Lamb agreed, that reunification could be hindered by conflict between the biological parents and the foster parent with respect to a range of social,

moral or religious values. (Ab.164-65, 306, 350-51; R.2086-87, 2432, 2541-42). Dr. Lamb and Judith Faust (an Arkansas child welfare expert (Ab.189-92; Supp. Ab.6; R.2144-49)), testified that deep prejudice on the part of a particular child's biological parent—regardless of what group it is against—is something that could be considered in making a placement decision for that child. (Ab.170, 210-11, 350-51; R.2097, 2191-92, 2541).

C. The Circuit Court found that the exclusion may in fact be harmful to the children in the child welfare system.

The Court found not only that there is no child welfare basis for the challenged exclusion, but also that the exclusion may in fact harm the very children it is purported to protect. The Court found that Arkansas needs more qualified foster parents and struggles to have a large enough pool of well-qualified foster parents to make good placement matches. (Add. 867). Moreover, it found, when the system does not have enough well-qualified foster parents, less than ideal matches occur, which might result in multiple placements, which is not good for children. *Id.* It found that categorical exclusions eliminate from consideration people who would otherwise be good foster parents. *Id.* Thus, the Court found, the challenged exclusion "may be harmful to promoting children's healthy adjustment because it excludes a pool of effective foster parents." *Id.*

All of these findings are supported by extensive evidence, including the testimony of Arkansas child welfare expert Judith Faust, a professor of social work at UALR and former director of the Arkansas DCFS. (Ab.189-90; Supp. Ab.5; R.2144-46). Ms. Faust testified that blanket exclusions shrink the pool of qualified foster parents, which is already insufficient to meet the needs of Arkansas' children. (Ab.195-98; R.2155-60). The State stipulated that

Arkansas needs more qualified foster parents and that the shortage in some parts of the state requires children to be placed far away from their parents, siblings and schools. (Add.365).

Ms. Faust also testified that excluding applicants with gay family members from the system of individualized evaluation means that some children cannot be placed with the family that would be best matched to meet their individual needs. (Ab.193-97; R.2152-58). She noted that there could be a variety of situations in which a gay or lesbian foster parent could be the ideal placement for a child—if there is a lesbian or gay relative willing to provide kinship foster care (*see* Ark. Code Ann. § 9-28-503 (mandating that DCFS "shall attempt to place the [foster] child with a relative for kinship care"), if there is a gay teenager needing foster care and a reluctance among other families to work with a gay adolescent,[10] or any number of reasons an applicant who happens to be gay would be the best match for a particular child. (Ab.198; R.2159-60). Dr. Lamb agreed that the exclusion could be harmful to children by relegating more children to poorer quality foster placements. (Ab.162-63; Supp. Ab.5; R.2082-83). For these reasons, Ms. Faust explained, blanket exclusions like the challenged regulation are contrary to established best practices in the child welfare field; the principle of individualized assessment is central to child welfare practice. (Ab.193- 95; R.2151-55).

The State's expert witness agreed that with respect to foster children, the primary rule is that the needs of each child must be individually addressed. (Ab.332; R.2500)(*See also* Ab.326-28; R.2486-91). The Board itself, in its licensing regulations, also recognizes the importance of

[10] The evidence showed a need for foster parents for self-identified gay teens and that heterosexuals are not always comfortable with gay foster children. (Ab.59-63, 255-57; R.1865-72, 2284-88).

making placement decisions "based on an individual assessment of the child's needs." (Add.750). And the State does not dispute the fact that some children would be best off in the care of families with gay members. (Add. 877)(Ab.256-57; R.2286-88). Indeed, its expert witness acknowledged that there might be circumstances in which it is best for a child to remain with a gay foster parent. (Ab.327-28, 336-37; R.2490-91, 2508).

After hearing all of this evidence and evaluating the credibility of the expert witnesses, the Court concluded: "the testimony and evidence overwhelmingly showed that there was no rational relationship between the [exclusion] and the health, safety, and welfare of the foster children." (Add.888).

LEGAL ARGUMENT

THE CIRCUIT COURT CORRECTLY HELD THAT THE REGULATION WAS AN *ULTRA VIRES* ACT BY THE BOARD AND CONTRARY TO THE BOARD'S LEGISLATIVE MANDATE.

The Circuit Court has the authority to reverse an agency decision if the rights of the petitioner have been prejudiced because the agency's decision is "in excess of the agency's statutory authority." Ark. Code Ann. § 25-15-212(h)(2). Moreover, "the law is elementary that an agency has no right to promulgate a rule or regulation contrary to a statute." *McLane Co. v. Weiss*, 332 Ark. 284, 298, 965 S.W.2d 109, 115 (Ark. 1998). And "it is the role of the courts to determine if the Board has promulgated a regulation that is contrary to [statute]." *McLane Co., Inc. v. Davis*, 353 Ark. 539, 550, 110 S.W.3d 251, 259 (Ark. 2003).

The complaint in this action sought a declaration that the Board's enactment of the regulation was outside the scope of the authority granted to the Board by the legislature under

Ark. Code Ann., § 9-28-405(c), which is the authority to promulgate rules and regulations that:

1) Promote the heath, safety and welfare of children in the care of a child welfare agency;
2) Promote safe and healthy physical facilities;
3) Ensure adequate supervision of the children by capable, qualified, and healthy individuals;
4) Ensure appropriate educational programs and activities for children in the care of a child welfare agency;
5) Ensure adequate and healthy food service;
6) Include procedures for the receipt, recordation and disposition of complaints regarding allegations of violations of this subchapter, of the rules promulgated [thereunder], or of child maltreatment laws;
7) Include procedures for the assessment of child and family needs and for the delivery of services designed to enable each child to grow and develop in a permanent family setting;
8) Ensure that criminal record checks and central registry checks are completed on owners, operators and employees of a child welfare agency as set forth in this subchapter;
9) Require the compilation of reports and making [them] available to [DHS] when the board determines it is necessary for compliance determination or data compilation.

Plaintiffs further sought a declaration that the regulation contravenes that law.

The Court held that the challenged regulation is not within the authority delegated to the Board by the legislature and "contrary . . . to the defendant Board's statutory responsibility to promulgate rules to 'promote the health, safety, and welfare' of foster children." (Add.888-90).

The Court's ruling that the regulation is *ultra vires* was based first on its conclusion that the evidence overwhelmingly showed that the blanket exclusion has no rational connection to promoting children's health, safety or welfare. (Add.888). As discussed in detail above, the Court specifically found that being raised by gay parents has no negative effect on children's adjustment. (Add.868-69). And it rejected all of the State's asserted justifications for the exclusion. (Add.868-69). The Court also found that the state already individually screens every

applicant for health and safety and mandates that placements must be made to meet each child's individual needs. (Add.867, 869-70). Finally, the Court found that the blanket exclusion could in fact be harmful to children's healthy adjustment because it excludes a pool of effective foster parents when there is already a shortage. (Add.867).

