IN THE
ARKANSAS SUPREME COURT

DEPARTMENT OF HUMAN SERVICES, et al — APPELLANTS

v. — No. 05-814

MATTHEW HOWARD, et al — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY

THE HONORABLE TIM FOX
CIRCUIT JUDGE

APPELLANTS' REPLY AND RESPONSE TO CROSS APPELLANTS

Kathy L. Hall
#98-110
Arkansas Dep.t of Health
Human Services
PO Box 1437, S 260
Little Rock, AR 72201
(501) 682-1366
(501) 682-1390-fax

Attorney for Appellants

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REPLY

Appellees take sixteen and one-half pages to "summarize" the trial court's findings of fact while interjecting arguments and citations to the abstract and addendum. The "summary" is not a summary at all. In fact, it is an argument, inappropriately made, as to why the trial court was correct in its decision[1]. While the sixteen and one half pages should be part of Appellees opening argument, out of an abundance of caution, Appellants are compelled to reply. The Findings of Facts, Memorandum Opinion, and Judgment contained in the addendum at pp. 863 through 896 speak for themselves. Appellants do reiterate however, that their appeal is limited to the trial court's finding that the CWARB's regulation was based on morality and not the health, safety, and welfare of children. (Add. 863)

Appellees make much of the trial court's findings regarding gay people and the effect on children residing in their homes. Once again, Appellees miss the point. All of the testimony at trial centered around "gay people" as that term is defined by the ACLU. However, as Appellants keep stating, the regulation does not apply to "gay people" as defined by the ACLU and in the studies presented, but rather persons who *practice* homosexual conduct or have persons in their home who *practice* same-sex sex. Clearly, according to the regulation a person can be a self identified "gay" person and be a foster parent so long as they are not engaging in same-sex conduct. In any event, Appellants will respond.

Though Appellees' expert witness stated that the research regarding homosexual parenting was not in disagreement, that stops short of saying the research is thorough or otherwise grounded in scientific method. In fact the research is very limited. Should Arkansas

[1] Appellants submit that this portion of Appellees' Response is in violation of Ark. Sup. Ct. R. 4-1(b).

place children in these homes, the children would effectively become guinea pigs in a social experiment that could very well have devastating effects on the very ones the State has a duty to protect. Indeed, the Appellees' own experts testified to the problems with the research in this area. Appellees' expert, Dr. Berlin, testified that it is "imperative" that both longitudinal and cross-section studies be done to address different questions[2]. (AB. 120, R. 1978) He also testified that sample size is important and that the sample size should be representative of the group being studied. (AB. 106, R. 1951) He then discussed the two types of samples: nonprobability or convenience (where the group is selected a particular way); and probability (where the group is randomly selected). (AB. 106, 110 R. 1951, 1958) He then stated his own research was not a random sampling of the larger community, but rather was his clinical population. (AB. 106, R. 1952) In fact, he's never done a study using a true random sample. Because he used convenience samples there is no way to know what potential bias may exist in the study. (AB. 107, 110 R. 1952, 1959) Nor does he know of any studies regarding homosexual parenting using random samples. (AB. 107, R. 1953) He noted that one of the 'sad realities' in this area was that there is not enough data. (AB. 107, R. 1953) Studies are more reliable when they can be replicated and quality research as to be as objective as possible. (AB. 109, 114 R. 1956, 1965)

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[2] Dr. Michael lamb testified that while hundreds of longitudinal studies have been done regarding the effect of parenting on child development, only one longitudinal study has been done regarding gay and lesbian parenting and that study consisted of 78 children. (AB. 139, 141, 152, R. 2028, 2033, 2057-58) The study was done in England, was a convenience sample, and the children were on average 9.5 years old when the study began. (AB. 153, R. 2058-59)

Dr. Lamb, the Appellees' other expert, testified that there are few studies looking at children in the foster care system. (AB. 126, R. 1998) He could not identify any studies of children in the foster care system who were placed in homes with homosexual parents. (AB. 142, R. 2034) In total, there have been about a dozen studies done on children with homosexual parents, which resulted in about 50 empirical reports. (AB. 137-38, R. 2023) Also, it's important to note that the dozen studies done included a total of 600-700 children. (AB. 166, R. 2090) Of those studies, the homosexuals were usually more educated than the heterosexuals. (AB. 157, R. 2068) Mr. Lamb went on to state that if you took a group of parents in San Francisco and did a study and then took a group of parents comparable in education and income in Texarkana, you'd get the exact same result. (AB. 167-68, R. 2094) In other words, Mr. Lamb does not believe that regional attitudes come in to play in this type of equation.

