IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

MATTHEW LEE HOWARD, CRAIG STOOPS, ANNE SHELLEY, and WILLIAM WAGNER — PLAINTIFFS

VS.

CASE NO. CV 1999-9881

THE CHILD WELFARE AGENCY REVIEW BOARD and THE ARKANSAS DEPARTMENT OF HUMAN SERVICES — DEFENDANTS

JUDGMENT

In accordance with the *Memorandum Opinion* and *Findings of Fact and Conclusions of Law* issued on even date herewith, the court declares that:

1. The Arkansas General Assembly legislatively delegated to the defendant Child Welfare Agency Review Board the authority to promulgate rules and regulations that "promote the health, safety, and welfare of children."

2. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards, promulgated by the defendant Board, is not a rule or regulation that "promotes the health, safety, or welfare of children."

3. Section 200.3.2 of the Minimum Licensing Standards is unconstitutional as being violative of the Separation of Powers Doctrine.

4. Section 200.3.2 of the Minimum Licensing Standards does not violate the Equal Protection provisions of the United States Constitution or the Arkansas Constitution.

5. Section 200.3.2 of the Minimum Licensing Standards does not violate the plaintiffs' constitutional rights to privacy or intimate association under either the United States Constitution or the Arkansas Constitution.

IT IS ACCORDINGLY ADJUDGED AND DECREED THAT Section 200.3.2 of the Minimum Licensing Standards is unconstitutional under the Separation of Powers Doctrine and the defendants are enjoined from enforcement of such regulation.

TIMOTHY DAVIS FOX
CIRCUIT JUDGE

12/29/04
DATE

cc: counsel of record

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court issues the following findings of fact and conclusions of law pursuant to Rule 52 of the Arkansas Rules of Civil Procedure:

FINDINGS OF FACT

1. Act No. 1041 of 1997, commonly referred to as "The Child Welfare Agency Licensing Act" is codified as A.C.A. §9-28-401, *et seq.*

2. The defendant Child Welfare Agency Review Board was created pursuant to A.C.A. §9-28-403(a)(1).

3. A.C.A. §9-28-402(13) defines "foster home" as follows:

> (13)"Foster Home" means a private residence of one (1) or more family members that receives from a child placement agency any minor child who is unattended by a parent or guardian in order to provide care, training, education, custody, or supervision on a twenty-four hour basis, not to include adoptive homes.

4. When the Child Welfare Agency regulations were first promulgated in 1997 there was no provision excluding lesbians, gay men, or persons living with such individuals because the Child Welfare Agency saw no need for such exclusion (*Stipulated Facts*, #6).

5. In 1999, the Child Welfare Agency Review Board enacted section 200.3.2 of the Minimum Licensing Standards, which states:

> 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 (*Stipulated Facts*, #7).

6. The Board's attorney advised the Board 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 (*Stipulated Facts*, #14).

7. Lesbians and gay men are not excluded from adopting children in Arkansas (*Stipulated Facts*, #23).

8. Lesbians and gay applicants seeking to adopt are subjected to the same screening process as every other applicant (*Stipulated Facts*, #25).

9. Prior to 1999, there was no prohibition under any Arkansas law or regulation excluding lesbians or gay men or those living with them from being foster parents (*Stipulated Facts*, #26).

10. The defendants are aware of "homosexuals," as defined, who have served as foster parents in Arkansas (*Stipulated Facts*, #27).

11. The defendants are not aware of any child whose health, safety, and/or welfare has been endangered by the fact that such child's foster parent, or other household member, was "homosexual", as defined. (*Stipulated Facts*, #28).

12. The State has no statistics indicating that gays are more prone to violence than heterosexuals or that gay households are more unhealthy than heterosexual households (*Stipulated Facts*, #30).

13. Based on its foster care statistics the defendants do not know of any reason that lesbians and gay men would be unsuitable to be foster parents (*Stipulated Facts*, #31).

14. The regulations in place prior to enactment of the "homosexual" exclusion ensured that only individuals capable of providing stable, nurturing, safe, healthy homes would be approved to be foster parents (*Stipulated Facts*, #33).

15. The plaintiff, Anne Shelley, is a lesbian, applied to be a foster parent and was advised that she could not be a foster parent because a law was passed prohibiting homosexuals and lesbians from fostering.

16. The plaintiff, William Wagner, has been married for over 30 years and is ineligible to be a foster parent because his adult gay son sometimes lives with Mr. Wagner and his wife.

17. The plaintiff, Matthew Howard, is an ordained minister, is gay, has been with his partner in a sexually monogamous relationship for 19 years, has two children of his own that he is co-parenting with a lesbian couple, and was rejected as a foster parent applicant because he is gay.

18. Section 210.1 of the Minimum Licensing Standards provides that:

> The agency shall select the home that is in the best interest of the child, the least restrictive possible, and is matched to the child's physical and emotional needs. The placement decision shall be based on an individual assessment of the child's needs.

19. Arkansas needs more qualified foster parents.

20. Categorical exclusions eliminate from consideration people who would otherwise be good foster parents.

21. The child welfare system struggles with having a large enough pool of well-qualified foster parents to make good reasonable matches.

22. When the system doesn't have enough well-qualified foster parents, less than ideal matches occur, which might result in multiple foster home placements which are not good for the children.

23. The blanket exclusion may be harmful to promoting children's healthy adjustment because it excludes a pool of effective foster parents.

24. Determination of the foster home that is most appropriate for each child should be based on a careful and thorough assessment of each individual child, his or her circumstances and conditions, strengths and needs, at the time of placement.

25. The Child Welfare League of America has a standard that says that applicants for foster

parenting should not be denied solely on the basis of age, marital status, income, sexual orientation, race, physical condition, handicap, or location.

26. The National Association of Social Workers has policy statements regarding best practices in the field of social work. One of the policy statements states that barriers to foster parenting that are unsupported by evidence need to be removed, the three examples of unsupported barriers being fostering by single parents, fostering by parents who want to adopt, and fostering by non-traditional families, including gay and lesbian parents.

27. There are four well known predictors of healthy child adjustment: (i) the quality of the child's relationship with the parent primarily responsible for his or her care: (ii) the relationship the child has with another parent figure; (iii) the quality of the relationships between the adults; and (iv) the resources available to the child.