The Court then concluded that the regulation was enacted by the Board not to promote children's health, safety or welfare, but rather, to legislate the Board's views of morality. (Add.888) ("What the defendant Board was attempting to do was to legislate public morality."). This conclusion is supported by extensive evidence presented to the Court.

First, Board member James Balcom testified that his decision to support the exclusion was based on the community's disapproval of gay couples and his own religious belief that homosexuality is immoral. (Ab.252-53; Supp. Ab.7; R.2277-78). He said he has a moral objection to children being in a household in which there is a same-sex relationship. (Ab.253; R.2278). He does not want children to be exposed to gay role models, and thus, even disapproves of gay characters on television shows. (Ab.254-55; R.2281-82). He has other strong negative views about gay people that reflect bias. He believes gay people recruit others to be gay; that they recruit in schools, teaching children how to have same-sex sex; and that if gay people did not recruit, there would be pretty close to no gay people. (Ab.255; R.2282-84).

Board member Robin Woodruff testified that she also believes that homosexual relationships are "wrong" and a sin, and that they violate her Biblical convictions. Thus, she does not approve of her children spending time with openly gay couples, including gay relatives and their partners, because she does not want the role model of the gay couple before her children. (Ab.239-45, R.2247-60).

And the State stipulated that Board member David Whatley, in discussing the proposed regulation during a Board meeting, stated: "personally, as far as I am concerned, I don't think in any way should we ever promote homosexuality in any form or fashion, ever. I just don't think it's morally right and I don't think it's something that I, as a person on the board, would ever condone or agree with." (Add.726-27).

Moreover, the State stipulated that prior to the enactment of the challenged exclusion, Arkansas already had foster care regulations that screened specifically for all of the concerns raised by the State in defending the regulation. (Add.728). The State further stipulated that the Board was advised by its attorney that "there was no need to enact the exclusionary provision because the preexisting regulations already gave the Board the enforcement power to take care of any concerns and to adequately protect the interests of children." (Add.727). This makes it hard to believe that the Board enacted the regulation to address the very same concerns already being addressed through the existing regulations, leading to the conclusion that the regulation was enacted out of disapproval of gay people. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-37 (1973) (in striking down exclusion of unrelated household members from food stamp eligibility, the Supreme Court rejected the government's asserted interest in protecting against fraud because other provisions in the Food Stamp Act were "aimed specifically at" fraud, making it hard to believe that the policy was rationally intended to prevent the very same problem).

Finally, the State concedes that gay foster parents might be the best placement for some children. (Ab.256-57, 327-28; R.2286-89, 2490-91). Yet the Board enacted this blanket exclusion anyway. This makes it especially clear that this regulation had nothing to do with promoting children's welfare and everything to do with expressing disapproval of gay people.

As the Circuit Court recognized, legislating their views of morality is not within the authority delegated to the Board by the legislature. The legislature did not give it unlimited power to enact any regulations concerning foster care placements without regard to whether those regulations promote children's welfare. The legislature delegated to the Board only the power to enact regulations that serve any of nine specific goals, all of which relate to the health, safety and welfare of children in foster care, not public morality. As the Court noted, the legislature has purposefully distinguished among "health," "welfare," "safety," and "morals." (Add.889).

Since the regulation does not promote the health, safety or welfare of foster children, and, rather, was enacted to promote a view of morality, it does not fall within the authority given to the Board by the legislature and it contravenes that legislative mandate by unnecessarily depriving children of effective foster parents that they desperately need. For the same reasons, it is also arbitrary and capricious. Ark. Code Ann. § 25-15-212(h)(6); *Partlow v. Arkansas State Police Comm'n*, 271 Ark. 351, 353, 609 S.W.2d 23, 25 (1980) (An administrative action that is not supported by any rational basis is arbitrary and capricious).

In challenging the Court's rulings on these claims, the State's main argument seems to be that the Court got the facts wrong. It argues that the Board in fact enacted the regulation to promote children's welfare, and that families with gay household members are not good placements for vulnerable foster children because I) gay people are less stable, and ii) placement in such families would create stress and social problems and hinder reunification because of societal prejudice against gay people– they are "not in tune with society's moral compass" and not considered "normal." But the Court rejected these assertions as factually baseless. (Add.868-69, 888). The State simply disagrees with the Court's findings of fact but offers no

argument as to why those findings are clearly erroneous.

Moreover, the State's assertions related to social prejudice against gay people (that it would create stress and social problems for children and hinder reunification with their parents), do not constitute legitimate bases for government action. As discussed more thoroughly in Point I(A)(4), *infra*, the Constitution forbids the government (including its courts) from deferring to societal prejudice, even where it is done to shield children from prejudice. *Palmore v. Sidoti*, 466 U.S. 429 (1984) (reversing order that denied custody to mother in interracial marriage on the basis that society disapproved of such relationships and would stigmatize her child); *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (unconstitutional to rely on stigma attaching to mother's status as a lesbian when making child custody decision); *Conkel v. Conkel*, 509 N.E.2d 983, 987 (Ohio App. 1987) (same); *Jacoby v. Jacoby*, 763 So.2d 410, 414 (Fla. App. 2000) (same).[11]

The remaining arguments offered by the State in its appeal brief have no relevance to the legal issues before the Court. First, it asserts that "[c]urrently, the State does not permit non-related cohabiting couples to be foster parents," but cites no legal or factual support. Appellants'

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[11] For this reason and because promoting public morals is not within the scope of authority of the Board, the State's reliance on the Court of Appeals' decision in *Thigpen v. Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987), is misplaced. Moreover, in *Jegley v. Picado*, this Court recognized that *Thigpen* was based on the now invalidated sodomy law. 349 Ark. 600, 621, 80 S.W.3d 332, 343 (citing *Thigpen* as example of how "our sodomy statute has been used outside the criminal context in ways harmful to those who engage in same-sex conduct prohibited by the statute"); *see also* Point I(B), *infra* (discussing this Court's holding in *Jegley* that public morals is not a legitimate basis for the State to disadvantage a particular group).

Argument, at 4. There is nothing in State law or existing foster care regulations that would bar a heterosexual applicant who is cohabiting with an unmarried partner. *See* Ark. Code Ann. § 9-28-402(13)(defining"foster home" as a private residence of "one (1) or more family members."); (Add. 750-56). In any case, even if such an exclusion existed and were constitutional after *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), it would have no relevance to this case because the regulation at issue here disqualifies any family that has a gay member, whether that gay person is cohabiting or not. And there is no basis for the State's assertion that if the regulation is invalidated, "any 'couple', regardless of level of commitment, will be able to become foster parents provided all other screenings are passed." Appellants' Argument, at 4. The State stipulated that other regulations ensure that only stable families are approved. (Add.728).