What it boils down to is this: Appellees are asking this Court to rely on twelve studies of 600-700 children where the samples were self selected and to hold that as a matter of law that is sufficient to establish that it is in the best interest of foster children to be placed in homes with a practicing homosexual. Again, they are asking this Court to make the foster children of this state guinea pigs in a social experiment.

It is clear that the Appellees' own experts' opinions demonstrate that the Court erred when it found that it is not harmful for children to live with homosexuals. There simply is not enough research available for the trial court to make that conclusion or any of the other conclusions the trial court made regarding the rational for the regulation[3]. However, Appellees assertion that children are not at risk of contracting HIV from and HIV+ household member is

[3] See Appellees' Argument regarding drug abuse, instability, child neglect, domestic violence, sexual abuse, and diseases. (App. ARG. Pp 7-10).

completely absurd. Of course if a person is HIV+ there is the possibility that a household member could contract HIV. That's why it's called a communicable disease. Diabetes, the illness they compare HIV to is not communicable. As such, the comparison is illogical. *See, Onishea v. Hopper*, 171 F.3d 1289 at 1299 (11th Cir. 1999) (finding that when a disease that results in death there is significant risk if it is shown that a certain event can occur and that event can lead to transmission of the disease.)

Next, Appellees argue that the trial court rejected the State's assertion that children do best with both a mother and father. (Ap. Brief at Arg. 12) Again, even Appellees' expert testified that children are better served with both a mother and father. (AB. 163, R. 2084) As such, the parties are in agreement on that point and the trial court's finding was in error.

Appellees then write that the trial court rejected the "state's assertion" that the regulation protected children from social prejudice. (Ap. Brief at Arg. 13) The state never made that assertion at trial. As noted in Appellees' own response, Dr. Rekers testified that if a biological family disapproved of a gay foster parent it may affect reunification. (Ap. Brief at Arg. 14) That statement is self evident, not "social prejudice."

On page 15 of their brief, Appellees argue the finding of the trial court that the regulation at issue may be harmful to children in the child welfare system. Excluding practicing homosexuals from being foster parents does indeed shrink the pool of potential parents, but as noted by Appellees' own experts, no one is sure just how big that pool is in the United States, much less Arkansas. Dr. Berlin estimated that five to six percent of the population self identified as gay, but he did not to commit to that answer. (AB. 108, R. 1954-55) There was no evidence at all of the number of those persons who want to be foster parents. Furthermore, that answer

related to the Cross Appellants' definition of gay. Presumably a smaller number of persons engages in the behaviors to which the regulation is addressed.

It is also important to note that the appellate courts of this State have never condoned extramarital cohabitation in the presence of a child. *Powell v. Marshall*, CA 04-627 (Ark. App. 11-3-2004) (citing *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999); *Word v. Remick*, 75 Ark. App. 390, 58 S.W.2d 422 (2001); *Thigpen v. Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987)). By definition, all homosexual 'partnerships' can only be extramarital because Arkansas specifically prohibits same sex marriage and does not recognize same sex marriages. Ark. Code Ann. § 9-11-208 (Repl. 1998). This is because it affects the *welfare* the child because the moral breakdown leading to promiscuity and depravity which renders one unfit to have custody of a minor child. *Hepp v. Hepp*, 61 Ark. App. 240, 968 S.W.2d 62 (1998)(emphasis added). It follows that when the issue is our children, morality falls under welfare that has to be protected. Thus, the trial court erred when it found that the Board exceeded its authority when it regulated the morality of children. Clearly, the Board was regulating the welfare of children in State custody. In this regard, by not letting cohabitating couples, whether opposite or same sex, the Board is protecting the welfare of children.

This Court's Lack of Jurisdiction:

At the time this suit was filed, back in 1999, Matthew Howard had not even applied to become a foster parent. (AB. 216) Neither had Mr. Wagnor or Ms. Shelley. Mr. Wagnor testified that he had called regarding becoming a foster parent, but that he was denied without ever going down and completing an application. (AB. 64) He went on to testify that the reason given for the 'denial' was that he had a homosexual in his house. (AB. 64) Then, Mr. Wagnor testified that his son (the homosexual referred to on the telephone to DHS) had not actually

stayed in his home since December 2003, and then it was only for a four day visit. (AB. 65) As such, it is clear that the Wagnors were not affected by the challenged regulation when they called the Department to inquire about applying to become foster parents.