28. The traditional family form is now the minority family form in this country.

29. Being raised by gay parents does not increase the risk of problems in adjustment for children.

30. Being raised by gay parents does not increase the risk of psychological problems for children.

31. Being raised by gay parents does not increase the risk of behavioral problems.

32. Being raised by gay parents does not prevent children from forming healthy relationships with their peers and others.

33. Being raised by gay parents does not cause academic problems.

34. Being raised by gay parents does not cause gender identity problems.

35. 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.

36. There are benefits to children's adjustment in having two parents as opposed to one parent and children in single parent families are more likely to have adjustment difficulties than children in two parent families.

37. Children of lesbian or gay parents are equivalently adjusted to children of heterosexual parents.

38. There is no factual basis for making the statement that heterosexual parents might be better able to guide their children through adolescence than gay parents.

39. There is no factual basis for making the statement that the sexual orientation of a parent or

foster parent can predict children's adjustment.

40. There is no factual basis for making the statement that being raised by lesbian or gay parents has a negative effect on children's adjustment.

41. There is no reason in which the health, safety, or welfare of a foster child might be negatively impacted by being placed with a heterosexual foster parent who has an adult gay family member residing in that home.

42. Homosexuality is not a mental disorder.

43. Pedophilia is a mental disorder in which an adult is sexually attracted to children.

44. Pedophilia may be exclusive pedophilia or non-exclusive pedophilia. Exclusive pedophilia refers to situations in which there is no sexual attraction to adults. Non-exclusive pedophilia refers to situations in which there is some degree of attraction to adults but a stronger degree of attraction to children.

45. Conventional use of the words heterosexual, bisexual, and homosexual only relate to the gender of an age appropriate adult to which the individual is attracted.

46. There is no evidence that gay people, as a group, are more likely to engage in domestic violence than heterosexuals.

47. There is no evidence that gay people, as a group, are more likely to sexually abuse children than heterosexuals.

48. The best predictors for whether a person will meet the criteria for drug or alcohol abuse and/or dependency are age, gender, and employment status.

49. There are a number of demographic factors correlating with the number of sexual partners of an individual; age and cohort difference, ethnicity, religiosity, and gender being some of the variables.

50. The determination of relationship durability requires a multi-variable approach, a prediction about relationship stability can't be made using only sexual orientation.

51. If Regulation section 200.2, subsection 4, which requires every member of a foster family to have a physical exam within 6 months before the initial approval of the foster home, requires HIV testing as part of the routine physical examination, such 6 month physical should adequately test for HIV.

52. A.C.A. §9-28-409(a)(1)(C) requires that prior to the approval of an individual as a foster

parent, that such individual and any foster parent household member over the age of ten (10) years be checked with the child maltreatment central registry in Arkansas and any state in which such individual has resided for the previous six (6) year period. Such check is to be repeated every two (2) years.

53. A.C.A. §9-28-409(b)(1)(C) requires that prior to the approval of an individual who has lived continuously in Arkansas for six (6) years as a foster parent, that such individual and any foster parent household member over the age of sixteen (16) years, shall be checked with the Arkansas State Police, in accordance with agency policies, for convictions of certain offenses. Such check is to be repeated every five (5) years.

54. A.C.A. §9-28-409(c)(1)(C) requires that prior to the approval of an individual who has not lived continuously in Arkansas for six (6) years as a foster parent, that such individual and any foster parent household member over the age of sixteen (16) years, shall be checked with the Federal Bureau of Investigations, in accordance with agency policies, for convictions of certain offenses.

CONCLUSIONS OF LAW

1. The State of Arkansas stands *in loco parentis* to foster children in Arkansas.

2. The General Assembly legislatively delegated to the defendant Board the authority to promulgate rules and regulations to "promote the health, safety, and welfare of children."

3. The health, safety, and welfare of foster children are legitimate state interests.

4. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the defendant Board is not rationally related to the legitimate state interest of protecting the health of foster children.

5. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the defendant Board is not rationally related to the legitimate state interest of protecting the welfare of foster children.

6. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the defendant Board is not rationally related to the legitimate state interest of protecting the safety of foster children.

7. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the defendant Board is contrary to the statutory obligation of the defendant Board set forth in A.C.A. §9-28-405(c).

8. Preservation of public morality is a legitimate state interest, either in conjunction with health, safety, and welfare and/or separate and apart from such legitimate state interests.

9. The General Assembly did not legislatively delegate to the defendant Board the authority to promulgate rules and regulations determining issues of "public morality".

10. The General Assembly has not legislatively defined the policy of the State of Arkansas concerning the preservation of "public morality" with respect to foster children and foster parents.

11. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the defendant Board is not unconstitutional under a rational basis equal protection analysis because it may be rationally related to the legitimate state interest of preservation of "public morality."

IT IS SO ORDERED.

TIMOTHY DAVIS FOX
CIRCUIT JUDGE

12/29/04
DATE

cc: counsel of record

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MEMORANDUM OPINION

On March 23, 2004, October 5, 2004, and December 20, 2004, this matter came on for trial. Testimony was taken from plaintiff Matthew Howard, plaintiff Anne Shelley, plaintiff William Wagner, Robin Woodruff, James Balcom, Dr. Cheralyn Powers, Dr. Rebecca Martin, Judith Faust, Dr. Michael Lamb, Dr. Frederick Berlin, Dr. George Rekers, Dr. Susan Cochran, and Dr. Pepper Schwartz. In addition to the testimony and evidence, the parties filed *Stipulated Facts* on March 17, 2004.

STATEMENT OF THE CASE

This action is a challenge to an administrative regulation promulgated subsequent to the enactment of Act No. 1041 of 1997. Act No. 1041, commonly referred to as "The Child Welfare Agency Licensing Act," is codified as A.C.A. §9-28-401, *et seq.* A.C.A. §9-28-402 contains the legislative definitions relating to "The Child Welfare Agency Licensing Act." A.C.A. §9-28-402(13)

defines "foster home" as follows:

> (13) "Foster Home" means a private residence of one (1) or more family members that receives from a child placement agency any minor child who is unattended by a parent or guardian in order to provide care, training, education, custody, or supervision on a twenty-four hour basis, not to include adoptive homes.