The State also argues that exceptions can be made to the rule through the "alternative compliance" process. First of all, even if families with gay members could access a special process to secure an exception to the general prohibition against fostering by gay people, that would not save the regulation from lacking any rational connection to children's welfare. In any case, the alternative compliance procedure offers no safety valve here, since applicants do not have standing to seek an alternative compliance exception; only agencies can make such a request to the Board. *See* Ark. Code Ann. § 9-28-405(h)(1) ("The board may grant an agency's request for alternative compliance upon a finding that the child welfare agency does not meet the letter of a regulation promulgated under this subchapter but that the child welfare agency meets or exceeds the intent of that rule through alternative means.");(Add.877)(Ab.257-58; R.2288-90).

Finally, the State emphasizes the fact that the exclusion covers only "sexually active

homosexuals" and that celibate gay people would not be disqualified. Appellants' Argument, at 3, 5. But this is irrelevant to the analysis because the Court's findings regarding the suitability of gay parents were not based on celibate gay people. Indeed, the studies discussed at trial showing equally good outcomes for children of gay parents were not focused on celibate gay people and included studies of children raised by same-sex couples. (Ab.352; R.2544). And Judith Faust testified that none of the child health and welfare associations' views about the suitability of gay parents are predicated upon an assumption of celibacy. (Ab.210; R.2190). Thus, there is no child welfare basis for categorically excluding families with gay members regardless of whether those family members are in intimate relationships.

The Court concluded, based on the evidence presented, that the regulation has no rational connection to the health, safety or welfare of foster children, and was enacted to promote a view of morality. Thus, the Court properly concluded that the Board, in enacting the regulation, acted outside of the scope of its authority and contrary to law. The Court's ruling striking down the regulation should therefore be affirmed.

ARGUMENT IN SUPPORT OF CROSS-APPEAL

There are two additional bases upon which the regulation should be invalidated—it violated Plaintiffs' constitutional rights to equal protection and privacy/intimate association—and the Court's rejection of those claims was legal error.

I. THE CIRCUIT COURT ERRED IN HOLDING THAT THE EXCLUSION DOES NOT VIOLATE THE RIGHT TO EQUAL PROTECTION.

Regardless of the level of scrutiny applied,[12] the regulation violates the right to equal protection because the Court found that "[t]he testimony and evidence overwhelmingly showed that there was no rational relationship between [the exclusion] and the health, safety and welfare of the foster children." (Add.888). Because there is no rational connection between the exclusion and any legitimate government interest, the regulation violates the right to equal protection guaranteed by the 14th Amendment to the United States Constitution and by Art. 2, §§ 2, 3 and 18 of the Arkansas Constitution. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996); *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002).

The Court erred in concluding that even in the absence of any child welfare basis for the regulation, it does not violate the right to equal protection because "'public morality' is a stand

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[12] As discussed in Point II, *infra*, because the classification penalizes the exercise of a fundamental right (the right to privacy/intimate association discussed in *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), and *Lawrence v. Texas*, 539 U.S. 558 (2003)), the appropriate level of scrutiny of the equal protection claims is strict scrutiny. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Bosworth v. Pledger*, 305 Ark. 598, 604-05, 810 S.W.2d 918, 921 (1991). However, the regulation fails even rational basis review.

alone legitimate state interest" and government acts "rationally related to furthering the legislatively determined 'public morality' are constitutional." (Add.895). This Court and the United States Supreme Court have already recognized that the State may not single out a group for disfavored treatment based on nothing but moral disapproval of that group. *Jegley*; 349 Ark. at 633-34, 637, 80 S.W.3d at 350-51, 353; *Lawrence v. Texas*, 539 U.S. 558, 571, 577 (2003).

A. The Circuit Court correctly rejected the State's child welfare rationales.

The Equal Protection Clause requires that a state action, at a minimum, meet the rational basis test, which has two parts: I) there must be an independent and legitimate government purpose for the classification drawn the by law, and ii) the classification must be rationally related to furthering that purpose. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985); *Dupree v. Alma Sch. Dist.*, 279 Ark. 340, 345-47, 651 S.W.2d 90, 93 (1983).

Neither this Court nor the United States Supreme Court has hesitated to strike down a law under rational basis review if either one of these requirements was not met. *See, e.g, Romer*, 517 U.S. 620 (striking down amendment barring civil rights protection based on sexual orientation); *Cleburne*, 473 U.S. 432 (striking down zoning law that singled out the mentally disabled); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (striking down exclusion of households with unrelated adults from food stamp eligibility); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down law barring unmarried couples from using contraception); *Jegley*, 80 S.W.3d 332 (striking down law prohibiting same-sex sexual intimacy); *Golden v. Westmark Comty. College*, 333 Ark. 41, 969 S.W.2d 154 (Ark. 1998) (striking down offset of disability benefits for social security recipients aged 65 and over); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (Ark. 1991) (striking down statutory fee caps for appointed defense counsel); *Dupree*, 279 Ark. at 346, 651

S.W.2d at 93 (striking down school finance system based on tax base of each district).[13]

Plaintiffs set forth below the core legal principles of rational basis analysis that are relevant to the Court's review of the asserted child welfare justifications for the exclusion, followed by an analysis showing why each of these rationales fails that constitutional standard.

The purpose of rational basis review.

The purpose of the rational basis test is to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law," *Romer*, 517 U.S. at 632-33, which is something the Equal Protection Clause does not allow. *Id.*, at 635; *Moreno*, 413 U.S. at 534. This Court put it this way: "The guarantee of equal protection serves to [protect] minorities from discriminatory treatment at the hands of the majority." *Jegley*, 349 Ark. at 633, 80 S.W.3d at 350. The purpose of the rationality review is to ensure that "legislation *is not the product of arbitrary and capricious government purposes*." *Id.*, at 634, 80 S.W.3d at 351 (citation omitted).

There must be a logical, believable connection between the exclusion and the objective.

In order to satisfy the rational basis test, the link between the exclusion and the objective, first and foremost, has to be "rational." This Court has said that there has to be the "possibility of a deliberate nexus with stated objectives." *Ester v. Nat'l Home Centers*, 335 Ark. 356, 364-65, 981 S.W.2d 91, 96 (1998). The "classification must . . . rest on some ground of difference

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[13] Justice O'Connor described the Court's analysis in *Romer*, *Cleburne*, *Moreno* and *Eisenstadt* as applying a "more searching" form of rational basis review because the classifications were enacted out of the "desire to harm a politically unpopular group." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). Whether those cases represent ordinary or more searching rational basis review, the evidence here shows that the regulation fails either standard.

having a fair and substantial relation to the object of the legislation." *Arnold*, 306 Ark. at 303, 813 S.W.2d at 775. Where the connection between the exclusion and the goal is so tenuous that it is impossible to credit, it cannot justify the exclusion. *Romer*, 517 U.S. at 623; *Cleburne*, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

For example, in *Romer*, 517 U.S. 620, the Supreme Court considered an equal protection challenge to "Amendment 2" to the Colorado Constitution, which barred civil rights protections for gay people. *Id.*, at 623. The interests the State offered in support of the amendment—respect for the freedom of association of landlords and employers and conserving resources to fight race and sex discrimination—were unquestionably legitimate. *Romer*, 517 U.S. at 635. The Court nonetheless struck "Amendment 2" down under rational basis review, holding that it defied the "conventional and venerable" principles of the rational basis test because "the breadth of the Amendment is so far removed from these particular justifications" that it was "impossible to credit them." *Romer*, 517 U.S. at 635. The amendment, it said, "is at once too narrow and too broad." *Id.*, at 633. Thus, it struck down the amendment as lacking a rational basis, concluding it was "inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632.

