IN THE SUPREME COURT OF ARKANSAS

DEPARTMENT OF HUMAN SERVICES and
CHILD WELFARE AGENCY REVIEW BOARD

APPELLANTS/
CROSS-APPELLEES

v. No. 05-814

MATTHEW LEE HOWARD, CRAIG STOOPES
ANNE SHELLEY and WILLIAM WAGNER, APPELLEES/
CROSS-APPELLANTS

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

HONORABLE TIMOTHY FOX

CROSS-APPELLANTS' REPLY BRIEF

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

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

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ARGUMENT

Appellees/Cross-Appellants Matthew Howard, et al ("Plaintiffs") submit this reply to the State's response to Plaintiffs' brief in support of their cross-appeal.

I. This Court has jurisdiction to hear this case.

The State argues now for the first time that there is no final agency decision from which to appeal to the Circuit Court and, thus, Plaintiffs failed to exhaust available administrative remedies. Under administrative rule-making, the adoption of the rule is the final action and there is no dispute that the Board adopted the challenged foster regulation. The Administrative Procedure Act provides that "the validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that the rule, or its threatened application, injures or threatens to injure the plaintiff in his person, business or property"; the action may be brought in the Circuit Court; and "[a] declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question." Ark. Code Ann. § 25-15-207; *see, e.g., McEuen Burial Ass'n v. Arkansas Burial Ass'n Bd.*, 298 Ark. 572,575, 769 S.W.2d 415, 417 (1989).

The cases cited by the State stand for the basic proposition that if there is an ongoing administrative proceeding, a party may not circumvent that process by filing a complaint for a declaratory judgment while the agency review is in progress. *Ford v. Arkansas Game & Fish Comm'n*, 335 Ark. 245, 251, 979 S.W.2d 897, 900 (1998); *McLane Southern, Inc. v. Davis*, 80 Ark. App. 30, 38, 90 S.W.3d 16, 21 (2002) ("requests for declaratory relief should be denied

when there are ongoing proceedings where the issue may be resolved.”). Here, no agency proceedings were pending when Plaintiffs commenced this lawsuit.[1]

II. <u>The Plaintiffs have standing to challenge the exclusion.</u>

The State now argues that the Plaintiffs lack standing because they did not apply to become foster parents before filing this lawsuit. This argument has no merit. To have standing to challenge a law, “a party must demonstrate that he is possessed of a right which the statute infringes and that he is within the class of persons affected by the statute.” *Thompson v. Arkansas Social Servs.*, 282 Ark. 369, 373, 669 S.W.2d 878, 880 (1984); *see also Jegley v. Picado*, 349 Ark. 600, 619, 80 S.W.3d 332, 341 (2002). The regulation is clear on its face that anyone with a gay household member is disqualified. Plaintiffs are either gay or have a gay household member. They are within the class of persons affected by the exclusion.

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[1] Even where there is no final agency decision, this Court has said that exhaustion of administrative remedies is only required when there is a genuine opportunity for adequate relief and an administrative appeal would not be futile. *See, e.g., Cummings v. Big Mac Mobile Homes, Inc.*, 335 Ark. 216, 220, 980 S.W.2d 550, 552 (1998). Here, any further appeal to the Board would have been futile given that numerous members of the community (including Matthew Howard) had already gone to the Board to urge it not to enact the exclusion, testifying and submitting written materials at five public hearings. The Board had ample opportunity to consider the arguments against the exclusion and nevertheless decided to enact it. *Id.*, at 220, 980 S.W.2d at 552 (“A basic rule of administrative procedure requires that an agency be given the opportunity to address a question before a complainant resorts to the courts.”).

There was no need for Plaintiffs to go through the motions of applying and getting denied to know that their rights are affected by the regulation. *See e.g., McEuen Burial Ass'n v. Arkansas Burial Ass'n Bd.*, 298 Ark. 572, 575, 769 S.W.2d 415, 417 (1989) (a challenge to a rule imposing certification requirements for burial associations was justiciable even though plaintiff had not been denied certification because "it is obvious that some of the associations, as a result of the application of the rules, are threatened with denial."). Where it would be futile to submit an application for a permit, the failure to apply for it is not a basis to deny a party standing to challenge a law restricting access to that permit. *See, e.g., U.S. v. Hardman*, 297 F.3d 1116, 1121 (10th Cir. 2002) (because it would have been futile for claimants, who were not members of certain Native American tribes, to apply for permits to possess eagle feathers, claimants had standing to challenge the law limiting permits to members of those tribes even though they did not apply for permits); *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996) (plaintiffs had standing to challenge permit requirement to erect billboards, even though they did not apply for permits, because applying would have been futile given that an ordinance flatly prohibited the placement of billboards in the locations desired by plaintiffs); *see also Northeastern Florida Chapter of Associated General Contractors of America*, 508 U.S. 656, 666 (1993) ("To establish standing . . ., a party challenging a set-aside program [for contracts for minority-owned businesses] need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.").