The defendant Child Welfare Agency Review Board was created pursuant to A.C.A. §9-28-403(a)(1). The General Assembly legislatively delegated the authority, pursuant to A.C.A. §9-28-403(a)(2), to the Child Welfare Review Board to "promulgate rules and regulations to enforce the provisions of this subchapter."

In 1999, the Child Welfare Agency Review Board enacted section 200.3.2 of the Minimum Licensing Standards, which states:

> 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.

The *First Amended Complaint* alleges seven causes of action: first, that the subject regulation is outside the scope of the areas of authority granted to the defendant Board; second, that the subject regulation is in violation of the Board's statutory responsibilities; third, the enactment of the subject regulation was violative of the Administrative Procedure Act because there was not substantial evidence before the Board for it to conclude that the subject regulation was within its' statutory authority; fourth, that the subject regulation is violative of the Equal Protection Clause of the United States Constitution and of 42 U.S.C. §1983; fifth, that the subject regulation is violative of the plaintiffs' rights to equal protection under Article 2, sections 2, 3 and 18 of the Arkansas Constitution; sixth, that the subject regulation is violative of the plaintiffs' rights to privacy and

intimate association under the United States Constitution and 42 U.S.C. §1983; and seventh, that the subject regulation is violative of the plaintiffs' rights to privacy and intimate association under the Arkansas Constitution. During the course of the proceedings, the plaintiffs dismissed Count III, the cause of action under the Administrative Procedure Act.

TESTIMONY - ANNE SHELLEY

Anne Shelley testified that she is a lesbian, has been in an intimate sexual relationship with a partner since 1999, applied to be a foster parent, and was advised that she could not be a foster parent because a law was passed prohibiting homosexuals and lesbians from fostering.

TESTIMONY - WILLIAM WAGNER

William Wagner testified that he was a 50 year old optical lab technician, married for over 30 years with two children, a daughter and a son. He and his wife founded "Fulfill a Dream" when they lived in Fort Smith. After moving to Fayetteville, he and his wife volunteered at "Camp Rainbow," an oncology camp for children with catastrophic illness and cancer and Mr. Wagner was a counselor there for seven years. Over the years Mr. Wagner and his wife have taken care of about eighty children who were not in their legal custody, most for only a day or two. Their son, who is over eighteen, is gay. Some of the children that stayed with the Wagners who were kicked out of their homes were kicked out because of their actual or perceived sexual orientation. One girl that stayed with them was beaten by a log chain because her father perceived her to be a lesbian. The Wagners have never been licensed as foster parents by the State of Arkansas. They called and went through the questionnaire and answered the questions truthfully. When they got to the question "do you have gays or lesbians living in the household?" they answered yes because their son sometimes lives with them.

TESTIMONY - MATTHEW HOWARD

Matthew Howard testified that he is forty-four years old and lives in Little Rock. He has a masters degree in theology, two years of seminary, and is an ordained minister with the Fellowship of Metropolitan Community Churches, a denomination that has an outreach primarily to the gay and lesbian community. He works at Easter Seals of Arkansas as a case manager dealing with families who have children with developmental disabilities. Mr. Howard has been together with his partner, a librarian, for 19 years in a sexually monogamous committed relationship. He has two children of his own, three years old and two years old, who he is co-parenting with a lesbian couple. His children are with him a minimum of two and a half days a week and his extended family is very involved with his children. Mr. Howard was interested in becoming a foster parent and was rejected because he was gay.

TESTIMONY - ROBIN WOODRUFF

Robin Woodruff testified that she was a member of the Child Welfare Agency Review Board in 1999 when the regulation was passed and that she made the initial proposal for the regulation. Her initial proposal was for a heterosexual married couple qualification for foster care. She noticed in looking through the regulations that there was an absence of an absolute for role modeling and stability as in a home with both a mom and dad. The Board didn't agree with her regulation as originally proposed and a lawyer for the Board advised the Board that it couldn't limit fostering to married couples because it would be inconsistent with state law. Ms. Woodruff stated that she does not object to a celibate gay person who is otherwise qualified from serving as a foster parent, that she believes that same sex relationships are wrong, that homosexual behavior is a sin just like she has issues in her life that are sins, and that homosexuality violates her biblical convictions. She

further testified that she believes that adults who have same sex orientation should remain celibate and that she would not be a proponent of her children spending time with openly gay couples.

TESTIMONY - JAMES BALCOM

Mr. James Balcom testified that he has been employed for thirty years at a residential foster care adoption agency and that he was a member of the Child Welfare Agency Review Board. He stated that if there was a determination that the child would be best served in a home with a homosexual individual or homosexual couple that were actively engaged in homosexual conduct that there are provisions in the regulations that would permit placement with such individuals under "alternative compliance." Mr. Balcom stated that there were three components to his decision, scientific evidence, his personal beliefs including his religious beliefs, and societal mores. He also testified that he personally believed that gay relationships are immoral, that people with homosexual orientation should remain celibate, and that he has a moral objection to people being in a household where there is a same sex relationship going on. He stated that the Board had received a position statement from the Child Welfare League of America stating its opposition to restrictions on gay parents; a statement from the National Association of Social Workers opposing restrictions on parenting by gay people; and a position statement from the American Psychological Association opposing restrictions on placements with gay parents. Mr. Balcom believes people choose to be gay, that gay people recruit others to become gay, that gay recruitment is done by "gay militants," and that "gay militants" have people who act as coaches to teach other people how to practice homosexual acts and bring them into the lifestyle. He also believes that the process of gay recruitment is a gradual one like religious proselytizing, and he believes that "militant gays are recruiting in schools in Massachusetts." One of such militant gay organizations active in recruiting in the schools is a

group called "Parents and Friends of Lesbians and Gays," an organization in which the members are not gay but are parents and friends of gay people.

Mr. Balcom also testified that a "gay foster parent might be a good placement for a gay identified teen," depending upon the specific child and that placement could be accessed through alternative compliance. He stated that individual applicants can't utilize the alternative compliance procedure because they have no standing before the Board as an individual. Agencies have to make the request to the Child Welfare Agency Review Board.

