

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

MATTHEW LEE HOWARD, CRAIG STOOPEs
ANNE SHELLEY and WILLIAM WAGNER

PLAINTIFFS

No. CV99-9881

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

DEFENDANTS

PLAINTIFFS' POST-TRIAL BRIEF

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INTRODUCTION

The Court has held that rational basis review is the standard to be applied to this equal protection challenge. Plaintiffs' pre-trial brief thoroughly discussed the relevant law regarding the application of rational basis review. *See* Plaintiffs' Pretrial Brief, at 6 to 14. But it is worth reiterating the purpose of equal protection rational basis review, which is particularly relevant in this case: Rational basis review "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law," which the equal protection clause does not allow. *Romer v. Evans*, 517 U.S. 620, 632-33, 635 (1997); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). The Arkansas Supreme Court explained it this way: Rational basis review serves to protect "minorities from discriminatory treatment at the hands of the majority" by making sure the "legislation is not the product of arbitrary and capricious government purposes." *Jegley v. Picado*, 349 Ark. 600, 633-34, 80 S.W.3d 332, 350-51 (2002) (citations

omitted).

The evidence presented in this case demonstrates that the challenged foster care regulation is in direct conflict with this constitutional mandate. The evidence shows that there is no conceivable legitimate purpose that is rationally furthered by the exclusion of individuals with gay household members from the individualized evaluation process applied to all other foster parent applicants. This case is therefore controlled by *Romer, Moreno, City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Jegley*, where laws and policies were struck down under rational basis review because there was an insufficient connection between the classification and the purported government interests.¹

Over the course of this litigation, the defendants or their expert witness have offered a variety of purported justifications for the challenged exclusion, which fall into three categories. First, they have asserted that gay people as a group are more likely to engage in a variety of illegal or repugnant behavior and otherwise pose a danger to children—they said that gay people are more likely to engage in domestic violence, sexually abuse children, neglect children, have diseases, have unstable relationships, and engage in substance abuse.² Second, the defendants

¹ Justice O'Connor described *Romer, Cleburne, Moreno* and *Eisenstadt* as the application of a "more searching" form of rational basis review because the classifications were either found or inferred to have been enacted out of the "desire to harm a politically unpopular group." *Lawrence v. Texas*, 123 S.Ct. 2472, 2485 (2003) (O'Connor, J., concurring). Regardless of whether these cases represent ordinary rational basis review or a more searching variety, the evidence in this case—both the absence of any child welfare justification for the exclusion and direct and circumstantial evidence that the Board acted out of disapproval of gay people—meets that standard.

² Unlike the other items on this list, substance abuse was never identified by the defendants in any of their responses to plaintiffs' discovery requests asking them to identify all government interests that justify the challenged regulation. *See* Defendants' Response to Plaintiffs' Third Request for Interrogatories, No. 3 (Plaintiffs' Exh. 5); Defendants' Response to

have asserted that the existence of societal prejudice against gay people justifies the exclusion of families with gay members from fostering. Third, they offer the assertion that children are best off in families with married mothers and fathers.³

Before trial, the defendants significantly narrowed their justifications for the regulation⁴ and offered evidence at trial regarding only four of the previously asserted rationales: the assertion that gay people are more likely to be substance abusers, the assertion that they have less stable relationships, the existence of societal prejudice against gay people,⁵ and the assertion that children are best off in married mother/father families. However, since we are under the rational basis standard, plaintiffs put on evidence at trial addressing and refuting all of the rationales that the State has asserted throughout the course of this litigation, even those that it has abandoned.⁶

Plaintiffs' Fifth Request for Interrogatories, Nos. 1-6 (Plaintiffs' Exh. 5); Rule 30(b)(6) deposition of defendants (James Balcom, designee) (Exh. 8 in Support of Plaintiffs' Motion for Summary Judgment). Nevertheless, it was raised at trial by the State's expert witness, Dr. George Rekers.

³ This interest had not been identified by the defendants in discovery either (*see* note 2, *supra*) but was raised by Dr. Rekers.

⁴ In pre-trial filings, the defendants represented to the Court that they would not rely on domestic violence, sexual abuse, HIV, adulterous relationships or "stigma to children in homosexual homes" as justifications for the regulation. *See* Defendants' Motion in Limine, filed March 1, 2004; Defendants' Response to Plaintiffs' Motion in Limine to Exclude Testimony of Dr. Charles C. Gist, at 5, filed March 10, 2004.

⁵ Defendants put on testimony regarding this interest even though "stigma to children in homosexual homes" was one of the interests expressly abandoned by the defendants prior to trial. *See* note 4, *supra*.

⁶ Some of the asserted rationales did not require factual rebuttal because they were either an impermissible purpose (yielding to social prejudice), or irrelevant (the asserted preference for married heterosexual couples). *See* points I(B)(2) and (3), below. Nevertheless, plaintiffs put on expert testimony addressing these points.

Finally, while the Court recognized that this case and the Florida adoption case present different issues, plaintiffs take this opportunity to advise the Court of the latest development in that case. In *Lofton v. Sec., Florida Dep't of Children & Families*, 388 F.3d 1275 (11th Cir. 2004)(petition for *certiorari* pending), plaintiffs' petition for rehearing *en banc* was denied by a vote of 6 to 6, with the full Eleventh Circuit dividing over the panel's rational basis analysis and its decision upholding Florida's categorical exclusion of gay people from adopting children. Three of the six dissenting judges concluded that the exclusion fails equal protection rational basis review under the principles of *Romer*, *Cleburne*, *Moreno* and *Eisenstadt*. *Lofton*, 388 F.3d at 1290-1303 (Barkett, J., dissenting (joined by Anderson and Dubina, JJ)). The other three dissenters expressed doubts about the constitutionality of the statute.⁷

SUMMARY OF ARGUMENT

I. The challenged regulation does not rationally further any legitimate government interest.

A. The evidence presented at trial showed that having a gay household member, including a gay parent, does not compromise children's healthy development in any way. The evidence showed that the scientific research has established that being raised by gay parents has no adverse impact on children's adjustment (and that there is no basis to think that having a gay household member who is not a parent would affect children's adjustment either). Thus, there is

⁷ These three judges said they would have granted *en banc* review because, in their view, "there is a serious and substantial question whether Florida can constitutionally declare all homosexuals ineligible to adopt while, at the same time, allowing them to become permanent foster parents, and not categorically barring any other groups such as convicted felons or drug addicts from adopting." *Lofton*, 388 F.3d at 1313 (Marcus, J., dissenting (joined by Tjoflat, C.J., and Wilson, J.)).

a consensus in all of the relevant professional fields, including psychology, social work and child welfare, that gay people should not be excluded from consideration as adoptive and foster parents.

B. None of the justifications for the exclusion that have been asserted by the defendants are supported by any evidence, and some are not legally cognizable or relevant.

1) The evidence showed that there is no factual basis for the State's degrading characterization of its gay citizens as violent, sexually abusive, diseased, unstable, negligent, and substance abusing. Moreover, since before the challenged regulation was passed, the State's foster care regulations have required that each foster applicant be individually screened for these problems, and there was no evidence indicating that gay people cannot be screened through this system just as heterosexual applicants can. Thus, there is no rational basis for departing from this system of individualized assessment just for applicants with gay household members. Moreover, the existence of provisions that address these same purported concerns "casts considerable doubt" on the proposition that the challenged regulation was enacted to serve precisely the same purpose. *Moreno*, 413 U.S. at 536-37.

2) The regulation cannot be justified by the fact that gay people are subjected to societal prejudice and discrimination. This is not a permissible basis for government action. *Romer*, 517 U.S. at 635; *Cleburne*, 473 U.S. at 448; *Palmore v. Sidoti*, 466 U.S. 429 (1984). In any case, the evidence at trial showed that children of gay parents are no less likely to be socially well-adjusted or have good relationships with friends and extended families than their peers. The evidence also showed that children endure negative peer reaction for all sorts of personal and family characteristics that make them different in the eyes of others. Thus, the purported

interest in shielding children from social prejudice does not justify the exclusion of only families with gay members. *Cleburne*, 473 U.S. at 448 (unless the group that is singled out for disfavored treatment poses a special threat not posed by other non-burdened groups, the classification fails equal protection rational basis review).