Ms. Shelly did not fill out a formal foster parent application either. (AB. 227) A telephone call does not equal a foster parent application. As such, none of the Plaintiffs in this matter had standing to bring the suit. (AB. 228, 229)

Likewise, no Plaintiff exhausted the available administrative remedies and as such the Circuit Court and this Court lack jurisdiction to hear the matter. Jurisdiction can be raised at any time, even on appeal and this Court itself may properly consider jurisdiction for the first time on appeal even if no party has previously raised the issue. *State v. Dawson*, 343 Ark. 683, 38 S.W.3d 319 (2001). The regulation in question was implemented pursuant to the Administrative Procedure Act ("APA")[4]. (Add. 733) Judicial review of DHS decisions is governed by the Administrative Procedure Act, Ark. Code Ann. §§ 25-15-201-218 (Repl. 2002 & Supp. 2005). *Arkansas DHS v. Siloam Springs Nursing/Rehabilitation,* CA 04-962 (Ark. App. 9-28-2005). An appeal to circuit court can only be taken after administrative remedies have been exhausted. *McLane Southern Inc. v. Davis*, 80 Ark. App. 30, 90 S.W.3d 16 (2002); *Ford v. Arkansas Fish and Game Comm'n*, 335 Ark. 245, 979 S.W.2d 897 (1998). Here, no request at all was made to the board to repeal the regulation. No administrative hearing was requested. There is no final agency decision from which to appeal to circuit court. Because Plaintiffs did not exhaust their administrative remedies, this action should be dismissed.

THE TRIAL COURT ERRED WHEN IT MISAPPLIED THE RATIONAL BASIS STANDARD OF REVIEW AND HELD THAT THE REGULATION PASSED BY THE CWARB VIOLATED THE SEPARATION OF POWERS DOCTRINE.

[4] Appellees/Cross-Appellants' first Complaint alleged a violation of the APA, but that was dismissed by the Plaintiffs at trial. (AB. 873-74)

The rational basis standard instructs that "a classification `must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Thus, it is "constitutionally irrelevant [what] reasoning in fact underlay the legislative decision." *Railroad Retirement Bd.* v. *Fritz,* 449 U.S. 166, 179 (1980) (quoting *Flemming v. Nestor,* 363 U.S. 603, 612 (1960)). Courts may hypothesize interests that might support legislative distinctions, whereas heightened scrutiny limits the realm of justification to demonstrable reality. *Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53 (2001) (internal citations omitted.) As such, the State is not required to articulate its reasoning for the regulation at the moment it was enacted. Also, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." See, *FCC v.Beach Communications*, 508 U.S. 307 at 315 (1993); see also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 at 48 (1986). Furthermore, as stated in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), a case regarding age discrimination, States are permitted to make distinctions when they have a rational basis even if it "is probably not true" that those reasons are valid in the majority of cases. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude. *Cleburne,* at pp. 439-442.

The fact that the state is not willing to rely on flawed studies of 600 to 700 children of gay parents does not mean that the regulation was based on morals. Until the questions about parenting the most vulnerable citizens of our State can be answered, it is obvious that the regulation does protect and health, safety, and welfare of foster children. A 1997 Law Review article sums up the State's concern by saying "the evidence does not prove that homosexual parenting is equivalent to heterosexual parenting or that it is not harmful in significant ways to

children." *The Potential Impact of Homosexual Parenting*, (1997 UNIV. OF ILL. LAW REV. 833) The article goes on to point out that most of the research in this area is based on unreliable quantitative research that is flawed methodologically and analytically. *Id.* at 844. The reasoning behind the assertion that the research is flawed includes factors such as: 1) the studies have small sample sizes; 2) many of the samples in the studies are self-selected; 3) the comparison group is rarely married heterosexuals; 4) lack of adequate control for other variables that may impact the results; 5) many of the studies are based on retrospective recall, which has the potential of memory distortion or selective recall; 6) there are no longitudinal studies; 7) many studies concern personality measures, such as self-esteem, which are unreliable; and 8) the analysis of the data is usually overbroad generalizations. *Id.* at 846-851.

As stated above, Dr. Berlin testified that it is "imperative" that both longitudinal and cross-section studies be done to address different questions and he said sample size was important. Likewise, he admitted his own research was of self-selected participants. (AB. 106, 120, R. 1951, 1978) According to Dr. Berlin himself and to the Illinois Law Review article, the studies relied on by Appellees are all flawed and should not be relied upon by the Court when it scrutinizes the regulation.