> *The government may not single out a group for unequal treatment if other groups present the same concern with respect to the asserted government interest.*

The regulation cannot be justified by any purported concerns about gay people that apply equally to non-excluded groups. Unless the disadvantaged group poses a special threat with respect to an asserted state interest, the Equal Protection Clause does not permit that group to be singled out for a burden. *Cleburne*, 473 U.S. 432. In *Cleburne*, the Supreme Court struck down

a zoning rule requiring a home for the developmentally disabled to obtain a special use permit. The city offered various rationales for the ordinance, including the home's location in a flood plain, potential city liability for acts of residents of the home, and avoiding congestion. *Id.*, at 448-50. The Court concluded that these reasons do not explain why the city singled out the developmentally disabled.

> [T]his concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit. The same may be said of another concern of the Council--doubts about the legal responsibility for actions which the mentally retarded might take. If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at Featherston would present any different or special hazard.

Id., at 449. The Court used similar reasoning to dispatch the remaining rationales. While any of them might explain in isolation why group homes for the developmentally disabled were not allowed, none explained why such group homes were not allowed and similar uses which implicated the same interests were allowed. *Id.*, at 449-50.

> *The connection between the exclusion and the objective must be based in reality; unsupported stereotypes do not satisfy the rational basis test.*

The basic premise of equal protection is that the government cannot draw classifications "for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 635. It follows that for the link between the classification and purpose to be rational, it cannot be based on unsupported stereotypes or negative assumptions about a group; it must be based in reality. *Romer*, 539 U.S. at 632-33, 635 (classification must be grounded in a "factual context"); *Heller v. Doe*, 509 U.S. 312, 321 (1993) (rational basis review must have "footing in the realities of the

subject addressed by the legislation");*Cleburne*, 473 U.S. at 448 ("mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for" unequal treatment of home for the mentally disabled); *Moreno*, 413 U.S. at 536-539 (rejecting "unsubstantiated" charge that hippies are more likely to commit fraud). As this Court has put it, equal protection "requires that a classification rest on real and not feigned differences." *Smith v. State*, 354 Ark. 226, 235, 118 S.W.3d 542, 547 (2003).

While hypothesizing a rationale for the government classification is generally permissible under rational basis review, the hypothetical rationale must be based in the real world; it must rest on real differences between the group disadvantaged by the classification and others, not feigned ones. Thus, the State cannot satisfy the rational basis test by merely asserting unsupported negative stereotypes about gay people. If stereotypes are all that justify a classification, it is impermissibly drawn simply "to make [the group] unequal to everyone else." *Romer*, 517 U.S. at 635. If governments could pass laws that hurt unpopular minorities by simply pointing to stereotypes, that would give them carte blanche to engage in invidious discrimination. That would not be rational basis review; it would be no review at all.

The Kansas Supreme Court recently dealt with this very issue, holding in an equal protection case that the government cannot justify treating gay people differently by pointing to negative assumptions and stereotypes about gay people that are unsupported by any facts. *State v. Limon*, 122 P.3d 22 (Kan. 2005). In *Limon*, a gay teenager challenged a criminal law known as a "Romeo and Juliet" law, which imposed significantly different penalties on teenagers who engage in sexual conduct with younger teenagers depending on whether the sexual act involved same-sex or opposite-sex partners. *Id.*, at 25. Matthew Limon, who was 18, received a 17 year

prison sentence for consensual oral sex with a younger male teenager, while the punishment would have been a maximum of 15 months had the two teenagers been an opposite-sex pair. One of Kansas's proffered justifications for the harsher penalty was the assertion that relationships between gay adults and minors are more likely to be coercive than relationships between heterosexual adults and minors. The Kansas Supreme Court rejected this under rational basis review because the notion that gay people "would have a higher tendency to be coercive" lacked "factual support." *Id.*, at 36. *See also Taylor v. Taylor*, 353 Ark. 69, 83-84, 110 S.W.3d 731, 739-40 (2003) (recognizing the impropriety of courts ruling based on the stereotype that gay people are harmful to children).[14]

1. <u>The exclusion does not rationally further the State's interest in protecting children from violence, sex abuse, drug abuse, instability or neglect.</u>

    a. The State's assertions that gay people are prone to these negative traits and behaviors are stereotypes that have no basis in reality.

The State has asserted as justifications for the exclusion that gay people as a group are more prone to domestic violence, child sex abuse, drug abuse, instability and child neglect. The first reason these justifications fail rational basis review is that the State's description of its gay citizens is factually baseless. (Add.868-69). The Court's findings show that there are no "real"

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[14] *Taylor* addressed unmarried overnight guest restrictions in child custody orders. To the extent that such restrictions on parents' custody in the absence of demonstrated harm to the child are still permissible after *Taylor* and still constitutional after *Jegley*, they have no relevance here because the exclusion is based on sexual orientation, not cohabitation. A gay person in the family is a disqualifier regardless of whether he or she ever has overnight guests. In contrast, unmarried heterosexuals may be considered regardless of their sexual activity.

differences between gay people and heterosexuals that are relevant to the ability to provide a safe, stable, nurturing home for a child and to raise well-adjusted children; there are only "feigned" differences. *Smith*, 118 S.W.3d at 547. The exclusion of applicants with gay household members is "a status-based enactment divorced from any factual context from which [the court] could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer*, 517 U.S. at 635. The State is relying on stereotypes that are just as false and odious as long-rejected stereotypes of other minority groups. *See, e.g.*, *People v. Hall*, 4 Cal. 399, 405 (1854) (describing African Americans and Native Americans as having inferior intellectual ability and being liars). This does not satisfy rational basis review.

b. Because preexisting regulations effectively screen out individuals who pose a risk of the harms the State cites, the exclusion does nothing to protect children against these harms.

The State stipulated that prior to enacting the challenged exclusion, its screening process "ensured that only those individuals capable of providing stable, nurturing, safe, healthy homes would be approved to be foster parents." (Add.728). Thus, excluding families with gay members serves only to throw away families who <u>can</u> provide the kind of environment that the State demands for the children in its care. It does <u>nothing</u> to promote children's health, safety or welfare. There is simply no logical connection between the State's classification and the purposes it says it seeks to advance.