3) As this Court has ruled, the defendants' purported preference for married heterosexual couples as foster care placements has no bearing on this case because State law defines foster families as including single-parent families. The Board cannot override the legislature. Moreover, even if the Board had the authority to enact a regulation to limit placements to married heterosexual couples, the exclusion of applicants with gay household members (including married couples who have gay family members) while permitting most unmarried people (all single heterosexuals) to apply, has no rational connection to that objective. Furthermore, the evidence showed that the scientific research has established that parents' gender does not impact children's adjustment.

C. The evidence showed that the challenged exclusion not only fails to serve any child welfare purpose, but actually works against the interests of children by limiting the pool of available caregivers by excluding potential loving families like those of the plaintiffs, and sometimes preventing children from being placed with the family that would best meet their individual needs.

II. The evidence—both the absence of any child welfare basis for the regulation, and the direct and circumstantial evidence of the Board members' motivation—also shows that the regulation was enacted out of antipathy towards gay people, which the Equal Protection Clause does not permit. *Romer*, 517 U.S. at 635.

III. The evidence shows that the opinions of the defendants' expert witness not only conflict with the scientific evidence, but are not even based on science. Rather, they are based on his personal ideology regarding homosexuality, and thus, should not be credited.

ARGUMENT

I. THE REGULATION DOES NOT RATIONALLY FURTHER ANY LEGITIMATE GOVERNMENT INTEREST.

A. The evidence demonstrates that having a gay household member—including a gay parent—has no adverse effect on children's adjustment.

The scientific research presented at trial—both a half a century of child development research on factors that affect children's adjustment and 25 years of research focused specifically on gay parents and their children—showed that children raised by gay parents are just as healthy and well-adjusted as the children of heterosexual parents.

Plaintiffs presented the expert testimony of Dr. Michael Lamb, a developmental psychologist with 30 years of experience who specializes in the effects of different child rearing circumstances—including a variety of “non-traditional” family settings—on children's adjustment. Transcript of the testimony of Dr. Michael Lamb on March 23, 2004 (“Lamb I”), at 2-6. Until this summer, Dr. Lamb was a senior research scientist for the federal government at the National Institute of Child Health and Human Development, where he was chief of the Section on Social and Emotional Development. Lamb I, at 2-3; Transcript of the testimony of Dr. Michael Lamb on October 5, 2004 (“Lamb II”), at 4. He is now a professor of psychology at Cambridge University in England. Lamb II, at 4.

Dr. Lamb testified that a vast body of child development research over the last 40-50

years has established that the predictors of children’s healthy adjustment are: i) the quality of the child’s relationship with the parent(s)—a relationship characterized by warmth, closeness, and parental sensitivity and guidance promote healthy adjustment; ii) the quality of the relationship between the parents (if there are two)—harmonious relationships support healthy adjustment of children while significant conflict impedes it; and iii) adequate resources. Lamb I, at 12-15. It is well-established within the child development field that these are the factors that correlate with children’s adjustment. *Id.*, 15-16.

Moreover, Dr. Lamb testified, the research shows that these three factors correlate with children’s adjustment in all sorts of family forms. *Id.*, at 22. Thus, the research has demonstrated that children do not need to be in the “traditional” family setting with married biological parents, mother staying at home and father being the bread-winner, to thrive as some had assumed. If the quality of the parent-child relationships is good, the relationship between the parents is harmonious (if there are two), and there are adequate resources, children develop healthily in a range of “non-traditional” family environments, e.g., families with employed mothers, single parent families, and foster families. *Id.*, at 16-17, 23-26.⁸

Thus, prior to the commencement of scientific research studying children of gay parents, Dr. Lamb testified, there was no basis to expect that being raised by gay or lesbian parents would have an adverse effect on children’s adjustment. There was no reason to start with the assumption that gay parents are sub-optimal for children. *Id.*, at 38-39.⁹

⁸ These same three factors predict healthy adjustment for foster children, but foster parents also need to be able to relate to agencies and prepare the child for reunification with his or her family. Lamb I, at 16-17.

⁹ Moreover, Dr. Lamb testified that research on the couple relationships of lesbians and gay men shows that there is no difference in the level of conflict experienced by same-sex

And when researchers did study children who were raised by gay parents, they consistently found that they are just as well adjusted as their peers. *Id.*, at 39-40. Numerous studies were conducted on children of all age groups by a variety of researchers over the past 25 years, and their findings were uniform. *Id.*, at 40-43, 50-51. Not a single one of the studies that evaluated children of gay parents found an elevated rate of adjustment problems. *Id.*, at 53-54.¹⁰

The defendants' expert witness, Dr. Rekers, did not offer any studies reaching contrary conclusions about the adjustment of children raised by gay parents; nor did he dispute Dr. Lamb's description of the findings of these studies. He merely quibbled with their methodology. Rekers, at 41-43. His criticism is baseless.¹¹ These studies, which were conducted by some of the most distinguished developmental psychologists in the United States and abroad, followed standard methodologies that are commonly used and well accepted in the field of psychology,

couples as compared to heterosexual couples. Lamb I, at 72, 101.

¹⁰ The only study purporting to demonstrate any harm associated with having gay parents is a survey conducted by Paul Cameron, which, while purporting to report on characteristics of individuals raised by gay parents, did not ask the majority of the subjects if they had lesbian or gay parents in the first place. Lamb I, at 54-55; Transcript of the testimony of Dr. Fred Berlin on March 23, 2004 ("Berlin"), at 51-52, 60-61. This makes the results meaningless and led Dr. Lamb to characterize Cameron's findings as "bogus". Lamb I, at 55.

Paul Cameron is not someone who conducts research in the area of children's development. Lamb I, at 57. He is the head of an organization called the Family Research Institute (Lamb I, at 57) and seeks to demonstrate that gay families are inferior. Transcript of the testimony of Dr. George Rekers on October 5, 2004 ("Rekers"), at 94. Dr. Berlin referenced an article noting that Dr. Cameron had been dropped by the American Psychological Association and censured by other professional associations for misrepresenting data. Berlin, at 59. One federal district judge described Cameron's work on the effects of parental sexual orientation on children's development as a "total distortion" of the data. *Baker v. Wade*, 106 F.R.D. 526, 536-37 (N.D. Tex. 1985), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985).

¹¹ It is also a red herring because criticizing the research does not show that gay parents are inferior. Even if there were no research on children raised by gay parents, as discussed above, there is no basis to start with the presumption that they would have poorer adjustment.

and were published by reputable academic journals after being subjected to the rigorous peer review process. Lamb I, at 42-44. Dr. Rekers' complaint is that the research did not use nationally representative samples of thousands of foster children followed through adulthood. Rekers, at 41, 102. But this is true of most of the research conducted in the field of psychology, including developmental psychology. *Id.*, at 46, 89. Developmental psychologists typically do intensive studies of a small number of subjects collected through convenience sampling as opposed to large-scale representative survey research used in other disciplines. *Id.*, at 46, 48-49, 89. There is no need for representative surveys following thousands of subjects into adulthood to know the impact of parental sexual orientation on foster children's adjustment. *Id.*, at 48; Lamb II, at 5. Nor, Dr. Lamb testified, would such a study even be feasible. Lamb II, at 6-7. Indeed, Dr. Lamb is not aware of any longitudinal studies following any groups of foster children into adulthood. *Id.*, at 6.

The body of research on children of gay parents establishes that these children develop just as healthily as other children. This is a well settled scientific question, not an issue about which there are disparate findings and disagreement in the field. Lamb I, at 61.¹² Indeed, it is so well established that researchers who study children of gay parents are no longer focusing on whether there is any disparity in adjustment. *Id.*, at 61. It is a topic of consensus within all of the relevant professional fields—psychology, social work and child welfare. The major national professional associations in those fields—the American Psychological Association, the National

¹² All of this evidence shows that contrary to the characterization of the research by the Eleventh Circuit in *Lofton*, which did not have any scientific evidence in the record, the body of research on children raised by gay parents is not in its “nascent stage,” it is not “inconclusive,” it does not reach conflicting results, and it is not considered methodologically flawed by members of the field. Lamb I, at 45, 57-61.