TESTIMONY - DR. CHERALYN POWERS

Dr. Cheralyn Powers has a Ph.D. in clinical psychology and began working in 1979 with adults and children in general clinical work, therapy, and assessment. She is a past president of the Arkansas Psychological Association and is affiliated with the American Psychological Association. She was authorized by the Arkansas Psychological Association to testify about the proposed regulation before the Child Welfare Agency Review Board. She testified that in matters that are so personal and so emotional that extra care needs to be taken in evaluating the basis for making decisions. She further testified that after conducting a "meta-analysis" of the results of many studies, the conclusions she drew were that:

> the sexual orientation of the parents did not negatively affect the development of the child, result in any kind of pathology, was not contraindicated for child health. That, in fact, when studies looked at both heterosexual parents and homosexual parents, the differences were not related. The differences in child development were not related to gender identity of the parents.

Dr. Powers concluded that with regard to good outcomes for the child, differentiating foster parents on the basis of sexual orientation was not a meaningful way to distinguish foster parents.

TESTIMONY- DR. REBECCA MARTIN

Dr. Rebecca Martin received her M.D. in 1980 and completed an internship and residency in internal medicine, followed by a fellowship at University of Arkansas Medical School in infectious diseases. She has served as both a teacher and a clinician at the VA and at UAMS. She has treated 350-400 HIV patients over her career, published articles in academic journals, and is a frequent lecturer on HIV. According to Dr. Martin, the latest data on new HIV infections was that 31% of new infections were from men having sex with men, women having sex with women is not generally thought to be a risk. Fifty percent (50%) of the new infections are in people less than 25 years of age with almost half of those being heterosexual transmissions. People of color are disproportionately affected, with African-Americans making up twelve percent (12%) of the population, but over half of the new HIV infections. She further testified that someone who lives in a household with someone who is HIV positive is not at risk unless they are having sexual activity with them. Dr. Martin also testified that with the advent of new treatments starting in 1996 she considers HIV to be a chronic disease and treats it as such, much as she would treat diabetes or heart disease. With respect to agency regulation section 200.2, subsection 4, which requires every member of a foster family to have a physical exam within 6 months before the initial approval of the foster home, if such regulation required HIV testing as part of the routine physical examination then the six month window should adequately test for HIV.

TESTIMONY- JUDITH FAUST

Judith Faust received a masters degree in social work in 1971 and has worked in child welfare and was Director of the Division of Children and Family Services in Arkansas from 1991-1993. She is currently employed as a faculty member at the University of Arkansas at Little Rock

School of Social Work, teaching full time in the Masters of Social Work program. Ms. Faust stated that when a child can't stay with his or her family there are a range of placement options such as kinship care, foster-family care, and residential group care with the determination of which type of setting is most appropriate for a particular child being a determination that "needs to be based on careful and thorough assessment of each individual child, his or her circumstances and conditions, strengths and needs, at the time of placement." She testified that blanket exclusions of groups of people from fostering really only enter the picture with respect to child abuse and violent crime convictions and that during her career there used to be blanket exclusions for single people, for couples who applied as foster parents but said they wanted to adopt, and it was also common practice to not make trans-racial placements. All of such blanket exclusions have changed. Ms. Faust stated that blanket exclusions don't make sense for two reasons. First, categorical exclusions eliminate from consideration people who would otherwise be good foster parents. Second, the child welfare system struggles with having a large enough pool of well-qualified foster parents to make good reasonable matches. When the system doesn't have enough well-qualified foster parents, less than ideal matches occur, which might result in multiple foster home placements which are not good for the children. She also testified that there are situations in which a gay foster parent might be the "placement of choice." Ms. Faust's opinion was that the importance of individual evaluations of both the needs of the child as well as the strengths of the applicant was a well established principal in the child welfare field and that such principal was at the "heart of all social case work practice and certainly at the heart of child welfare practice." She further testified that the chief professional organization that guides child welfare practice across the country is the Child Welfare League of America (CWLA) and that such organization publishes standards of excellence for foster family

care. DCFS is a member of CWLA. CWLA has a standard that says that applicants for foster parenting should not be denied solely on the basis of age, marital status, income, sexual orientation, race, physical condition, handicap, or location. There is also an organization named National Association of Social Workers (NASW). NASW has policy statements regarding best practices in the field of social work. One of the policy statements states that barriers to foster parenting that are unsupported by evidence need to be removed, the three examples of unsupported barriers being fostering single parents, fostering by parents who want to adopt, and fostering by non-traditional families, including gay and lesbian parents.

Ms. Faust additionally testified that when the UALR social work faculty learned of the proposed regulation there was "unanimous dismay at a policy that would categorically exclude gay and lesbian people from foster parenting." She further testified that there was an, "unanimous sense that this policy didn't make sense in light of what the children the system serves need, in light of what would best serve the children in the system."

TESTIMONY - DR. MICHAEL LAMB

Dr. Lamb received his Ph.D. in psychology from Yale University in 1976. He took academic positions from then until 1987 when he moved to his then current position as Senior Research Psychologist at the National Institute of Child Health and Human Development, one of the constituent agencies of the National Institutes of Health. In such capacity, Dr. Lamb was in charge of the section on social and emotional development. During his career he has authored over 500 publications in either professional peer-review journals or chapters in professional books. Additionally, he has written or edited about thirty books. He was qualified, for the purpose of this litigation, as an expert in developmental psychology and specifically in parenting and children's

adjustment, including the adjustment of children raised by gay parents. Dr. Lamb testified that there are four well known predictors of healthy child adjustment: (i) the quality of the child's relationship with the parent primarily responsible for his or her care: (ii) the relationship the child has with another parent figure; (iii) the quality of the relationships between the adults; and (iv) the resources available to the child. Dr. Lamb also testified that at this time the traditional family form is clearly the minority family form in this country. Dr. Lamb stated that being raised by gay parents: (i) does not increase the risk of problems in adjustment for children; (ii) does not increase the risk of psychological problems for children; (iii) does not increase the risk of behavioral problems; (iv) does not prevent children from forming healthy relationships with their peers and others; (v) does not cause academic problems; (vi) does not cause gender identity problems; and (vii) does not cause any adjustment problems at all.