Thus, it is hard to believe that the Board enacted the exclusion in order to protect children against the specific harms that were already screened out by pre-existing foster care eligibility requirements, especially where the Board was advised by its attorney that those requirements

already addressed its concerns. (Add. 727). *See Moreno*, 413 U.S. at 536-37, (in striking down exclusion of unrelated household members from food stamp eligibility, the Supreme Court rejected the government's asserted interest in protecting against fraud because other provisions in the Food Stamp Act were "aimed specifically at" fraud, making it hard to believe that the policy was rationally intended to prevent the very same problem).

c. Sexual orientation is not a rational proxy for these harmful traits.

The State has never taken the position that all or even most gay people are violent, sexual abusers, drug abusers, unstable or neglectful parents. The most that the State has ever alleged is that gay people are more likely than heterosexuals to have these characteristics. As discussed above, the Court rejected these assertions as lacking any factual basis. But regardless of the Court's findings, it is simply irrational to screen for these harms by making any demographic characteristic a proxy for such traits and behaviors. Such a system would let in many if not most of the people who have these harmful characteristics because there are some people who pose these risks in every demographic group. And it would throw away many qualified people within that demographic. This is precisely why individual evaluations of every applicant are standard child welfare practice in Arkansas and nationwide. (Add.728)(Ab.195-96; R.2154-56).

One could find a higher statistical probability of some negative trait in every demographic group. For example, the undisputed testimony at trial showed that males, younger people and non-Asians all have higher rates of drug and alcohol problems (Ab.419-20; Supp. Ab.19; R.2719-18 to 2719-23); that African Americans, poor people and less religious people are less likely to have stable relationships (Ab.397-400; R.2655-61); and that most perpetrators of sexual abuse are males. (Ab.86, 95; R.1916, 1930). Basing eligibility on group membership would,

thus, leave precious few if any eligible foster parents. And because it was undisputed that other groups have higher rates of drug abuse, instability and child sex abuse than gay people, and those groups are not excluded, the challenged regulation also fails under *Cleburne*, 473 U.S. at 448-50.

Using a demographic characteristic like sexual orientation as a marker for the threats the State says it is concerned about defies the "conventional and venerable" principles of the rational basis test because "the breadth of the [exclusion] is so far removed from these particular justifications"— "it is at once too narrow and too broad"—that it is "impossible to credit them." *Romer*, 517 U.S. at 633, 635. *See also Limon,* 122 P.3d at 36 (public health is not a rational basis for law disadvantaging gay people because the law "burdens a wider range of individuals than necessary for public health purposes" and is simultaneously "under-inclusive because it lowers the penalty for heterosexuals engaging in high risk activities").

d. These asserted justifications are also "impossible to credit" because the State does not exclude gay people from adopting.

The State's assertions that it excludes gay people to protect children from domestic violence, sex abuse, drug abuse, instability and neglect are "impossible to credit," *Romer*, 517 U.S. at 635, given that the State allows gay people to become permanent parents by adopting, does not even inquire about the sexual orientation of adoption applicants, and puts gay people through the same screening process as all other adoption applicants. (Add.727-28). It is simply beyond belief that the State would allow children to be placed in the permanent care of individuals it believed could not provide safe and appropriate temporary care as foster parents. These asserted interests are "impossible to credit" and must be rejected. *Romer,* 517 U.S. at 635.

2. The State's asserted interest in protecting children against disease does not constitute a rational basis for the exclusion.

a. A blanket exclusion of all people with certain disabilities would violate the Americans with Disabilities Act.

The State asserted that the exclusion is justified as a means of excluding people with HIV and other diseases, but that goal is not even a permissible government interest. Excluding people on the basis that they are perceived to be HIV+ or to have other diseases, without an individualized determination as to the significance of any risk they might pose, would violate the Americans with Disabilities Act. *Doe v. County of Centre*, 242 F.3d 437, 446-50 (3d Cir. 2001) (violation of ADA to exclude family with HIV+ child from fostering any child).

b. The notion that people who have HIV are a danger to children has no basis in reality.

In addition, there is no factual basis for the notion that parents who have HIV are harmful to children. The uncontested evidence shows that children are not at risk of contracting HIV from HIV+ household members of any sexual orientation. (Ab.179-82; R.2120-27). Moreover, the treatment available for HIV has made it a chronic illness like diabetes, not necessarily a terminal disease, and people with HIV can be unimpaired in their ability to care for children. (Ab.182-84; R.2127-34). Because this justification has no basis in reality, it fails rational basis review. *Romer*, 517 U.S. at 632-33, 635; *Smith*, 354 Ark. at 235, 118 S.W.3d at 547.

c. Because preexisting regulations effectively screen out individuals who cannot provide a healthy home, the exclusion does nothing to protect children against this harm.

The State stipulated that the individual screening in place prior to the enactment of the challenged regulation "served to screen out applicants who . . . had diseases that made them

unable to parent or created a risk for a child." (Add.728, 869). Thus, excluding families with gay members serves only to throw away families who can provide healthy homes. Thus, it is hard to believe that the Board enacted the exclusion in order to protect children against disease when pre-existing foster care eligibility requirements already screened out applicants who pose a health risk. *Moreno,* 413 U.S. at 536-37.

d. Sexual orientation is not a rational proxy for HIV or other diseases.

Finally, the undisputed evidence showed that being gay is not a proxy for having HIV or other sexually transmitted diseases. *See supra*, at 11. Thus, excluding gay people is not rationally related to the goal of ensuring healthy families for children. *Romer,* 517 U.S. at 633, 635; *see also Limon*, 122 P. 3d at 36-37 (holding public health not rational basis for law that disadvantaged gay people). Moreover, the fact that other groups that are disproportionately affected by HIV, *see supra,* at 11, are not excluded means that this asserted justification also fails rational basis review under *Cleburne,* 473 U.S. at 448-50.

3. The State's asserted preference for placements in families with married mothers and fathers cannot constitutionally justify the exclusion.

a. The asserted preference for married couples conflicts with state law regarding foster parent eligibility.

The Court properly held the asserted preference for married couple foster parents to be irrelevant to the inquiry because the legislature has expressly stated that single people may foster. (Ab.280-81, 284-87; R.2378-79, 2384-89). The Court noted that State law defines "foster home" as a private residence of "one (1) or more family members." Ark. Code Ann. § 9-28-402(13). The Board cannot override this legislative determination. *See, e.g., McLane v. Weiss*, 332 Ark. 284, 298, 965 S.W.2d 109, 115 (1998).

b. The exclusion of applicants with gay household members does not rationally further the goal of providing children placements with married male/female couples.

The exclusion does not rationally further the goal of placing children with married couples. It disqualifies all applicants who have gay household members, including married couples such as plaintiff William Wagner and his wife. (Add. 874). Yet it does not disqualify the bulk of prospective foster parents who are unmarried—it permits all unmarried heterosexuals to be considered (unless they have a gay household member); indeed 30% of foster placements in Arkansas are with single people. (Ab. 221; R.2212).