Association of Social Workers and the Child Welfare League of America—have taken public positions against restrictions on gay people parenting, adopting or fostering. Transcript of the testimony of Judith Faust on March 23, 2004 (“Faust”), at 66-68.¹³ Within Arkansas, the Arkansas Psychological Association advised the Board that the scientific research shows that parental sexual orientation does not negatively impact children’s development. Transcript of the testimony of Dr. Cheralyn Powers on March 23, 2004, at 5-9. And the University of Arkansas at Little Rock faculty of social work submitted a letter to the Board opposing the challenged exclusion as lacking any basis in science. Faust, at 69-70. All of this testimony was undisputed.

While the scientific research on the impact of gay household members on children has focused exclusively on the impact of having gay parents, there is no reason to believe that if living with a gay parent poses no disadvantage to a child’s development, that having a gay household member who is not a parent would. Lamb I, at 113, 115. Both plaintiffs’ and defendants’ experts seem to agree on the lack of evidence supporting the notion that children would be adversely affected if placed with heterosexual foster parents who have a gay family member in the home. Dr. Lamb testified that he is not aware of any reason the health, safety or welfare of a child would be negatively affected by the presence of a gay sibling or other gay family member residing in a foster home headed by heterosexual foster parents. Lamb I, at 113, 115. Dr. Rekers conceded that he does not know if the research would say that the vast majority of heterosexual couples with gay household members would be harmful to children. Rekers, at 182. He said there is “less evidence to know one way or the other.” Rekers, at 182-83.

¹³ The North American Council on Adoptable Children, an organization that seeks to promote permanent placements for orphaned children, has also opposed such restrictions. Faust, at 68.

Finally, contrary to what the defendants seem to be suggesting, whether the regulation excludes only non-celibate lesbians and gay men or all gay people is irrelevant to the constitutional inquiry as there is no evidence that being raised by non-celibate gay people is disadvantageous to children. Indeed, the scientific studies discussed at trial showing equally good outcomes for children of gay parents looked at both children of single gay parents and those raised by same-sex couples. *See, e.g., Lamb II*, at 26-27. They were not focused on celibate gay people. Thus, there is no rational basis for categorically excluding families with gay members regardless of whether those family members are in intimate relationships.

- B. None of the defendants' asserted justifications constitutes a rational basis for the regulation.
 - 1. The regulation is not justified by the defendants' assertions that gay people pose a heightened risk of substance abuse, relationship instability, sexual abuse, disease, domestic violence or neglect.
 - a. There is no factual basis for the defendants' negative characterization of gay people.

The defendants have asserted a host of long-rejected stereotypes about gay people, as well as some previously unheard of negative group characterizations of gay people. The evidence at trial showed that the defendants' intensely unflattering description of their lesbian and gay fellow citizens is without any factual support.

i. Substance abuse.

The defendants' expert witness asserted that gay people have higher rates of substance abuse than heterosexuals. Dr. Rekers made this assertion at trial, but did not offer any scientific evidence to support this statement.

In response, plaintiffs presented the expert testimony of Dr. Susan Cochran, a psychologist and epidemiologist at UCLA's Department of Public Health who has conducted many of the studies that examine the rates of substance abuse among gay people and heterosexuals. Transcript of the testimony of Dr. Susan Cochran on November 18, 2004 ("Cochran"), at 5-9.

Dr. Cochran discussed the body of research looking at the prevalence of substance abuse among gay and heterosexual people and that research refutes Dr. Rekers' assertion. The studies do not show any statistically significant difference in the rates of substance abuse among gay men and heterosexual men. *Id.*, at 29-36. Among women, lesbians have a higher rate of substance abuse than heterosexual women, but it is a small minority of lesbians, and the rate among lesbians is not higher than the rate among men (gay or heterosexual). *Id.*, at 31-36. Gay men, heterosexual men and lesbians are all very similar in their rates of substance abuse, with heterosexual women having lower rates. *Id.*, at 32, 36-37.

The difference in the prevalence of substance abuse between lesbian and heterosexual women appears mainly in the 26-35 year old age range. *Id.*, at 37-38. The reasons lesbians' rate of substance abuse resembles men's as opposed to the lower rate of heterosexual women, at least in the 26-35 year old range, has been attributed to the fact that in some relevant ways, in that age bracket the lifestyles of lesbians are more similar to men's: lesbians are less likely than heterosexual women to be pregnant or stay-at-home parents, which has been found to inhibit drinking and drug use; and lesbians are more likely than heterosexual women to be in the work force, which correlates with more drinking. *Id.*, at 40-41.

While gay men and women do not have higher rates of substance abuse than heterosexual

men, there are other groups that do have higher rates, yet are not barred from fostering. *Cleburne*, 473 U.S. at 448 (unless the group that is singled out for disfavored treatment poses a special threat not posed by other non-burdened groups, the classification fails equal protection rational basis review). Dr. Cochran testified that there are numerous demographic predictors of higher rates of substance abuse. Men are twice as likely as women to abuse drugs or alcohol. Cochran, at 17-22. Younger people have dramatically higher rates of substance abuse than older people. *Id.*, at 17-18, 22. There are significant ethnic differences in rates of substance abuse (e.g., 17.2% among American Indians and 6.3% among Asians). *Id.*, at 17-18, 22-23. And the rates vary based on employment (17.0% of unemployed adults vs. 10% of full-time employed adults are substance abusers) as well as level of education (e.g., college graduates have a rate of 6.7%; those who have not graduated from high school have a rate of 10.6%). *Id.*, at 17-18, 23-24. Urban dwellers have nearly twice the rate of substance abuse as people living in rural communities (9% vs. 5.7%). *Id.*, at 17-18, 24. And religious people tend to have lower rates of substance abuse than non-religious people. *Id.*, at 17-18, 23. Yet none of these groups with higher rates of substance abuse are excluded from fostering. This evidence was undisputed, and in fact, Dr. Rekers acknowledged that there are variations among ethnic and religious groups with respect to the rate of substance abuse. Rekers, at 119-20.

If all groups with elevated rates of substance abuse were excluded from fostering, Dr. Cochran testified, at the individual level probably most of us would be barred—e.g. men, younger people, and white people would all be excluded because they are from groups with higher rates of substance abuse. Cochran, at 42-43.

ii. Relationship instability

The defendants have also asserted that gay people are less likely to provide stable families than heterosexuals. The only support they offered for this statement was Dr. Rekers' reference to a study that found that the mean number of sexual partners (over the lifetime and over the past five years) was higher for gay men than heterosexual men, and for lesbians than heterosexual women. Rekers, at 43-45. Dr. Rekers argued that this data shows that gay people have more frequent relationship turnover. Rekers, at 45-47, 64-65.

Dr. Lamb testified that the scientific research has demonstrated that gay couples can and do have stable relationships. Lamb I, at 67-68. Indeed, Matthew Howard and Craig Stoope have been together for 19 years, and no couple could be more stable or committed than this one. Craig has moved with Matthew to three different states as Matthew's church work required him to transfer to new parishes. Transcript of the testimony of Matthew Lee Howard on March 23, 2004 ("Howard"), at 25-27. Dr. Lamb also testified that heterosexual relationships are not necessarily stable, as evidenced by the 50% divorce rate. Lamb I, at 67-68.

Dr. Lamb also testified that studies comparing the quality of the relationships of lesbian and heterosexual couples who are parents showed that the quality of the lesbian parents' relationships was at least as good as the heterosexual parents. Lamb II, at 27. While these studies did not focus on relationship longevity, Dr. Lamb noted that the study by Bos of 100 lesbian couples raising children showed an average length of relationship of just under 15 years. *Id.*, at 26-27.

On December 20, plaintiffs will rebut Dr. Rekers' testimony on this topic through the expert testimony of Dr. Pepper Schwartz.

iii. Sexual abuse

The defendants asserted, and then dropped, the most heinous stereotype about gay people—that they pose a greater risk of sexually abusing children.