When the trial court found that the board had exceeded it authority because it was legislating morality, it erred. True, the regulation may protect the morals of our foster children. The regulation also protects the health, safety and welfare of the children in foster care because we do not know the effect of temporary homosexual parenting.

What we do know is that Appellees' own expert testified that children are better served with both a mother and father. (AB. 163, R. 2084) What we do know is that HIV is a communicable disease. (AB. 179, R. 2120-21) What we do know is that if parents are biased

against homosexuals, placing their children with homosexuals could affect reunification. (AB. 271-72, R. 2361-62) What we do know is that children in the foster care system have additional stressors and more psychiatric disorders than children from healthy homes. (Ab. 267-69, R. 2351-56) What we do know is that it is not in the best interest of children to be placed in homes where non-marital sex is taking place. These reasons support the regulation's purpose of protecting the health, safety, and welfare of foster children.

RESPONSE

THE TRIAL COURT DID NOT ERR WHEN IT HELD THAT THE EXCLUSION DOES NOT VIOLATE THE RIGHT TO EQUAL PROTECTION

Cross Appellants repeat their previously unsuccessful attempts to persuade a court that their equal protection argument is subject to strict scrutiny. (Ap. Brief at Cross-Arg 1, fn 12) These efforts are misplaced. First, *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002) and *Lawrence v. Texas*, 539 U.S. 558 (2003) are both criminal cases where the constitutional right at issue was liberty, clearly a fundamental right. Here, there is no right, constitutional or otherwise, at issue because there is no right to be a foster parent. Additionally, *Lawrence* clearly was decided on due process grounds and not equal protection. Finally, and most importantly, every case cited by Cross Appellants—*Jegley, Lawrence, City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985) and *Bosworth v. Pledger,* 305 Ark. 598, 810 S.W.2d 918 (1991)—were decided applying a rational basis analysis. Indeed, the Court in *City of Cleburne* stated that the only equal protection claims that were subject to strict scrutiny were those based on race, alienage, or national origin. Clearly, sexual behavior is not one of those categories.

When the trial court stated that there was no rational relationship between the regulation and the health, safety, and welfare of foster children, it was referring to the fact that the trial court found that the CWARB implemented the regulation based on morality. In fact, the trial court stated, "[c]learly if the subject regulation was rationally related to insuring the health, welfare, and safety of minor children the equal protection challenge would fail." (Add. 892) The trial court went on to state, "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." (Add. 895) Then, the equal protection challenge failed anyway. (Add. 864) Cross Appellants rely on *Jegley* and *Lawrence* for the proposition that there is no "morality" exception under the Equal Protection Clause. Again, *Jegley* and *Lawrence* are criminal cases that have no application here. Also, it is clear, and Cross Appellants concede, that the state has a legitimate interest in, and can implement laws to preserve, morality. (Ap. Brief at Cross-Arg-17)

As stated in Appellant's opening brief and reply, the regulation clearly passes a rational basis standard. Many of the points argued in the Cross Appeal under this point are discussed in Appellants' reply portion of this brief. To avoid redundancy, Appellants incorporate that portion of the reply into this response.

Cross Appellants, at Cross-Arg-3, assert that the exclusion of homosexuals as foster parents defeats the purpose of providing good foster parents in the foster care system. Because the research in this area is so lacking and because the foster care system is not intended or designed to benefit potential foster parents but instead to benefit children, that assertion is unsupported. Cross Appellants give great weight to *Romer v. Evans*, 517 U.S. 620 (1996), which struck down a bar to civil rights protections for homosexuals. While it is true that homosexuals may be entitled to certain civil rights protections, that argument misses the point because no one has a "right" to be a foster parent. There is no fundamental, statutory, regulatory, or constitutional right to foster parent in Arkansas. Applicants seeking to become foster parents choose to *invite* the State to come into their home.

All legislation to which an equal protection analysis may apply imposes involuntary classifications to at least some extent. All classifications, by definition include some and

exclude others. Thus all classifications discriminate to some extent. *Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562 (1976). Classifications are set aside as violative of the equal protection clause only if they discriminate based solely on reasons unrelated to the pursuit of the state's goals and *only if no grounds can be conceived to justify them.* 16B Am. Jur. 2d, *Constitutional Law* § 808 (1998)(emphasis added). That section goes on:

> While no bright line rule for determining the reasonableness of a statute under the Equal Protection Clause exists, a classification must be naturally and reasonably related to what it seeks to accomplish, and some reason to distinguish and prefer a particular individual or class must exist.