He further testified that both men and women have the capacity to be good parents and that there is nothing about gender, per se, that affects one's ability to be a good parent. There is research that indicates that there are benefits to children's adjustment in having two parents as opposed to one parent and that children in single parent families are more likely to have adjustment difficulties than children in two parent families. The studies consistently report that children of lesbian or gay parents are equivalently adjusted to children of heterosexual parents and that there is no evidence to support an assertion that there is more likely to be child abuse and domestic violence in families with gay parents than families with heterosexual parents. Dr. Lamb's opinion is that it is an ideological position that children are best off when raised by married mothers and fathers and that there are clearly differences in what people believe based on things other than scientific research. He also testified that there is no basis: (i) for making the statement that heterosexual parents might be better

able to guide their children through adolescence than gay parents; (ii) for believing that the sexual orientation of a parent or foster parent can predict children's adjustment; and (iii) for believing that being raised by lesbian or gay parents has a negative effect on children's adjustment.

Dr. Lamb stated that there is no child welfare basis to categorically exclude gay people from being foster parents, that such categorical exclusion could be harmful to promoting children's healthy adjustment because it excludes a pool of effective foster parents, and that there is no reason in which the health, safety, or welfare of a foster child might be negatively impacted by being placed with a heterosexual foster parent who has an adult gay family member residing in that home.

TESTIMONY - DR. FREDERICK BERLIN

Dr. Berlin has both an M.D. and a Ph.D., the latter being obtained in 1974. He is an associate professor at Johns Hopkins Hospital and founder of the John Hopkins Sexual Disorders Clinic. Dr. Berlin is also Director of the National Institute for the Study, Prevention and Treatment of Sexual Trauma. He has served as a consultant to the ad hoc committee on sexual abuse of the National Conference of Catholic Bishops, as a member of the Cardinals' Commission in Boston, provided consultation to the Episcopal Church for screening of individuals, provided consultation to the European Parliament, and has been a participant in a White House conference on child sexual abuse. He has also been invited to address the United States Senate subcommittee on the same issue. Additionally, Dr. Berlin has conducted seminars for the United States Department of Justice as well as seminars for the Federal Bureau of Investigation. He was qualified, for purposes of the trial, as a specialist in forensic psychiatry with his special area of expertise within psychiatry being sexual disorders and the spectrum of human sexuality.

Dr. Berlin testified that homosexuality is not a mental disorder and by 1986 any reference

to homosexuality as a mental disorder was removed from the DSM. He further testified that people discover their sexual interests, they don't decide voluntarily to have them and that there is no evidence to support the idea that a person's sexual orientation is affected by the sexual orientation of that person's parent. According to Dr. Berlin, it is extremely difficult, if not impossible, for someone to change their sexual orientation. The American Psychiatric Association has developed an official policy statement that there is no evidence that methods used to try to reorient a person sexually work and since there is no evidence it is unethical for a professional to try to utilize such methods. He also testified that there is no evidence to support that gay people, as a group, are more likely to engage in domestic violence than heterosexuals and that gay people are not more likely to sexually abuse children than heterosexuals.

Testimony - Dr. George Rekers

Dr. Rekers testified that he has a Ph.D. in psychology from UCLA, has a Diplomate in clinical psychology from the American Board of Professional Psychology, and is licensed in South Carolina in both clinical psychology and experimental psychology. He is a tenured full professor of neuropsychiatry and behavioral science at the University of South Carolina School of Medicine in addition to being a psychologist on the children's inpatient service at the Hall Psychiatric Institute. Dr. Rekers is also an ordained minister and has a doctorate in theology. He has treated gay patients to try to change their sexual orientation, some of such patients being minors brought in by parents. He has children of his own and would not allow openly homosexual people to spend time with them unsupervised. Dr. Rekers testified that, for several reasons, a homosexual household is an inferior family structure in terms of promoting the best interests of a child. He further testified that a married family was the best setting.

TESTIMONY - DR. SUSAN COCHRAN

Dr. Cochran has a Ph.D. in clinical psychology and a Master's degree in epidemiology. She has had approximately sixty publications in peer review journals and is a professor of epidemiology and statistics at the UCLA School of Public Health. She has conducted studies, including epidemiology studies, concerning alcohol and drug abuse. Dr. Cochran's testimony was presented as an expert in psychology and epidemiology with a specialization in health disparities among minority communities including lesbians and gay men and including substance abuse within that community. Dr. Cochran testified that demographic factors relating to substance abuse or dependance include gender, age, education, employment status, race, urbanity, and religiosity. Some of the statistical information presented by Dr. Cochran concerning percentage of individuals meeting the alcohol/substance abuse criteria was:

(a)	men under 25 -	12%;
(b)	women under 25 -	6%;
(c)	general population, age 21 -	24%;
(d)	general population, age 26 -	7%;
(e)	American Indians -	17%;
(f)	Asian Americans -	6%
(g)	Full time employed -	10%;
(h)	Unemployed -	17%;
(i)	College graduates -	7%;
(j)	Not finishing high school -	11%;
(k)	Urban population -	9%; and
(l)	Rural population -	6%.

Dr. Cochran further testified that there is no statistically significant difference in the overall rate of alcohol dependency diagnosis among heterosexual men and homosexual men. There is a somewhat higher rate among homosexual women than heterosexual women for both alcohol and drug dependency but not for abuse. Heterosexual males, homosexual females, and homosexual males all

have similar rates of substance abuse and dependency. The best predictors for whether a person will meet the criteria for drug abuse and dependency are age, gender, and employment status.

TESTIMONY - DR. PEPPER SCHWARTZ

Dr. Schwartz obtained a M.A. from Washington University in Sociology, a Masters in Philosophy from Yale University in Sociology, and her Ph.D. from Yale University in Sociology. She is a tenured Professor of Sociology at the University of Washington, has served on numerous editorial boards and reviews, published approximately eight books, published about forty articles in academic journals, and is the recipient of the 2004 American Sociological Association "Public Understanding of Sociology" award. Dr. Schwartz was qualified as an expert in sociology with an expertise in couple relationships including both heterosexual and same sex couples. She testified that a comparison of the quality of relationship between heterosexual and homosexual relationships has been done and that in terms of quality of relationships, same sex couples of both men and women were higher in certain categories. According to Dr. Schwartz, the divorce rate varies by region, overall it is about 50% , the rate being higher in urban areas and about 1/3 of children are growing up in single parent families with some demographers say up to ½ of all kids are growing up in single parent families. The same factors apply to same sex or heterosexual couples in evaluating couple stability and leading to couples breakup - how much of a couple are they, common friends, work, extended family relationships, how well do they know each other, have they handled hard times in the relationship, and have they had continuous residence for periods of time. She testified that there are a number of demographic factors correlating with number of sexual partners; age and cohort difference, ethnicity, religiosity, and gender being some of the variables. The determination of relationship durability requires a multi-variable approach, a prediction about relationship stability

can't be made only using sexual orientation. She further testified that if the State's goal is to have foster parents with stable relationships, excluding gay applicants, as a group, does not advance such goal.