To address this issue, plaintiffs put on the expert testimony of Dr. Fred Berlin, a psychiatrist who is an expert in sexual disorders, including pedophilia. Berlin, at 2-3. Dr. Berlin is the director of the National Institute for the Study, Prevention and Treatment of Sexual Trauma and a professor at Johns Hopkins University School of Medicine. *Id.*, at 3. He has evaluated and treated hundreds of individuals with pedophilia and published a number of articles on that topic in academic journals. *Id.*, at 4-5. Dr. Berlin has served as a consultant to various governmental and non-governmental organizations including the National Conference on Catholic Bishops, the United States Department of Justice and the FBI. *Id.*, at 6-8.

The undisputed evidence offered by Dr. Berlin shows that the myth of gay people as sexual predators of children is completely baseless. *Id.*, at 36-50. There is no evidence that gay people are any more likely than heterosexuals to be sexually attracted to children or sexually to victimize a child. *Id.*

iv. Disease.

The defendants asserted that a justification for the regulation is that gay people have higher rates of HIV and other sexually transmitted diseases (“STDs”), and thus, might expose children to disease or be unable to care for children. But they did not put on any evidence related to this topic at trial.

First, excluding families with gay members from fostering because they are perceived to be HIV+ or to have other diseases, without an individualized determination as to the significance of any risk they might pose, would violate the Americans with Disabilities Act. *Doe v. County*

of Centre, 242 F.3d 437, 446-50 (3d Cir. 2001) (violation of ADA to exclude family with HIV+ child from fostering any child).

Moreover, plaintiffs rebutted defendants' assertion through the expert testimony of Dr. Rebecca Martin, a physician who specializes in treating infectious diseases, including HIV, and who has directed the infectious disease clinics at University of Arkansas for Medical Sciences and the VA hospital in Little Rock for 15 years. Transcript of the testimony of Dr. Rebecca Martin on March 23, 2004 ("Martin"), at 20-21.

The undisputed evidence presented by Dr. Martin established that children are not at risk of contracting HIV from HIV+ household members of any sexual orientation. *Id.*, at 23-24, 27-30. Moreover, the evidence showed that the medication available to treat HIV means it has become a chronic illness like diabetes, not necessarily a terminal disease, and that people with HIV can live healthy lives and be unimpaired in their ability to care for children. *Id.*, at 30-33, 36.

Furthermore, any argument for excluding gay people out of concern that gay men are disproportionately affected by HIV could only be upheld if that group poses a unique threat not posed by other groups that are not excluded. *Cleburne*, 473 U.S. at 448-50. Dr. Martin's testimony showed that being gay is not a proxy for having HIV (especially for women, as sex between women is not a means of HIV transmission like both sex between men and heterosexual sex), and that other groups are disproportionately affected by this disease—e.g., the rate of HIV infection is 8 times greater for African Americans than whites and almost 2/3 of all women with HIV are black— but African Americans are not categorically excluded from fostering. Martin, at 25-27.

As for other STDs, Dr. Martin testified that all of the STDs that can be contracted by sex between men are also contracted heterosexually, and heterosexuals contract these diseases in large numbers. *Id.*, at 34-35. Moreover, a number of the STDs are not debilitating and have no impact on an individual's ability to function in society in any way. *Id.*, at 43.

None of Dr. Martin's testimony was disputed by the defendants.

v. Domestic violence.

The defendants asserted that gay people pose a risk of exposing children to domestic violence, but put on no evidence to support this statement.

Dr. Lamb testified that the research on family violence has identified a number of risk factors that predict domestic violence and child abuse, e.g. parental substance abuse and stress. Lamb I, at 66-67. Having a gay or lesbian parent is not one of those risk factors. *Id.*, at 67. This evidence was undisputed. Moreover, as discussed above, the research on children raised by gay parents discussed by Dr. Lamb does not show higher levels of maladjustment among these children.

vi. Neglect

Finally, the defendants asserted that gay people are more likely to neglect their children's needs. But, once again, they offered no evidence to support this assertion.

The research discussed by Dr. Lamb demonstrates that children raised by gay parents have equally good outcomes compared to those of children raised by heterosexuals. Such findings do not indicate higher levels of neglect by gay parents, and indeed, are incompatible with defendants' suggestion.

Dr. Schwartz's testimony on December 20 will also address this point.

In defending this regulation, the defendants offered a menu of horrible character flaws and other deficiencies that they tried to link to gay people. Ultimately, they did not even try to back up most of these assertions, and offered no evidence substantiating the few they did not abandon. The evidence presented by the plaintiffs demonstrates the absence of any support for the defendants' negative statements about gay people. Thus, none of them constitute a rational basis for the regulation. *Romer*, 517 U.S. at 632-33 (a rational basis must have a “factual context”); *Heller v. Doe*, 509 U.S. 312, 321 (1993) (rational basis review must have “footing in the realities of the subject matter addressed by the legislation”).

b. The State already screens all foster families for the harmful qualities cited by defendants.

As the stipulated facts show, the State's foster care regulations already screened for all of its purported concerns about gay parents—domestic violence, sexual abuse, substance abuse, disease, instability and neglect—through its process of individualized evaluation of foster care applicants. Stipulated Facts (“Stip.”) ¶ 33.¹⁴ There is no evidence that gay people cannot be screened through this system just as heterosexual applicants can. In fact, Dr. Cochran testified that there is no reason that gay people would be less effectively screened than heterosexuals for

¹⁴ The Board's Licensing Standards subject all foster parent applicants and members of their households to child maltreatment registry and criminal record checks, a home study and physical exams. Licensing Standards, §§ 100.4, 200.2.4. And the Standards specifically require foster homes to demonstrate “stability” (*id.*, § 200.3.3) and foster parents to be “physically, mentally and emotionally capable of caring for children.” *Id.*, § 200.3.7. These standards were in place prior to the enactment of the gay exclusion and remain in force today. Stip. ¶ 22; Licensing Standards.

substance abuse. Cochran, at 41-42. And Dr. Schwartz is expected to testify that there is no reason that gay couples would be less effectively screened than heterosexual couples for relationship stability. Thus, there is no rational basis for departing from this system of individualized evaluations just for gay people.

In addition, it is simply unbelievable that the exclusion was enacted to protect children against domestic violence, sexual abuse, substance abuse, disease, instability and neglect where pre-existing foster care eligibility requirements (which remain in force) already served to screen out applicants who pose a risk of these precise harms and the Board knew this. *Moreno*, 413 U.S. at 536-37 (rejecting fraud prevention as a rationale for excluding households with unrelated persons from food stamp eligibility because the existence of other provisions in the Food Stamp Act “aimed specifically at the problems of fraud” “casts considerable doubt upon the proposition that the [challenged rule] could rationally have been intended to prevent those very same abuses.”).

The defendants admit that prior to the enactment of the challenged regulation, the Board already had foster parent eligibility requirements “aimed specifically at the problems” (*see Moreno*, 413 U.S. at 536) of violence, abuse, disease, instability and neglect, screening applicants to determine if they pose a risk of exposing children to these harms. Stip. ¶ 33. And when the Board was considering the proposed exclusion, it was advised by its attorney that its own pre-existing eligibility requirements already addressed the Board’s concerns. Stip. ¶14. Thus, the Board was aware that these harms were already being screened for but voted to enact the challenged regulation anyway. Just like in *Moreno*, 413 U.S. at 536-37, the pre-existing regulatory scheme addressing the State’s purported concerns “casts considerable doubt” on the

proposition that the Board enacted the regulation to address the very same concerns.¹⁵

2. The asserted purpose of protecting children from prejudice against gay people is not a legitimate government interest.

Dr. Rekers offered various statistics on societal disapproval of gay people. Although plaintiffs cannot verify Dr. Rekers' sources, they do not dispute that prejudice and discrimination against gay people persists in this country. But the challenged exclusion cannot be justified by the fact that there is social prejudice against this group as it fails the first prong of the rational basis test—it is not a legitimate government purpose.