Id. Equal protection does not prohibit or prevent classification, provided such classification is reasonable for the purposes of the legislation and is not a subterfuge to shield one class or unduly burden another. *Id.*

> In the areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for such classification. ...
>
> Under an equal protection analysis, the rational basis standard does not require that the state must necessarily choose the fairest or best means of advancing its goals.

16B Am. Jur. 2d, *Constitutional Law* §§ 809-810 (1998).

Foster parenting is not a benefit inherent in being an Arkansas citizen. Indeed, foster parenting is not a benefit at all. Rather, foster parenting is more akin to unpaid volunteering, especially in light of the fact that while foster parents receive a fixed stipend to help defray the direct costs incurred to care for foster children, they receive no fees or other compensation for their time and effort. Once an applicant invites the State into their home, he or she cannot then turn around and complain about unwanted government intrusion.

Homosexuality is not a suspect classification. The United States Supreme Court has repeatedly refused to establish a protected class when the members of that class have a choice as to whether to not to join the class. It is well accepted that sexual orientation is not a protected class as are race, religion, origin and disability under federal or state law.

The potential harm of practicing homosexual parenting to foster children is unknown. However, the potential harm is certain. Arkansas jurisprudence recognizes that cohabitation is immoral and thus jeopardizes children's welfare. HIV is a reality. These reasons, standing alone, make the regulation rational. Despite the fact the trial court found Cross Appellants' experts credible does not change the fact that that even they conceded there is not enough research in this area to determine the effect of homosexual parenting on children in general, much less foster children who are already under additional stressors that cannot be alleviated by virtue of them being in foster care. As such, the exclusion does further the State's interest in protecting children from additional instability and stress in their lives and thus protecting their emotional health and welfare.

Arkansas law is clear that when custody of a child is at issue the primary consideration is the "best interest and welfare" of the child. *Hepp v. He*pp, 61 Ark. App. 240 968 S.W.2d 62, (1998) (a court should consider the moral fiber of parents when deciding the best interest of the child); *Golden v. Golden*, 57 Ark. App. 143, 942 S.W.2d 282 (1997)(moral training of children is essential to their welfare); *Watts v. Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986)(noting that there is a "distinction between human weakness leading to isolated acts of indiscretion, which do not necessarily adversely affect the interest of a child, and that moral breakdown leading to promiscuity and depravity, which render one unfit to have custody of a minor); *Digby v. Digby*, 263 Ark. 813, 567 S.W.2d 290(1978)("the primary consideration in

child-custody cases is the *welfare and best interest* of the children; all other considerations are secondary")(emphasis added). The trial court's rational was that while the State can legislate morality, the legislature did not give the Board the authority to do so. However, as our case law makes clear, the morality of the child's caregivers goes directly to the child's welfare. Welfare is something the Board has the authority to regulate, and it did so here. By enacting a regulation pertaining to the morality of foster parents, the Board was protecting the best interest and welfare of the children in foster care. As further discussed below, not placing children with homosexuals protects the foster child's welfare.

Appellees argue that there is nothing in the existing state law or foster care regulations barring co-habitating couples from being foster parents. (App. Arg. 23) That assertion is incorrect. The Minimum Licensing Standards for Child Welfare Agencies state that in two-parent homes the parties shall be joint applicants and they must be married for a minimum of two years. (Add. 751, R. 1523) By definition, co-habitating couples are two parent homes. In two-parent homes where the couple lives together without the benefit of marriage, it is impossible to have verification of marriage. As such, cohabitating couples, whether homosexual or heterosexual are not eligible to become foster parents. Likewise, our appellate courts have never condoned extramarital cohabitation in the presence of a child. *Powell v. Marshall*, CA 04-627 (Ark. App. 11-3-2004) (citing *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W2d 520 (1999); *Word v. Remick*, 75 Ark. App. 390, 58 S.W.2d 422 (2001); *Thigpen v. Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987)). By definition, all homosexual 'partnerships' can only be extramarital because Arkansas specifically prohibits same sex marriage and does not recognize same sex marriages. Ark. Code Ann. § 9-11-208 (Repl. 1998).

This regulation is not about self identified homosexuals not being permitted to foster, it is about non marital sex taking place in the presence of the children in State custody.