Excluding those who have gay household members in order to get children placed with married heterosexual couples defies logic. It disqualifies some of the very families the State says the regulation is meant to find, and lets in most people who do not meet this criteria. This is not merely an imperfect fit. The classification is so "discontinuous" with the purpose – "at once too narrow and too broad" – that it is "impossible to credit" that purpose. *Romer*, 517 U.S. at 632, 633, 635. It is implausible that a state desiring to place children with married couples would try to do that by excluding people with gay family members, married couples and all, and allow in most unmarried people. There is no "possibility of a deliberate nexus" between the exclusion and this objective. *Jegley*, 349 Ark. at 634, 80 S.W.3d at 351.

In *Lofton v. Sec., Dep't of Children and Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004), a panel of the Eleventh Circuit Court of Appeals accepted speculation[15] that married heterosexual couples are the optimal parents as a justification for Florida's statutory ban on

[15] The trial court in *Lofton* did not hear evidence as to whether the state's hypothetical rationale had any basis in reality. Here, the Court heard evidence and concluded that it does not.

adoption by gay people. Whether or not this speculation is rationally related to the classification at issue in Florida—a subject that bitterly divided the Eleventh Circuit[16]—for the reasons discussed above, it has no logical connection to the distinct regulation challenged here, which excludes applicants who have gay household members (including married heterosexual couples) from becoming temporary caregivers as foster parents.

c. The assertion that children are best off with a married mother and father is not based in reality.

As discussed above, the Court also rejected as a factual matter the State's assertion that children do better with a married mother and father, finding that I) children develop equally well

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[16] The Court denied the petition for rehearing *en banc* by a vote of 6 to 6. Three of the dissenting judges concluded that the law fails rational basis review under the principles of *Romer*, *Cleburne*, *Moreno* and *Eisenstadt*. *Lofton v. Sec., Dept. of Children and Family Servs.*, 377 F.3d 1275, 1290-1303 (11th Cir. 2004)(Barkett, J., dissenting (joined by Anderson and Dubina, JJ.)). Because Florida's statutory scheme, which allows single heterosexuals to adopt, is "so riddled with exceptions" to placements with married mothers and fathers, these judges concluded that the purported purpose of providing married heterosexual couples cannot "reasonably be regarded as [the law's] aim." *Id.*, quoting *Eisenstadt*, 405 U.S. at 449. The other dissenters expressed doubts about the law's constitutionality: "there is a serious and substantial question whether Florida can constitutionally declare all homosexuals ineligible to adopt while, at the same time, allowing them to become permanent foster parents, and not categorically barring any other groups such as convicted felons or drug addicts from adopting." *Lofton*, 377 F.3d at 1313 (Marcus, J., dissenting (joined by Tjoflat, C.J., and Wilson, J.)).

in families with lesbian or gay parents (Add.868-69)), and ii) there is nothing about gender, per se, that affects one's ability to be a good parent. (Add.868). Because this asserted justification has no basis in reality, it fails rational basis review. *Romer*, 517 U.S. at 632-33, 635; *Heller*, 509 U.S. at 321; *Smith*, 354 Ark. at 235, 118 S.W.3d at 547.

4. Social stigma due to societal prejudice against gay people cannot constitutionally justify the exclusion.

a. Deference to societal prejudice is not a permissible state interest.

The State points to prejudice and discrimination against gay people to justify barring placement with them. However, deference to social prejudice against a group fails the first prong of the rational basis test—it is not a legitimate government purpose.

As the Supreme Court held in *Cleburne*, 473 U.S. 432, disapproval of the burdened group is not a legitimate purpose, and it matters not whether the disapproval is the government's own or it is deferring to the views of others. Government cannot avoid the requirements of equal protection by deferring to "the objections of some faction of the body politic." *Id.*, at 448.

Nor may the government discriminate against disfavored groups in the context of parenting in order to shield children from societal prejudice, however real. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Supreme Court reversed a state court decision that denied custody to a woman in an interracial relationship on the basis that society disapproved of such relationships and would stigmatize her child. As the Court put it: "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.*, at 433.[17] Other courts

[17] *Palmore's* condemnation of state capitulation to prejudice is not limited to cases involving race, and indeed applies to cases involving public disapproval of groups who are

have similarly held that social prejudice against gay people is not a legitimate basis for denying custody to lesbian mothers. *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (unconstitutional to rely on social stigma attaching to mother's lesbianism when making child custody decision); *Conkel v. Conkel*, 509 N.E.2d 983, 987 (Ohio App. 1987) (same); *Jacoby v. Jacoby*, 763 So.2d 410, 414 (Fla. App. 2000) (same). This Court agreed that "the potential for social condemnation standing alone cannot justify a change in custody" away from a mother because she had a lesbian roommate. *Taylor*, 353 Ark. at 81-82, 110 S.W.3d at 738.

b. The assertion that societal prejudice against gay people interferes with their children's healthy adjustment is not based in reality.

The Court found that children raised by gay parents are no more likely than their peers to have difficulties in forming peer relationships. (Add.868). Because this asserted interest has no basis in reality, it fails rational basis review. *Romer*, 517 U.S. at 632-33, 635; *Heller*, 509 U.S. at 321; *Smith*, 354 Ark. at 235, 118 S.W.3d at 547.

c. This justification fails the rational basis test because other groups that face social prejudice are not excluded.

It was undisputed that children get teased for a host of reasons, including characteristics of their parents that make them different. (Ab.149-50, 306, 347-48; R.2050-51, 2430-31, 2534-35). Yet, no other groups are excluded to protect against social stigma. Thus, this justification does not explain the classification, and thus, lacks a rational basis. *Cleburne*, 473 U.S. at 448-50.

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protected by rational basis review. In *Cleburne*, 473 U.S. 432, in rejecting a city's reliance on the "negative attitudes" of neighbors to refuse a permit to a home for the mentally disabled, the Court explicitly rested its ruling on *Palmore* and its holding there that government may base discrimination on neither its own negative attitudes nor the negative attitudes of others.

B. The Court erred in holding that "public morality" is a stand-alone legitimate state interest justifying the disparate treatment of a particular group.

The Court erred in concluding that in the absence of a rational connection to any child welfare purpose, the exclusion satisfies equal protection rational basis review because "it may be rationally related to the legitimate state interest of preservation of 'public morality.'" (Add.895).

The police power embraces, among other things, "the preservation of public morals." *Jegley* , 349 Ark. at 635, 80 S.W.3d at 352. But as this Court recognizes, the police power is subject to "constitutional limits." *Id.*, at 636, 80 S.W.3d at 353. Where the State acts under the police power to preserve public morals by applying an even-handed policy to everyone, the right to equal protection is not implicated. But where the State applies a policy only to some, it can stand only if it meets the requirements of the Equal Protection Clause, and declaring that the differential treatment is based on morality is constitutionally insufficient.

Here, the challenged regulation is not an even-handed policy applied to everyone. It disqualifies only households with gay members, specifically singling out "homosexuals." (Add. 751). Both this Court and the United States Supreme Court have expressly rejected "public morality" justifications for laws that disadvantaged gay people when the interest in public morals was divorced from any separate and legitimate interest.