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

Nor may the government discriminate against disfavored groups in the context of

¹⁵ Making the asserted rationales even more incredible is the fact that the State allows this same group that it claims is so problematic for children to become permanent parents by adopting. There is no prohibition on adoption by gay people in any Arkansas statute or regulation. Stip. ¶ 23, Ark. Code § 9-9-204; Licensing Standards, section 300, et seq. Stipulated facts show that the State considers sexual orientation so irrelevant to parenting ability that it does not even inquire about the sexual orientation of adoption applicants. Stip. ¶ 24. Lesbians and gay men go through the same application and screening process as all other applicants. *Id.*, ¶ 25. It is simply beyond belief that the State, which is charged with protecting its dependent children, would allow children to be placed in the permanent care of individuals it believed could not provide safe and appropriate temporary care as foster parents. Since the defendants clearly agree that there is no difficulty with gay people adopting children, it is “impossible to credit” their assertions that they believe gay people pose a harm to children. *See Romer*, 517 U.S. at 635. Moreover, the defendants have stipulated that they do not know of a single child who has been harmed because his or her parent or foster parent was gay. Stip., ¶¶ 28 and 29.

parenting in order to shield children from societal prejudice, however real. *Palmore v. Sidoti*, 466 U.S. 429 (1984) (striking down a Florida state court decision denying custody to a woman in an interracial relationship on the basis that society disapproved of interracial relationships and would stigmatize her child); *see also S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (unconstitutional to rely on social stigma attaching to mother's status as a lesbian when making child custody decision); *Conkel v. Conkel*, 509 N.E.2d 983, 987 (Ohio App. 1987) (same).

Excluding lesbian and gay people—or any other group that faces societal prejudice¹⁶—from fostering in order to shield children from that prejudice, therefore, is not a legitimate government objective and must be rejected as a matter of law.

Since deference to prejudice is not a legitimate government interest, it was not necessary to rebut Dr. Rekers' testimony about the potential effects on children of exposure to prejudice against their gay foster family members. Nevertheless, the evidence showed that the adjustment of children raised by gay parents is not compromised by societal prejudice against their parents. The scientific research discussed by Dr. Lamb showed that these children are just as well-adjusted socially and just as likely as their peers to have good relationships with friends and extended family members. *Lamb II*, at 15-16, 23-24. And they are no more likely than other children to experience peer rejection. *Id.*, at 15-17. The studies showed that if children of gay parents are teased, they are more likely than their peers to be teased about their families, but they are not subjected to a greater amount of teasing than other children. *Lamb I*, at 68, *Lamb II*, at 15-17. Although Dr. Rekers asserted that half of children of gay parents experience problems

¹⁶ Dr. Rekers testified that if there were community disapproval of Muslims or people who wear glasses, and that filtered down to children, he would favor excluding those groups from fostering too. Rekers, at 188-89.

“due to stigma of their mothers’ sexual identity,” Rekers, at 38-39, he could not identify a scientific study to support that statement,¹⁷ and he said nothing about the scientific studies discussed by Dr. Lamb that refute it.

Moreover, the undisputed evidence showed what we have all observed—that children can experience negative peer reactions to all sorts of things about them or their families that are perceived as differences, e.g. their race, their membership in a religious or ethnic minority, the fact that their mother is fat. Lamb I, at 68; Lamb II, at 18. As defendants’ expert witness agreed, being placed in foster families with lesbian or gay members is hardly the only potential cause of social stigmatization or prejudice against foster children. *See* Rekers, at 103-04 (noting that children could be teased or rejected by peers for anything, e.g. if their parents are obese, or if they are placed with single foster parents or foster parents of a different race). Thus, singling out only gay people to protect against social stigmatization fails rational basis review. *Cleburne*, 473 U.S. at 448-50 (Unless the group that is singled out poses a special threat not posed by other non-burdened groups, the classification fails this test).

Dr. Rekers also speculated that being placed with a gay foster parent might impede reunification with the child’s biological parents if they disapprove of homosexuality. Rekers, at

¹⁷ Dr. Rekers referred to an article by someone in the field of education, who, he said, cited studies to support this proposition, but Dr. Rekers was unable to identify any such studies when asked to do so on cross examination. Rekers, at 188-89. Nor is Dr. Lamb aware of any studies with such results. Lamb II, at 15.

The only other material offered by Dr. Rekers to support his assertion regarding the extent of negative peer reaction to children of gay parents was not scientific evidence either, but two journalists’ interviews of adult children of gay parents, most of whom grew up in the 1960's and 1970's. Rekers, at 36-37, 105-06; Lamb II, at 18-23. It is not possible to ascertain how well adjusted these individuals are because the interviews were not clinical interviews. Lamb II, at 20-21. And those interviews do not reflect contemporary experiences, which Dr. Lamb noted would be quite different because of the greater awareness and tolerance of gay people now compared to 30-50 years ago. Lamb II, at 22-23.

34-35. But he did not offer any evidence to support this, and he recognized that reunification could be hindered by conflict between the biological parents and the foster parent with respect to a range of social, moral or religious values. Rekers, at 105. Dr. Lamb agreed that there could be any number of reasons biological parents would disapprove of their children’s foster parents, *e.g.*, their religion, race, ethnicity. Lamb II, at 24-25. He further testified that to the extent a foster child’s biological parent’s prejudice against a foster parent might interfere with reunification, it would not matter whether the prejudice was based on the foster parent’s race, religion, sexual orientation or any other attribute. Lamb I, at 105; *see Cleburne*, 473 U.S. at 448-50.¹⁸ And Dr. Lamb and Ms. Faust testified that deep prejudice on the part of a particular child’s biological parent—regardless of what group it is against—is something that could be considered in making a placement decision for that child. Lamb II, at 24; Faust, at 94.

3. The asserted goal of placing foster children with married heterosexual couples has no relevance to the constitutionality of the challenged regulation.

As the Court has ruled, the defendants’ asserted preference for foster placements with a married man and woman has no relevance to this case given that the legislature has expressly stated that single people may foster. Transcript of the testimony of Dr. Rekers on October 5,

¹⁸ Dr. Lamb testified that he is not aware of any studies that look at whether placement with foster parents with any particular demographic characteristics, including gay foster parents, has any effect on reunification with biological parents. Lamb I, 73-74, 104-06. He also testified that there is no basis to expect or hypothesize that reunification would be any more difficult because a foster parent happened to be gay, as there is nothing about being gay that would impair someone’s ability to facilitate reunification with the child’s biological family. *Id.*, at 104.

2004, at 57-62. State law defines “foster home” as a private residence of “one (1) or more family members.” Ark. Code § 9-28-402(13). The Board cannot override this legislative determination. *See, e.g., McLane v. Weiss*, 332 Ark. 284, 298, 965 S.W.2d 109, 115 (1998) (“the law is elementary that an agency has no right to promulgate a rule or regulation contrary to a statute.”).

Next, even if the Board could enact regulations that conflict with State law, regardless of what the evidence shows regarding the relative parenting abilities of married heterosexual couples vs. gay couples, the exclusion fails the second part of the rational basis test—it does not rationally further the goal of placing children with married couples. The challenged regulation disqualifies all applicants who have gay household members, including married couples such as plaintiff William Wagner and his wife, who have been married for more than 30 years.

Transcript of the testimony of William Wagner on March 23, 2004 (“Wagner”), at 7. And the Regulation does not disqualify the bulk of those prospective foster parents who are unmarried—it permits all unmarried heterosexuals to apply and be considered on their merits (unless of course they have a gay household member). Indeed, 30% of foster placements in Arkansas are to singles. Defendants’ Supplemental Responses to Plaintiffs Third Request for Interrogatories, no. 16 (Plaintiffs Exh. 5).