CREDIBILITY OF WITNESSES

It was a privilege for the court to hear testimony from experts having the credentials, qualifications and experience presented by some of the expert witnesses in this case. For any lay person, such as the court, willing to listen to the knowledge, training, and experience of such experts, their testimony provided much in the way of life affirming information about the resiliency and adaptability of mankind with respect to individual behavior modification to insure the existence of nurturing relationships with our children.

The most outstanding of the expert witnesses was Dr. Michael Lamb. Without a single note to refer to and without any hint of animus or bias, for or against any of the parties, Dr. Lamb succinctly provided full and complete responses to every single question put to him by all counsel and was very frank in responding to inquiries from the court. Of all of 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.

In counterpoint to the quality of Dr. Lamb's testimony was the testimony provided by Dr. George Rekers. It was apparent from both Dr. Rekers' testimony and attitude on the stand that he was there primarily to promote his own personal ideology. If the furtherance of such ideology meant providing the court with only partial information or selectively analyzing study results that was acceptable to Dr. Rekers. Dr. Rekers was unable to testify without referring to approximately

seventy pages of notes. A large part of his testimony was not responsive to the questions being asked of him but consisted of Dr. Rekers simply reading his prepared notes on a topic he wished to promote. For the most part, whether on direct examination or cross examination, he was either unable or unwilling to directly answer a question. Dr. Rekers is obviously an intelligent, educated, sincere individual, who has very strong personal beliefs, all traits for which Dr. Rekers should be commended. But 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 in resolving the difficult issues presented by this case. Dr. Rekers' personal agenda caused him to have inconsistent testimony on several issues. One example being that after testifying at length about how transitions were stressful for foster children and should be avoided if possible, Dr. Rekers then testified that it was hypothetically in a child's best interests to be removed from a successful fourteen year foster relationship in a homosexual household for the sole purpose of placement in a heterosexual household. When informed of Dr. Rekers' statement on such point Dr. Lamb testified that such statement was an "extraordinary suggestion" that "flies in the face of all we know about the importance of relationships between children and parent figures." Such portion of Dr. Rekers' testimony is also directly contrary to the expressed legislative policy of the Arkansas General Assembly found at A.C.A. §9-28-410(a)(1) which states that, "The policy of the State of Arkansas is that children in the custody of the Department of Human Services should have stable placements."

Count I
Regulation 200.3.2 Is Outside The Board's Areas of Responsibilities

The plaintiffs' first cause of action is that Regulation 200.3.2 is violative of the Separation

of Powers Doctrine. Such doctrine was discussed by the Arkansas Supreme Court in *Federal Express Corporation v. Skelton*, 265 Ark. 187, 578 S.W.2d 1 (1979), as follows:

> Our government is composed of three separate independent branches: legislative, executive and judicial. Each branch has certain specified powers delegated to it. The legislative branch of the State government has the power and responsibility to proclaim the law through statutory enactment. The judicial branch has the power and responsibility to interpret the legislative enactments. The executive branch has the power and responsibility to enforce the laws as enacted and interpreted by the other two branches. The "Separation of Powers Doctrine" is a basic principle upon which our government is founded, and should not be violated or abridged.

The General Assembly delegated the power to the defendant Board to legislate rules and regulations that, "promote the health, safety, and welfare of children", A.C.A. §9-28-405(c)(1). The 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.

What the defendant Board was attempting to do was to legislate public morality. The law is well settled that there is a legitimate social interest in morality. In *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), a case involving the First Amendment, a fundamental right case, the Court stated:

> The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' *R.A.V. v. City of St. Paul*, supra at 382-282, 112 S.Ct. 2538 (quoting *Chaplinksy v. New Hampshire*, supra, at 572, 62 S.Ct. 766).

The General Assembly has used the word "moral" in over two hundred instances in the Arkansas Code. It is also clear that there is a legislative and legal difference between the words "health",

"welfare", "safety", and "morals".[1] As evidenced by the cited statutes, the General Assembly legislatively delegates its authority to the executive branch in varying degrees. Sometimes it is the entire panoply of health, safety, welfare, and morals; other times, it is a subset of the four areas. In the case before the court, the defendant Board was not delegated the authority to legislate for the General Assembly with respect to "public morality." Accordingly, Regulation 200.3.2 is unconstitutional as being violative of the separation of powers doctrine.

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[1] *i.e.*, **A.C.A. §9-29-101(a)(1)** - "It is found and declared: (1) That juveniles who are not under proper supervision and control, or who have absconded, escaped, or run away, are likely to endanger their own health, morals, and welfare, and the health, morals, and welfare of others"; **A.C.A. §11-6-205** - "No child under sixteen (16) years shall be employed or permitted to work in any occupation dangerous to the life and limb, or injurious to the health and morals of the child, or in any saloon, resort, or bar where intoxicating liquors of any kind are sold or dispensed"; **A.C.A. §11-12-104 (b)(1)** - "No child under sixteen (16) years of age may be employed in the entertainment industry: (1) In a role or in an environment deemed to be hazardous or detrimental to the health, morals, education, or welfare of the child as determined by the Director of Department of Labor"; **A.C.A. §3-5-213** - "All incorporated cities and towns in the State of Arkansas are authorized to pass proper ordinances governing the issuance and revocation of licenses ..... Cities and towns may impose additional restrictions, ... and such other rules and regulations as will promote public health, morals, and safety which they may be ordinance provide"; **A.C.A. §3-9-205(b)** - "Nothing in this subchapter, however, shall be construed as limiting the power of other proper state or local governmental bodies to regulate .... as may be necessary for the protection of public health, welfare, safety and morals". **A.C.A. §5-64-101(o)(1)** - "Narcotic drug" means any drug which is defined as a narcotic drug .... In the formulation of definitions of narcotic drugs, the Director of the Department of Health is authorized to ..... which threaten harm to the public health, safety, or morals"; **A.C.A. §5-68-402** - "(a) The General Assembly determines that the during the past several years, the spread of obscene publications has become a matter of increasingly grave concern to the people of the state. (b) The elimination of this evil and the consequent protection of the citizens and residents of this state against those publications are in the best interests of the morals and general welfare of the people"; **A.C.A. §11-10-102(1)** As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: (1) Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state"; **A.C.A. §14-54-104(C)** - "In order to better provide for the public welfare, safety, comfort, and convenience of inhabitants of cities of the first class, the following enlarged and additional powers are conferred upon these cities: (C) To prevent or regulate the carrying on of any trade, business, or vocation of a tendency dangerous to morals, health, or safety, or calculated to promote dishonesty of crime"; **A.C.A. §14-56-403(a)** - "The plans of the municipality shall be prepared in order to promote, in accordance with present and future needs, the safety, morals, order, convenience, prosperity, and general welfare of the citizens"; **A.C.A. §14-68-301(3)(A)** - "Blighted area" means an area ....., are detrimental to the public health, safety, morals, or welfare"; **A.C.A. §15-5-102(c)** - "It is declared to be the public policy and responsibility of this state to promote the health, welfare, safety, morals, and economic security of its inhabitants ...."; **A.C.A. §16-105-303** - "The operation of a dance hall in which, or around which, public disturbances ..... a public nuisance and detrimental to the public morals ....."; and **A.C.A. §17-17-114(a)(3)** - " .... The penalty may be imposed only if the board formally finds that the public health, safety, welfare, and morals would not be impaired thereby ..."