In *Jegley*, this Court rejected "public morality" as a rationale to support a law barring certain sexual conduct if engaged in by members of the same sex. The State argued that the statute was a legitimate use of its police power to "protect[] public morality." *Jegley*, 349 Ark. at 633-34, 80 S.W.3d at 351. But the Court, in evaluating the Plaintiffs' equal protection claim, demanded a legitimate government interest apart from the mere assertion of protecting public

morals. The purpose of equal protection, it explained, "is not to protect traditional values and practices, but to *call into question* such values and practices when they operate to burden disadvantaged minorities. . . ." *Id.*, at 633, 80 S.W.3d at 350. Noting that equal protection forbids the government from enacting laws out of a desire to harm an unpopular group, this Court struck down the law, holding that "the police power may not be used to enforce a majority morality on persons whose conduct does not harm others." *Id.*, at 635, 637, 80 S.W.3d at 353.

A year after this Court decided *Jegley*, the United States Supreme Court struck down Texas's homosexual sodomy law in *Lawrence*, 539 U.S. 558. In *Lawrence*, as in *Jegley*, "promot[ing] morality" was the interest offered by the government to justify the law (*see Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring)), and the Court rejected it. *Id.*, at 577 (majority op.). The Court recognized that some people condemn homosexuality as immoral:

> [T]he Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. That condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.

Id., at 571. However, the Court said "[t]hese considerations do not answer the question before us." *Id.* Rather, "[t]he issue is whether the majority may use the power of the State to enforce these views" on society. *Id.* The Court concluded that "our obligation is to define the liberty of all, not to mandate our own moral code." *Id.* (Citation omitted). Thus, the Court held, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Id.*, at 577. After *Lawrence*, moral disapproval of homosexuality is not even a "legitimate state interest" for

purposes of the Due Process Clause. *Id.*, at 578. And as Justice O'Connor noted in her concurring opinion, "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.*, at 582. The "invocation of moral disapproval" does not explain a classification but, rather, amounts to "a classification of persons undertaken for its own sake." *Id.*

Thus, *Jegley* and *Lawrence* make it clear that there is no "morality" exception to equal protection. If there were, this guarantee would mean little. When states pass laws to express disapproval of a group of citizens, they typically say they are doing it to express a moral position. For example, states have argued that laws that discriminated to express disapproval of interracial couples, women working outside the home, and hippies living in communes were justified because they were aimed at preserving public morality. *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (interracial marriage); *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (women's employment); *Moreno v. U.S. Dep't of Agric.* 345 F. Supp. 310, 314 (D.D.C. 1972) (hippies). But as we now recognize, disapproval of these groups are not legitimate justifications for government discrimination. *United States v. Virginia Military Inst.*, 518 U.S. 515, 550 (1996); *Palmore*, 466 U.S. at 431-32; *Moreno*, 413 U.S. at 534-35.

The fact that the State says it is seeking to protect minors does not change the analysis. The Court found that the exclusion has no rational connection to promoting children's health, safety or welfare. (Add.868-69, 888). All that is left is moral disapproval of gay people, but under *Jegley* and *Lawrence*, the naked assertion of public morality disconnected from any separate and legitimate government interest is not sufficient.

The Kansas Supreme Court recently rejected a similar morality-based justification for

unequal treatment of gay people purportedly to protect minors. *Limon*, 122 P.3d at 34-35. There, Kansas argued that disparate treatment of gay and heterosexual teenagers who have sex with younger teenagers is justified by the goal of preserving traditional sexual mores and promoting the moral development of children. The Court rejected these rationales, holding that "[w]e are directed in our equal protection analysis by the United States Supreme Court's holding in *Lawrence* that moral disapproval of a group cannot be a legitimate governmental interest." *Id.*

Finally, the State's focus on the fact that the regulation does not exclude celibate gay people does not change this analysis. *Lawrence* made clear that the *Romer* principle that disapproval of gay people is not a legitimate government interest applies whether the differential treatment is based on same-sex sexual orientation or on same-sex sexual conduct. *Lawrence,* 539 U.S. at 574 (noting that *Romer* applies to all legislation aimed at the "solitary class [of] persons who [are] homosexuals, lesbians, or bisexual either by 'orientation, conduct, practices or relationships.'"). And in *Jegley*, the fact that this State's sodomy law applied to sexual conduct, not orientation, did not prevent this Court from rejecting the State's asserted interest in public morality and striking down the law as a violation of the right to equal protection.

The Court erred in holding that the preservation of public morality, disconnected from any child welfare purpose, is a legitimate state interest justifying the exclusion. Therefore, the Court's denial of Plaintiffs' equal protection claim should be reversed.

II. THE CIRCUIT COURT ERRED IN HOLDING THAT THE EXCLUSION DOES NOT VIOLATE THE RIGHT TO PRIVACY/INTIMATE ASSOCIATION.

The exclusion also violates the right to privacy/intimate association protected by the Arkansas and federal constitutions. *Lawrence*, 539 U.S. 558; *Jegley*, 349 Ark. 600, 80 S.W.3d

332. Government acts that penalize the exercise of a fundamental constitutional right trigger strict scrutiny, violating the Constitution unless they further a compelling state interest and are narrowly tailored. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

The regulation burdens the right to intimate association selectively—among all people who have intimate relationships, only gay people are penalized. Thus, this can be conceptualized either as a stand-alone privacy/intimate association claim or as an equal protection violation that imposes a differential burden on a fundamental right. Either way it triggers strict scrutiny. *See, e.g., Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92 (1972) (applying strict scrutiny to equal protection challenge to law that imposed a differential burden on speech), and *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002) (applying strict scrutiny to due process claim).

A. Government acts that penalize the exercise of a fundamental constitutional right trigger strict scrutiny.

Strict scrutiny is triggered whenever the government burdens the exercise of a fundamental right, whether by completely barring the exercise of the protected activity or by disadvantaging people in some way – penalizing them– because they exercise the right. For example, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court struck down a state one year residency requirement to be eligible for certain government benefits. The Court held that this policy unconstitutionally penalized people based on their exercise of the fundamental right to travel interstate. The policy did not bar anyone from entering the state, but the Court applied strict scrutiny because it disadvantaged people who chose to do so. *Shapiro*, 394 U.S. at 634; *see also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640, 647-48 (1974) (invalidating school's mandatory maternity policy because "[b]y acting to penalize the pregnant teacher for

deciding to bear a child," the policy constituted "a heavy burden" on the exercise of that right, which the school could not justify); *Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating law penalizing veterans who refused to take a loyalty oath by denying them tax exemptions). As the Court explained in *Shapiro*, "any classification which serves to penalize the exercise of [a constitutional right], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." 394 U.S. at 634.

B. The exclusion penalizes the exercise of the fundamental right to privacy/intimate association.

1. The exclusion penalizes Howard, Stoopes and Shelley's fundamental right to privacy/intimate association with their partners.