Drawing the line at those who have gay household members is an illogical way to try to get children placed with married heterosexual couples. It disqualifies some of the very families the defendants say the regulation is designed to find, and lets in most of the people who do not meet this criteria. This is not merely an imperfect fit. This classification is so “discontinuous” with this asserted purpose that it is “impossible to credit.” *Romer*, 517 U.S. at 632, 635;

Cleburne, 473 U.S. at 446 (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”).¹⁹

It is simply implausible that a government body desiring to place foster children with married couples would try to do that by excluding applicants who have gay household members, married couples and all, and allow in the bulk of the unmarried people. There is no “possibility of a deliberate nexus” between the exclusion and this objective. *Jegley*, 349 Ark. at 634, 80 S.W.3d at 351.

Although all of this means that whether married heterosexual parents are best for children’s adjustment is legally irrelevant, the evidence at trial showed that there is no support for that assertion. Dr. Lamb, who has conducted a great deal of research and written volumes—indeed, the book—on the role of fathers in children’s development (Lamb I, at 4-7; Lamb II, at 57), testified that it is well established in the field of developmental psychology that both men and women have the capacity to be good parents and that children do not need one of each as parents to develop healthily. Lamb I, at 26-33. He testified that although there tend to be some differences in the dominant parenting styles of men and women (e.g. men tend to be more playful, women tend to be more soothing), mothers and fathers generally engage in some of both types of interaction, and children are not disadvantaged if their parents do not assume

¹⁹ For this reason, three judges on the Eleventh Circuit rejected Florida’s assertion that the exclusion of gay people from adopting in that state is justified by the goal of promoting placement with married mothers and fathers. Because Florida’s statutory scheme, which allows single heterosexuals to adopt, is “so riddled with exceptions” to placements with married mothers and fathers, these judges concluded that the purported purpose of providing married heterosexual couples cannot “reasonably be regarded as [the law’s] aim.” *Lofton*, 388 F.3d at 1290-1303 (Barkett, J, dissenting (joined by Anderson and Dubina, JJ))(quoting *Eisenstadt*, 405 U.S. at 449). The exclusion at issue here, which knocks out some married couples, is even more disconnected with the purported married couple goal than the Florida adoption law.

traditional gender roles in terms of interactive styles. *Id.*, at 27-28, 81, 107. For example, older fathers tend to be less playful than younger fathers, but this does not adversely affect their children. Lamb II, at 48-49.

While there is a clear consensus in the field of children's development that two-parent families tend to better promote adjustment than single-parent families, Lamb I, at 28-30, it is also clear that it is not the gender of the parents that makes the difference. *Id.*, at 28-31. The research shows that the higher rate of maladjustment among children in single-parent families compared to children in two-parent families (30% vs. 15%) is attributable to the family conflict, the weakening or loss of a relationship with one parent, and the loss of resources that typically accompany divorce. *Id.*, at 28-31. These studies show that contrary to the assumption going into the research 50 years ago, it is not the absence of a male figure that is to blame for the higher rate of problems in single-parent families. *Id.*, at 31. It is that the circumstances that often surround single parenthood tend to result in the absence of one or more of the three factors that promote healthy adjustment. *Id.*, at 28-31.

Thus, there is no scientific basis to conclude that a child needs a male and female parent or role model in the home to develop healthily. *Id.*, at 31. Indeed, most children who grow up in a single-parent family without a father or a mother in the home—70%—have no adjustment problems at all. *Id.*, at 28-31.

Dr. Rekers asserted that children benefit from dual-gender parenting. However, this assertion is not supported by the research and departs from the established view in the field.²⁰

²⁰ Dr. Rekers asserted that since the vast majority of children will grow up to enter heterosexual marriages, they need the role model of a heterosexual family, yet he offers no evidence to support this statement. Rekers, at 48. And if Dr. Rekers' theory that children need role models of their own sexual orientation in the home were substantiated, then the challenged

And the bulk of the studies Dr. Rekers referenced²¹ simply illustrate points made by Dr. Lamb—that if there are two parents, both parents play an important role in their children’s development, and that men and women tend to exhibit differences in parenting style. Rekers, at 52-57; Lamb II, at 43-45, 47-49.²²

Moreover, Dr. Rekers acknowledged that the family dynamics that often accompany divorce, such as conflict, lack of supervision and the burdens of single parenthood, can affect children’s adjustment. Rekers, at 124-25. And although Dr. Rekers asserted that a male “parent figure” is important to children’s development, he acknowledged that studies show that when single mothers bring male partners into the home and family, their sons have higher rates of delinquency and conduct disorder than boys living alone with their single mothers. Rekers, at

regulation would have the additional problem of depriving gay youths in need of foster care of the only people who would be suitable to raise them.

²¹As discussed in plaintiffs’ accompanying Conditional Motion to Supplement the Rebuttal Testimony of Dr. Lamb, most of these articles discussed by Dr. Rekers (*see* Rekers, at 52-57) were not identified to plaintiffs in discovery, despite plaintiffs request for all articles Dr. Rekers would rely on at trial; some were identified two days before trial. Thus, plaintiffs were unable to have Dr. Lamb review those documents to provide specific rebuttal.

²² Dr. Rekers also testified about a review by Orme and Buehler (“Arm and Bueller” in Transcript) of the research literature on the characteristics associated with higher levels of foster family functioning. Rekers, at 52. He said that Orme and Buehler “summarize the studies by saying this, ‘several possible general correlations of foster family functioning have also been examined,’” and then points to a study by Walsh and Walsh included in the review which he said found that the provision of a strong male role model was related to higher levels of foster family functioning. Rekers, at 52-53. Although this article was not identified to plaintiffs during discovery either, and thus, Dr. Lamb was not prepared to fully address the Orme and Buehler review article or the Walsh and Walsh article cited therein, he recalled that contrary to Dr. Rekers’ suggestion, Orme and Bueller themselves did not include the provision of a strong male role model in their summary of the factors that have been shown to be important for good foster family functioning. Lamb II, at 46. He also noted that in the course of their work, Orme and Bueller—who have done some of the most important research on the quality of good foster parents—developed measures to evaluate prospective foster parents to assist agencies and this factor was not included. Lamb II, at 46-47.

126. Dr. Lamb agreed that the research shows that repartnering by single mothers, even if they marry, correlates with children doing worse. Lamb II, at 50-52.²³

C. The evidence shows that the challenged exclusion undermines the best interests of children in foster care.

The evidence presented at trial showed that not only is there no child welfare basis to exclude families with gay members from fostering, but excluding this group works against the best interest of children in the child welfare system by limiting their foster care options.

Arkansas child welfare expert Judith Faust, a professor of social work at UALR and former director of the Arkansas DCF (Faust, at 47-50), testified that the exclusion shrinks the pool of qualified foster parents, which is already insufficient to meet the needs of Arkansas' children. Faust, at 50-58. This was undisputed by the defendants.

It is unknown how many qualified foster parents the State of Arkansas is losing because of this regulation, but the State cannot afford to give up families like those of Matthew Howard and Craig Stoopes, and Bill and Carolyn Wagner. Matthew Howard is a former pastor who now works with families with children who have developmental disabilities. Howard, at 24-25. He and Craig Stoopes, who works at the public library in Little Rock, have lived together in a committed relationship for 19 years and are raising two young children. *Id.*, at 25-27. They seek

²³ Dr. Lamb testified that there is no scientific basis for the Eleventh Circuit's speculation that single heterosexuals might be better able than gay parents to guide their children through adolescence by relating stories about their own adolescence and dating. Lamb I, at 69. The research on couple relationships shows nothing so different between same-sex and different-sex relationships that gay and heterosexual people cannot relate to one another's relationship experiences. *Id.* Similarly, he said there is no reason a single heterosexual mother would be unable to guide her son through adolescence. *Id.*

to be foster parents because they are aware that there is a need for more foster families in Arkansas and feel that they can help meet that need. *Id.*, 29-30. Bill and Carolyn Wagner have been married for over 30 years and have two grown children. Wagner, at 7. They have demonstrated an extraordinary commitment to helping children. In addition to working a full-time job as an optical lab technician, Bill, along with his wife, founded and volunteers as a counselor at a camp for children with catastrophic illnesses. *Id.*, at 7-8. Moreover, the Wagners have opened their home to dozens of teens whose parents have kicked them out of the house. *Id.*, at 8-13. They are barred from being considered as foster parents because their son, who sometimes stays at home, is gay. *Id.*, at 15-16. Matthew and Craig, and Bill and Carolyn are the kinds of foster families Arkansas needs more of; they are not families the State can afford to throw away.