Count II
Regulation 200.3.2 Is In Violation Of The Board's Statutory Responsibilities

The plaintiffs' argument under Count II is corollary to their argument under Count I. There was one point on which every single expert that testified was in agreement. That point was that the number one rule with respect to foster children is that the needs of each and every foster child should be individually examined and a foster home placement made based upon that child's individual needs. Section 210.1 of the Minimum Licensing Standards promulgated by the defendant Board addresses such primary rule, as follows:

> The agency shall select the home that is in the best interest of the child, the least restrictive possible, and is matched to the child's physical and emotional needs. The placement decision shall be based on an individual assessment of the child's needs.

It is apparent from the testimony and evidence that the blanket prohibition contained in Regulation 200.3.2 is contrary to Section 210.1 and to the defendant Board's statutory responsibility to promulgated rules to "promote the health, safety, and welfare" of foster children.

Counts IV & V - Violation Of Equal Protection

Ordinarily the court's finding that Regulation 200.3.2 is invalid under the separation of powers doctrine would render any decision concerning the equal protection challenge moot. However, the present case has been pending for over five years at the trial court level and addresses issues that are of paramount interest to some of the most vulnerable members of our society. If possible, all of the constitutional issues raised by this litigation need to be resolved at the appellate level. In an effort to insure that the appellate courts have the opportunity to fully and completely address all constitutional challenges to the subject regulation this court will rule on the equal protection challenge.

Unless a challenged classification burdens a fundamental right or targets a suspect class, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest, *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 1627 (1996). At this point the law is well settled that in cases involving homosexuals or "gay rights," a suspect class does not exist. Nor is there any precedent for application of "heightened scrutiny." The plaintiffs argue violation of their fundamental rights of privacy and intimate association, such causes of action addressed below. This case involves the grant of a statutory privilege in a situation in which the state acts in *loco parentis* for minor children. Like adoption, foster parenting is a privilege created by statute and not by common law. There is no fundamental right to be a foster parent, nor any fundamental right to apply to be a foster parent. In *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), the Arkansas Supreme Court stated:

> Though homosexual citizens do not constitute a protected class, they are separate and identifiable class for purposes of equal-protection analysis. Under well-settled equal-protection analysis, any legislation that distinguishes between two groups of people must be rationally related to a legitimate governmental purpose. *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)."

The base level "rational basis" standard is the appropriate standard for resolution of this matter.

To resolve the equal protection claim, three questions must be answered. First, is there a discrimination? Second, is there a legitimate governmental purpose or interest involved? And third, is the discrimination "rationally related" to the governmental purpose? There is clearly a discrimination. Qualified individuals who fall within the blanket exclusion of the subject regulation are barred from being foster parents. Qualified individuals for whom the blanket exclusion is not applicable are not barred. There is also a legitimate governmental interest involved, with the State

having, "a duty of the highest order to protect the interests of minor children, particularly those of tender years," *Palmore v. Sidotti*, 466 U.S. 429, 104 S.Ct. 1879 (1984). Within the penumbra of such interest are subset interests including health, safety, welfare, and morality. The remaining question then is that of "rational relationship."

The Eleventh Circuit recently decided the case of *Lofton v. Gilmore*, 358 F.3d 804 (11th Cir. 2004). The *Lofton* case was a challenge to the Florida blanket ban on homosexual adoption. In Florida single gay individuals are eligible to be foster parents but not adoptive parents, the reverse of the present situation in Arkansas. There are both important factual similarities and differences between the present matter and that presented to the court in *Lofton*. The most important difference however is that *Lofton* was decided by the court based upon cross-summary judgment motions, without the opportunity for an in depth evidentiary analysis.

The *Lofton* case provides insight into just how difficult it is to resolve the constitutional issues in this area. In connection with the denial of the petition for rehearing en banc, *Lofton v. Gilmore*, 377 F.3d 1275 (July 1, 2004), the learned judges of the Eleventh Circuit issued a lengthy concurring opinion, one dissenting opinion in which three judges participated and a second dissenting opinion in which three other judges participated.

Clearly if the subject regulation was rationally related to insuring the health, welfare, and safety of minor children the equal protection challenge would fail. As determined in the ruling on Count I, by eliminating otherwise qualified individuals, the 200.3.2 blanket exclusion not only doesn't promote the health, safety, and welfare of minor children, it may actually run contrary to furthering such state interests. Although such determination ended the inquiry with respect to the Separation of Powers claim, it does not conclusively resolve the plaintiffs' Equal Protection claims.