In *Jegley*, this Court struck down Arkansas's sodomy law, which made consensual sexual activity between same-sex partners a crime. It held that under the Arkansas Constitution, "the fundamental right to privacy . . . protects all private, consensual, noncommercial acts of sexual intimacy between adults," including between same-sex couples. *Jegley*, 349 Ark. at 632, 80 S.W.3d at 350. Where such a right is invaded, therefore, this Court held, "we must analyze the constitutionality of [the statute] under strict-scrutiny review." *Id.*

In *Lawrence*, the United States Supreme Court struck down Texas's sodomy law as a violation of the federal constitutional right to autonomy. The Court recognized that intimate adult relationships are part of the "enduring" "personal bonds" that give meaning to life, and that this is just as true for gay people as it is for heterosexuals. *Lawrence*, 539 U.S. at 567. Thus, the Court held, lesbians and gay men have the same liberty interest in forming "intimate, personal relationships" that heterosexuals have. *Id.*, at 558. In deciding *Lawrence*, the Court did not identify a *new* right, but rather, made clear that the right to make personal decisions about

intimate relationships—a long-established right for heterosexuals—applies equally to gay people. *Id.*, at 568, 573-74. Same-sex intimacy, the Court explained, is protected by the same right recognized in the *Griswold v. Connecticut*, 381 U.S. 479 (1965), line of cases. *Lawrence*, 539 U.S. at 564-71. Thus, the Court applied heightened scrutiny and struck down the Texas law because it "further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.*, at 2484.[18]

The exclusion here disadvantages people because of the intimate relationships they form. The regulation defines the excluded class ("homosexuals") as those who have recently engaged in "any sexual contact involving the genitals of one person and the mouth or anus of another person of the same gender" (Add.751), the very conduct held to be constitutionally protected in *Jegley* and *Lawrence*. The situation of the Plaintiffs makes this penalty clear. Arkansas will not even consider the foster parent applications of Matthew Howard and Craig Stoopes solely because of their relationship. If they ended their intimate relationship of 19 years (and refrained from having any other), they would be evaluated like everyone else. This is not a regulation that incidentally affects people who exercise the right to form same-sex relationships; excluding people who enter into such relationships is its objective.

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[18] While the Court's language in *Lawrence* has resulted in some disagreement about the level of scrutiny it was applying, *compare Lofton v. Sec., Dep't of Children and Family Services*, 377 F.3d 1275, 1282-90 (Birch, J., specially concurring in the denial of en banc review), with *id.*, at 1303-13 (Barkett, J., dissenting from denial of en banc review), there is no need to resolve that here because this Court's opinion in *Jegley* clearly stated that the right at issue was fundamental and that it was applying strict scrutiny.

The penalty Arkansas exacts on people who form same-sex relationships is hardly trivial. The exclusion from the possibility of becoming a foster parent—whether to maintain existing family relationships (e.g., as a kinship foster parent, *see* Ark. Code Ann. § 9-28-503) or create new ones—is at least as burdensome as five months of forced job leave (*LaFleur*, 414 U.S. 632) and the denial of a tax exemption (*Speiser*, 357 U.S. 513), which triggered heightened review.

This is not to say that there is a right to become a foster parent. Neither is there a right to receive government benefits (*Shapiro*, 394 U.S. at 634), nor to work as a teacher (*LeFleur*, 414 U.S. at 647-48). Yet unequal treatment in these contexts as penalties for exercising constitutional rights triggered strict scrutiny. Similarly, because the challenged foster care regulation is penalizing people who exercise a fundamental right, it is subjected to strict scrutiny.

In addition, the regulation penalizes those who engage in same-sex intimacy by demeaning their very existence. *Lawrence* says that gay people who enter intimate, personal relationships are entitled to "retain their dignity" and deserve "respect for their private lives." *Lawrence*, 539 U.S. at 567; *id.*, at 578. Through this regulation, Arkansas labels gay people automatically and irrebuttably unfit to be around children. This "demeans the lives of homosexuals." *Id.*, at 567. Perhaps with the singular exception of sodomy laws that branded gay people criminals, it is difficult to imagine a greater assault on human dignity than to be presumed unfit to provide love and care for a child.

2. <u>The exclusion penalizes William Wagner's fundamental right to intimate association with his son.</u>

The Circuit Court recognized that the exclusion might burden William Wagner's right to intimate association with his son. (Add.895). Wagner is a heterosexual married man who has a

young adult gay son who sometimes lives at home. (Add.874). The court noted that the exclusion "might unconstitutionally restrict plaintiff Wagner's constitutional rights of privacy and association." (Add.895). The Supreme Court has long recognized that the constitution protects family relationships from governmental intrusion. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Conditioning Wagner's eligibility to foster on throwing his son out of his home penalizes his exercise of the right to privacy/intimate association.

C. The exclusion does not satisfy the requirements of strict scrutiny.

Because the exclusion penalizes the exercise of a fundamental right, the State must demonstrate through actual evidence a compelling reason for doing so, and that the burden is narrowly tailored. *See, e.g., Zablocki*, 434 U.S. at 388. Because there was not even a rational basis for the exclusion, there is no compelling interest. Moreover, the regulation has no tailoring at all, let alone the required narrow tailoring. The State concedes that in some circumstances, gay people could be the best foster placements for particular children. (Add.877)(Ab.256-57, 327-28; R.2285-88, 2489-90). The exclusion therefore fails the tailoring requirement regardless of the asserted interest. In addition, the State already has a narrowly tailored system of screening out individuals who pose a risk of the harms the State has cited—the individualized evaluation process. And the regulation is hardly tailored to achieve placements in mother/father homes, throwing out some married couples and letting in most unmarried adults.

Because the exclusion penalizes Plaintiffs' exercise of the fundamental right to privacy/intimate association, and it is not narrowly tailored to effectuate any compelling government interest, this is yet another basis for striking down the challenged regulation and the Circuit Court's denial of this claim should be reversed.

Dated: December 16, 2005

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Leslie Cooper
James D. Esseks
American Civil Liberties Union
Foundation
125 Broad Street, 17th Floor
New York, New York 10004
(212) 549-2627

David Ivers
Mitchell, Blackstock, Barnes,
Wagoner, Ivers & Sneddon
1010 West Third Street
Little Rock, Arkansas 72203-1510
(501) 378-7870

Griffin J. Stockley
ACLU of Arkansas
904 W. Second Ave.
Suite #1
Little Rock, Arkansas 72201-5727
(501) 374-2842

Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I, Leslie Cooper, certify that on December __, 2005, I caused the foregoing document to be served by Federal Express on the following persons at the addresses indicated:

Kathy L. Hall, Esq.
Office of Chief Counsel
Arkansas Department of Human Services
700 Main Street, Second Floor (Slot S260)
Little Rock, Arkansas 72201

Hon. Timothy Fox
Circuit Court of Pulaski County
6th Division
401 W. Markham St., Suite 210
Little Rock, AR 72201

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Leslie Cooper