Ms. Faust also testified that excluding applicants with gay family members from the system of individualized evaluation means that some children cannot be placed with the family who would be best matched to meet their individual needs. Faust, at 54-57, 62. Ms. Faust noted that there could be a variety of situations in which a gay or lesbian foster parent could be the ideal placement for a child—if there is a lesbian or gay relative willing to provide kinship foster care, if there is a gay teen needing foster care and a reluctance among other families to work with a gay adolescent,²⁴ or any number of reasons an applicant who happens to be gay would be the best match for a particular child. Faust, at 62-63. Dr. Lamb agreed that the exclusion could

²⁴ The evidence showed that there is a specific need for willing and able foster parents to take care of self-identified gay teens and that many heterosexual foster parents are not comfortable having gay foster children or are inappropriate placements for them because of their negative views about gay people. Transcript of the testimony of James Balcom on March 23, 2004 (“Balcom”), at 26-28; Wagner, at 8-14.

be harmful to children by relegating more children to poorer quality foster placements. Lamb I, at 70, 100. For these reasons, Ms. Faust explained, blanket exclusions like the challenged regulation are contrary to established best practices in the child welfare field; the principle of individualized assessment is central to child welfare practice. Faust, at 54-57, 63-65.²⁵

All of this testimony was undisputed by the defendants' expert witness. Indeed, Dr. Rekers agreed that the needs of each child in foster care need to be individually addressed. Rekers, at 68 ("It is the general standard of care for foster placement boards to consider the individual needs of a child . . ."); 173; *see also id.*, at 164 (when he was asked if he would favor removal of children from the care of gay foster parents, he said he couldn't answer that "yes" or "no" because "as a clinical psychologist, you evaluate each individual situation."). And he acknowledged that there might be circumstances in which it is best for a child to remain with a gay foster parent. Rekers, at 162-64.

The Board itself recognizes the importance of making individualized placement decisions to find the family that is best suited to meet each child's individual needs. Section 200.1.1 of the Board's Minimum Licensing Standards provides that "[t]he 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." The categorical exclusion of applicants with gay household members directly conflicts with this mandate. *See Faust*, at 89.

The defendants do not dispute the fact that some children would be best off in the care of

²⁵ This is evidenced by the policies of the Child Welfare League of America, of which Arkansas' DCF is a member. Faust, at 63-65.

families with gay members. Their only response is to argue that exceptions can be made to the rule where a caseworker determines that to be the case. Balcom, at 16. James Balcom testified that exceptions would be permitted through “alternative compliance”. *Id.* But the language of the alternative compliance statute suggests otherwise:

The board may grant an agency's request for alternative compliance upon a finding that the child welfare agency does not meet the letter of a regulation promulgated under this subchapter, but that the child welfare agency *meets or exceeds the intent of that rule* through alternative means.

Ark. Code § 9-28-405(h)(i)(emphasis added); *see* Balcom, at 29. Even if alternative compliance exceptions could be made, they could only be made by the Board upon the request of a licenced agency; applicants with gay household members would have no standing to seek exceptions. Balcom, at 30. And even if families with gay members could seek exceptions to the exclusion by jumping over additional hurdles, that would not make the regulation any less irrational given the absence of any child welfare basis for the regulation.

The evidence shows a complete absence of a logical connection or “deliberate nexus” between the exclusion of applicants who have gay household members and ensuring that children are placed in foster homes in which they can thrive. Thus, the regulation violates the equal protection guarantees of the federal and state constitutions.

II. THE EVIDENCE SHOWS THAT THE REGULATION WAS ENACTED OUT OF ANTIPATHY TOWARDS GAY PEOPLE.

An alternative basis to strike down the regulation is that it was enacted out of hostility towards gay people.

The fact that the government disapproves of or dislikes a group, or is deferring to community prejudice, is never a legitimate basis for the government to enact laws that disadvantage the group. *Romer*, 517 U.S. at 633-35; *Cleburne*, 474 U.S. at 449-50; *Moreno*, 413 U.S. at 534. Characterizing that disapproval as based in morality does not change that. *Lawrence*, 123 S. Ct. at 2482 (rejecting majoritarian views regarding morality as a basis for discriminatory laws); *id.*, at 2486 (O'Connor, J., concurring) ("Moral disapproval of [gay people], like the bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."); *Jegley*, 349 Ark. at 635-37, 80 S.W.3d at 352-53 (rejecting moral disapproval of gay people as basis for criminal law against same-sex sexual activity).

The evidence discussed above establishes that the regulation furthers no child welfare purpose. The United States Supreme Court has recognized that such discontinuity between a classification and legitimate purpose can "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," which the Equal Protection Clause does not permit *Romer*, 517 U.S. at 632, 634-35. In addition, there is both direct and circumstantial evidence that the Board indeed enacted this regulation out of disapproval of lesbians and gay men.

First, there is evidence that three Board members voted for the regulation based on their own personal disapproval of homosexuality and their deference to community disapproval of gay people.

Board member James Balcom testified that his decision to support the exclusion was based on the community's expression of disapproval of gay couples and his own religious belief that homosexuality is immoral. Balcom, at 15, 17-18.²⁶ He said he has a moral objection to children being in a household in which there is a same-sex relationship. *Id.*, at 18-19. He does not want children to be exposed to gay role models, and thus, even disapproves of gay characters on television shows. *Id.*, at 22, 34-35. Mr. Balcom has strong negative views about gay people and homosexuality that reflect bias. For example, he believes that gay people recruit others to be gay using tactics similar to religious proselytizing; that they recruit in schools, teaching children how to have same-sex sex; and that if gay people did not recruit, there would be pretty close to no gay people. *Id.*, at 23. He also believes gay people should remain celibate. *Id.*, at 18.

Board member David Whatley, in discussing the proposed regulation during a Board meeting, stated: "personally, as far as I am concerned, I don't think in any way should we ever promote homosexuality in any form or fashion, ever. I just don't think it's morally right and I don't think it's something that I, as a person on the board, would ever condone or agree with." Stip. ¶ 13 .

Board member Robin Woodruff testified that she also believes that homosexual relationships are "wrong" and a sin, and that they violate her biblical convictions. Transcript of the testimony of Robin Woodruff on March 23, 2004, at 23-24. Thus, she does not approve of her children spending time with openly gay couples, including gay relatives and their partners, because she does not want the role model of the gay couple before her children. *Id.*, at 24-26.

²⁶ He said he considered the scientific research, but that it did not contribute to his decision because he felt that there was no good scientific evidence on either side. Balcom, at 15, 17-18.

Moreover, the stipulated facts that Arkansas already had foster care regulations that screened specifically for all of the asserted harms defendants have attributed to gay people (Stip. ¶ 33) and that the Board knew this when considering the gay exclusion (Stip. ¶ 14)²⁷, make it impossible to credit those purposes and leads to the conclusion that the regulation was enacted out of disapproval of gay people. *Romer*, 517 U.S. at 635 (where facts make rationales too unbelievable to credit, Court concluded that classification was based on bias); *Moreno*, 413 U.S. at 536-37 (existence of regulations “aimed specifically at [the same] problems” as the challenged regulation “casts considerable doubt upon the proposition that the [challenged rule] could rationally have been intended to prevent those very same abuses.”).

Finally, the Board’s reliance on, and then abandonment of, several rationales that have been shown to be demonstrably false as a scientific matter, strongly supports the conclusion that the regulation was based not on a legitimate concern for protecting children, but on naked bias against lesbians and gay men.

III. THE DEFENDANTS’ EXPERT WITNESS’S OPINIONS SHOULD NOT BE CREDITED BECAUSE THEY ARE BASED NOT ON SCIENCE, BUT ON HIS PERSONAL IDEOLOGICAL VIEWS REGARDING HOMOSEXUALITY.