Cross Appellants' argument regarding the pre-screening process fails as well. There is no concrete evidence to suggest that a particular police officer would be unable to perform his official duties after the age of 50. However, the United States Supreme Court has held that requiring officers to retire at age 50 does not violate the Fourteenth Amendment to the United States Constitution. *Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307, 96 S. Ct. 2562 (1976). Likewise, many patriotic homosexuals would make outstanding soldiers, but open homosexuals cannot serve their county in the Military. *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126 (1997). Many police officers 50 years or older are no doubt capable; practicing homosexuals may be capable people, but to allow them to be foster parents does not protect the health, safety, and welfare of children. Because there is no fundamental right involved here and because the regulations is rationally related to the objective of securing the best interests of the children in our foster care system, the trial court was correct when it found that there was no equal protection violation.

THE CIRCUIT COURT WAS CORRECT WHEN IT HELD THAT THE EXCLUSION DOES NOT VIOLATE THE RIGHT TO PRIVACY/INTIMATE ASSOCIATION

When one applies to become a foster parent, thereby inviting the State into his or her home, one has a lesser interest in privacy than one would have in private affairs. See, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (discussing communications between public school teachers and school board). Because the Cross Appellants have invited the State into their home, they cannot now turn around and say their privacy is violated. As stated in *Califino v. Jobst*, 434 U.S. 47 n.1 (1997), "such intrusions into private family matters are on a different constitutional

plane than those that 'seek[] to foist orthodoxy on the unwilling by banning or criminally prosecuting' nonconformity."

Here, the trial court adopted the views of the Eleventh Circuit in *Lofton v. Sec. Dep't of Child & Family*, 358 F.3d 804 (11th Cir. 2004) with respect to Cross Appellants' right to privacy argument. (Add. 895) The *Lofton* court held that *Lawrence* did not create a new fundamental right to private sexual intimacy. *Id.* at 817. Foster parent-child relations are creatures of statute thus any liberty interest is defined by state law. *Id.*, citing *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 97 S. Ct. 2094. (1977). The *Lofton* court also noted that *Lawrence* was decided on a rational basis test. *Id.* at 817.

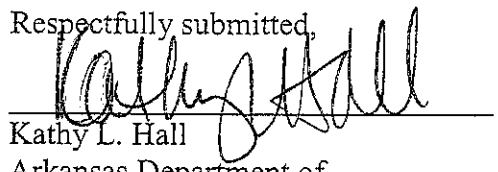
Arkansas does not penalize persons who are practicing homosexuals. However, once the State is invited into a home, a portion of the invitee's right to privacy evaporates. Thus, when it comes to being a foster parent in Arkansas, there is no right to privacy to be violated as that right is relinquished, as a candidate for volunteering. Cross Appellants are free to engage in same sex conduct or have people live in their homes who engage in same sex conduct. They will not be arrested. No one will enter their home without invitation and judge them. But once the State is asked to come in and act as judge, any prior privacy rights must defer to the rights of the children in our foster care system. Thus, the trial court should be affirmed on this point.

Conclusion:

Because the Appellees/Cross Appellants did not exhaust their administrative remedies and because they lack standing, this matter should be summarily dismissed. Alternatively, because the regulation does promote the health, safety, and/or welfare of children in foster care, the Board did not exceed its statutory authority and the trial court should be reversed on this point. Additionally, because the regulation does not violate the equal protection of

Appellees/Cross Appellants and does not violate their right to privacy or intimate association, this Court should affirm the trial court on these two points.

Respectfully submitted,



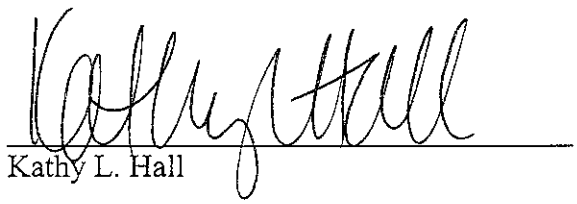
Kathy L. Hall
Arkansas Department of
Health and Human Servs.
Office of Chief Counsel
PO Box 1437, Slot S260
Little Rock, Arkansas 72201
(501) 682-1366
(501) 682-1390--fax

CERTIFICATE OF SERVICE

I, Kathy L. Hall, certify that a true and correct copy of the above Motion was mailed to the following this 6th day of February, 2006 via USPS with adequate postage to ensure delivery:

Leslie Cooper, Esq.,
ACLU
125 Broad Street
17th Floor
New York, New York, 10004

Grif Stockely
ACLU of Arkansas
904 West 2nd Street
Little Rock, AR 72201



Kathy L. Hall