Public morality, as determined by the elected representatives of the people and as long as it is within constitutional limits, is also a legitimate state interest. Black's Law Dictionary defines "public morality" as "the ideals or general moral beliefs of a society." The majority of the people may feel that homosexual relationships are contrary to the "general moral beliefs of society." As of the present time there has been no legislative expression defining "public morality" on this exact point. In the absence of specific legislative direction the courts have the authority to search the common law of our state for an answer. The court finds no assistance from such quarter. For all persons fortunate enough to be engaged in public service there will be situations in which the dichotomy of personal conviction and professional obligation becomes fully realized. However, it would be inappropriate for this court to attempt to impose its moral compass upon another just as it is inappropriate for the courts to attempt to sit as "super-legislatures." As stated by Carl Sunstein, in his article entitled *Foreward: Leaving Things Undecided*, 110 Harvard L. Rev. 4, 101. Mr. Sunstein stated:

> Courts do best by proceeding in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in the system of democratic deliberation. It is both inevitable and proper that the lasting solutions to the great questions of political morality will come from democratic politics, not the judiciary.

Having struck the blanket exclusion there is no need for this court to make a decision by judicial fiat as to what the public policy is with respect to "public morality" in this area.

The plaintiffs, citing *Lawrence v. Texas*, 539 U.S. 558 (2203) and *Romer v. Evans*, 517 U.S. 620 (1996), argue that "public morality" is an insufficient reason separate and apart from any separate legitimate reason and is unconstitutional because it constitutes "bias" or "irrational prejudice." The legal issues in *Lawrence* and *Romer* are vastly different than those presented in this

case, a case in which the primary focus of the governmental action is the protection of minor children. This legal issue leads us straight into the gaping maw of the philisophical dispute between legal utilitarians, proponents of natural law, originalists, and those advocating judicial minimalism. It is also an issue that appears to be of first impression. All of the other stand alone legitimate state interests are quantifiable, subject to being proved or disapproved by some form of data, evidence, or scientific measurement. In the absence of quantifiable information, "bias" is an insufficient reason to discriminate even under a rational basis examination. By its very nature "public morality" is qualifiable not quantifiable. Can "public morality" be a stand alone legitimate state interest in an equal protection case or must it be appended to some quantifiable state interest, such as safety or welfare? This issue was mentioned but not resolved at the trial court level in Lofton.[2]

If the General Assembly determines the moral pulse of the majority, does it matter if such determination is subject to extrinsic, empirical measurement? If not, then isn't this the exact situation that Justice Scalia was writing about in his dissenting opinion in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996) when he stated:

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[2] *See*, Footnote 17, *Lofton v. Gilmore*, 358 F.3d 804 (11th Cir. 2004). Florida also asserts that the statute is rationally related to its interest in promoting public morality both in the context of child rearing and in the context of determining which types of households should be accorded legal recognition as families. Appellants respond that public morality cannot serve as a legitimate state interest. Because of our conclusion that Florida's interest in promoting married-couple adoption provides a rational basis, it is unnecessary for us to resolve the question. We do note, however, the Supreme Court's conclusion that there is not only a legitimate interest, but "a substantial government interest in protecting order and morality," Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569, 111 S.Ct. 2456, 2462, 115 L.Ed.2d 504 (1991), and its observation that "[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." Gregg v. Georgia, 428 U.S. 153, 175, 96 S.Ct. 2909, 2926, 49 L.Ed.2d 859 (1976) (plurality opinion) (citation omitted).
We also note that our own recent precedent has unequivocally affirmed the furtherance of public morality as a legitimate state interest. *See, e.g.*, Williams v. Pryor, 240 F.3d 944, 949 (11th Cir.2001) ("The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis scrutiny."); *see also id.* at 949 n. 3 ("In fact, the State's interest in public morality is sufficiently substantial to satisfy the government's burden under the more rigorous intermediate level of constitutional scrutiny applicable in some cases.").

> I do not mean to be critical of these legislative successes; homosexuals are entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well.

The ruling of this court is that, in an equal protection challenge in which the State stands *in loco parentis* to minor children, where there is no suspect class, no heightened scrutiny, and no fundamental right involved, that for purposes of a rational basis review, "public morality" is a stand alone legitimate state interest and that rules, regulations, and/or statutes rationally related to furthering the legislatively determined "public morality" are constitutional.

Counts VI & VII - Rights To Privacy & Intimate Association

The plaintiffs also claim that Regulation 200.3.2 violates their rights to privacy and intimate association under both the U.S. and Arkansas Constitutions. In support of such claim they cite *Lawrence v. Texas*, 123 S.Ct. 2472 (2003). The legal principles addressed by *Lawrence* are different than those presented by this case.[3] The balance of the legal argument on these two issues is the same legal argument made to the Eleventh Circuit and rejected by such court in *Lofton v. Gilmore*, 358 F.3d 804 (2004). The *Lofton* court's analysis on the issues of privacy and intimate association is adopted by this court. The plaintiffs' claims for relief under Counts VI and VII are accordingly denied.

CONCLUSION

It is given to the courts to be the guardians of the four corners of our Constitution, to insure that the "tyranny of the majority" does not infringe upon the rights given to all, including the minority. The legislative branch is charged with the stewardship of public policy, a tremendous

[3] With an exception not specifically addressed by the parties. With respect to plaintiff Wagner who is heterosexual but has an adult gay son, the portion of the Regulation addressing "any adult member of that person's household" might unconstitutionally restrict plaintiff Wagner's constitutional rights of privacy and association.

privilege that is at the same time a heavy burden. Over the centuries the system of checks and balances between the three branches of government, each proceeding in good faith to perform its constitutional duties, has proven an excellent mechanism for resolution. Jerome Bruner has suggested that one of the reasons that people believe in our system of justice may be as simple as "our faith that confrontation is a good way to get to the bottom of things."[4] The "confrontation" in this case has presented us all with an excellent opportunity to replace ignorance with knowledge and to make an informed decision based on information as opposed to assumption.

We must always remain mindful that we are creatures of the temporal, that some of the cherished societal mores of our present may very well one day become the regretted bigotry of our past. Things change, sometimes too fast for those who are comfortable in the skin of the status quo, sometimes excruciatingly slow for those waiting their time under the sun. For those truly interested in reaching an informed decision as to what public policy or public morality should be with respect to the appropriate qualifications for foster parents necessary to best nurture and protect the children placed into foster homes in Arkansas the court strongly recommends careful reading of the information and expert opinions assembled in the record of this case.

TIMOTHY DAVIS FOX
CIRCUIT JUDGE

12/29/04
DATE

cc: counsel of record

[4] *Making Stories, Law, Literature*, Life, p. 42.