Virtually all of the testimony of Dr. Rekers is irrelevant to the constitutionality of the challenged regulation. In large part, his testimony addressed societal prejudice against gay people and his views regarding the significance to children’s development of having both a male

²⁷ The Board’s attorney advised the Board not to enact the “homosexual” exclusion because it would likely draw a legal challenge and the preexisting regulations already give the Board the enforcement power and discretion to take care of any concerns it might have, and are adequate to protect the interests of children. Stip., ¶ 14.

and female parent. As discussed above, existing societal prejudice and discrimination against gay people are not permissible bases for the State to further discriminate against this group. And whether dual-gender parenting is optimal for children's development is irrelevant to the issue before the Court.

The only testimony from Dr. Rekers that was arguably legally relevant was his empty assertion that gay people are more likely to be substance abusers; his discussion of the findings of a study regarding the average number of sex partners of gay and heterosexual people, which he considered relevant to the stability of gay couples; and his criticism of the methodology of the body of scientific research on children raised by gay parents.

All of Dr. Rekers' proffered justifications for the challenged regulation have been rebutted and shown to be contrary to the scientific evidence. But Dr. Rekers' testimony should not be credited at all because the evidence presented at trial demonstrated that his views are based not on science, but on his personal ideological views about homosexuality.

Dr. Rekers testified that in addition to being a psychologist, he is an ordained Baptist minister with a doctorate in theology and he believes the Bible is the infallible word of God. Rekers, at 128-31. He testified that he believes that it is a universal moral principle that homosexual behavior is sinful. *Id.*, at 131-32. He said that if sound scientific studies meeting his criteria found that children of gay parents are doing just as well as other children, he would still, on the personal level, favor the exclusion of homosexuals from fostering. *Id.*, at 135-36.

While Dr. Rekers claims that he can keep his personal religious beliefs about gay people and the relevant scientific research separate, the evidence shows that this is simply not true.

First, Dr. Rekers has written various books in which he fuses discussion of his religious

views and the psychological research on children's development. *Id.*, at 133-35; *see, e.g.*, Plaintiffs' Exh. 7, *Shaping Your Children's Sexual Identity* ("Shaping"). Indeed, he has written that it is appropriate to rely on the Christian Scriptures on issues relevant to children's development: "I would hardly be out of place to quote the Christian Scriptures on [the issue of children's sexual identity development]. It is nonsense to capitulate to the reasoning that quoting the Bible is imposing Judeo-Christian values upon a secular, non-Christian culture, when our American government, law, and society were founded on Christian values and the vast number of Americans identify with Christian values." Plaintiffs' Exh.7, *Shaping*, at 17.

Next, Dr. Rekers' purportedly scientific assessment of the body of research on children of gay parents shows that his conclusions are driven by his ideology, not a fair and objective reading of the science. For example, Dr. Rekers harshly criticizes the body of research that has consistently found that children of gay parents are equally well-adjusted, arguing that these studies are methodologically flawed. Yet in a manuscript he wrote reviewing that body of research, he relied on the discredited Cameron and Cameron study discussed above—the one that did not even ask respondents if they had gay parents— as "strongly point[ing] to confirmation" that gay parents pose certain harms to children, and characterized it as methodologically superior to the other studies on gay parents. Rekers, at 87-89; Lamb II, at 8-12. The fact that Dr. Rekers gave weight to this "uninterpretable" study while rejecting all of the other studies led Dr. Lamb to conclude that Dr. Rekers' assessment of the quality of the research does not represent an unbiased evaluation as it purports to. Lamb II, at 11-12.

Moreover, Dr. Lamb noted that although Dr. Rekers rejects the conclusions of the entire body of research on children of gay parents (except for Cameron's study) because of his

complaints about their methodology, he relies on those studies when it suits him. Lamb II, at 13. In a review manuscript he wrote, Dr. Rekers cited various excerpts from those studies as evidence of what he characterizes as harms associated with having gay parents. *Id.*, at 13. For example, Dr. Rekers cited findings in those studies that lesbian mothers are more often employed than heterosexual mothers, pointing to these findings as evidence that lesbian mothers are less committed parents than heterosexual mothers. *Id.*, at 14.²⁸

Dr. Lamb also noted that in Dr. Rekers' publications addressing the role of mothers and fathers, to support his assertion that children develop best with a male and female parent, he selectively cites a small number of studies from the mid-1940's through the early 1970's which are no longer cited by developmental psychologists, ignoring the hundreds of studies done over the next decades that consistently reach contrary conclusions. *Id.*, at 27-30, 50.

All of these examples demonstrate that Dr. Rekers is selective in his treatment of the research to advance his ideological views. Indeed, a colleague published a criticism of Dr. Rekers' work as misrepresenting and distorting the scientific evidence to conform to his religious beliefs. *Id.*, at 53-54 (discussing Dr. Ken Zucker's review of Dr. Rekers' books "Shaping Your Child's Sexual Identity" and "Growing up Straight", in which he concluded that Dr. Rekers' ideology leads him to distort his review and representation of the research literature.).

That science yields to ideology for Dr. Rekers is perhaps best illustrated by his

²⁸ It seems hardly necessary in 2004 to mention Dr. Lamb's testimony that it is not harmful to children if their mothers are employed. Lamb II, at 14. And Dr. Lamb testified that studies examining the parenting commitment of lesbian and heterosexual mothers refute Dr. Rekers' characterization of lesbian mothers as less committed. *Id.*, at 14. Dr. Rekers did not address those studies.

willingness to ignore the serious psychological harm to children that can result from transitions in foster placements—which he himself testified about²⁹—to support the removal of children from gay foster parents even after being in long-term placements with those foster parents. Rekers, at 164-65. Dr. Lamb found Dr. Rekers’ recommendation to disrupt stable long-term parent-child relationships “hard to comprehend” given that it flies in the face of all that is known about the importance of relationships between children and parent figures. Lamb II, at 25-26.

The dominance of Dr. Rekers’ ideological views is also illustrated by the fact that he “treats” patients to try to change their sexual orientation from homosexual to heterosexual (Rekers, at 153), even though the American Psychiatric Association has issued a policy statement saying that there is no evidence that such treatment is effective and opposing treatment aimed at changing one’s sexual orientation. Berlin, at 21-23.

Finally, in his zeal to demonize a community that he finds morally abhorrent, Dr. Rekers has gone so far as to publish inflammatory and baseless assertions about gay people, *e.g.*:

The gay liberationists have taken the deliberate ploy of pressing first for legislation to legalize the sexual behavior between two consenting adults. After they have succeeded in winning the emotional war of soothing the public’s queasy feelings about homosexual activity among adults, the next planned stop of the gay liberationists is to press for an elimination of laws of age discrimination (in the terminology of the rhetoric of revolt). This means that the gay activists are now beginning to press for the ‘rights of children’ to engage in homosexual behavior with adults. This will be their battle to legalize pedophilia!

Plaintiffs’ Exh. 7, Shaping, at 89.

²⁹ Dr. Rekers testified that separating a child from a foster family creates a risk for psychological harm. Rekers, at 22-23. Moreover, he testified, it can be particularly hurtful for foster children, who have already been separated from their families, to lose another relationship. Rekers, at 66, 186.

CONCLUSION

The evidence shows that there is no child welfare basis to exclude applicants with gay household members from fostering. The scientific research uniformly shows that children raised by gay parents are not disadvantaged in any way and all of the relevant professional associations agree that restrictions like the challenged regulation are both unwarranted and contrary to the best interests of children in foster care. And the evidence shows that the defendants' negative description of gay people is completely baseless. The exclusion of people with gay household members, therefore, is not rationally related to the furtherance of any legitimate government interest and, thus, violates the equal protection guarantee.

Moreover, the evidence shows that the regulation was enacted in order to express disapproval of gay people, which the Equal Protection Clause does not permit. The challenged exclusion "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Romer*, 517 U.S. at 634. This is another basis to strike down the regulation as violating the right to equal protection.

Dated: December __, 2004

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CERTIFICATE OF SERVICE

I, Leslie Cooper, certify that on December 7, 2004, I caused the foregoing document to be served by Federal Express on the following person at the address indicated:

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