Nevertheless, Plaintiffs did attempt to apply to become foster parents and, predictably, were turned away because of the exclusion. William Wagner and his wife called the local office of DHS to apply and were referred to Arkansas Families First, which, during a preliminary

telephone screening, told them that they did not qualify because they have a gay son who sometimes stays with them. (Ab. 63; R.1872-73). Similarly, Anne Shelly called her local DCFS office to apply and was directed to the Northwest Arkansas Children's Shelter, which told her that she was not eligible to become a foster parent because she is a lesbian. (Ab. 226-27; R. 2221-22). Matthew Howard went to the DHS office to apply but was shown the challenged regulation and told that he could not apply. (Ab. 214-15; R.2199-2200).

III. The exclusion fails Equal Protection rational basis review.

D. The State fails to demonstrate clear error in the Circuit Court's findings of fact regarding the absence of a child welfare basis for the exclusion.

In a futile attempt to show clear error in the Circuit Court's findings of fact, the State relies on misrepresentations of the testimony of Plaintiffs' expert witnesses and rhetoric not supported by anything in the record.[2]

1. The Circuit Court's findings regarding the well-being of children of gay parents were based on extensive evidence in the record about the quality and breadth of the scientific research in this area.

In finding that children raised by gay parents are just as well-adjusted as other children, the Circuit Court relied on expert testimony about the body of scientific research on children of gay parents. (Add. 868-69). The State argues that the Court's reliance on this research was

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[2] Contrary to the State's contention, the summary of findings and evidence in Appellees' brief was part of the argument and included within the 25 pages allowed by Ark. S. Ct. R. 4-1(b).

Some of the State's arguments concerning the Circuit Court's findings appear in its reply. Since the State incorporated the reply by reference into its response to the cross-appeal (Resp. 2), this brief addresses all of the State's disputes concerning the Court's findings.

improper because i) it says this body of research is flawed; and ii) it says there is not enough research in this area upon which to draw conclusions and, thus, placing children with gay parents is a "social experiment." To support these assertions, the State offers no citations to any evidence it submitted to the Circuit Court. Instead, it makes the following misrepresentations of the testimony of Plaintiffs' expert witnesses:

Regarding assertion that the research is flawed:

Misrepresentation: The State says "Appellees' expert witness" stopped short of saying that the research on children of gay parents is "grounded in scientific method." (Rep. 1)

The record: Dr. Lamb, Plaintiffs' expert witness who addressed the body of research on children of gay parents (whom the Circuit Court credited (Add. 886-87)), testified that these studies followed standard scientific methods that are well-accepted in the field of psychology, and were published by reputable academic journals after being subjected to the rigorous peer review process. (Ab.137-43, 342-43, 357; Supp. Ab.3-4, 14-15; R.2021-35, 2522-25, 2553-54).[3]

Misrepresentation: The State asserts that Dr. Berlin testified that "the studies relied on by Appellees are all flawed and should not be relied on by the Court." (Rep. 8).

The record: The State did not offer any citation to such testimony by Dr. Berlin because it does not exist. Dr. Berlin did not even testify about the research on children of gay parents because he was called as an expert on different subjects. (Ab. 71; R. 1890). The State cites Dr. Berlin's responses to questions about various scientific research methods. (Rep. 2, citing AB.

[3] The State comments on the use of self-selected samples. (Rep. 3). While Dr. Lamb made it clear that such sampling is not a research flaw, he also noted that this is not how the samples were found for all of the studies. (Ab.139, 158-59; R.2027, 2070-72).

106, 109, 110, 114,120; R.1951, 1956, 1965, 1978). But nowhere in the testimony cited by the State or in any of his testimony did Dr. Berlin suggest that there were problems with the research methodology used in the studies on children of gay parents. Nor did he say that non-probability samples are invalid, or that longitudinal studies are always necessary as the State suggests he said. To the contrary, he testified that there are many types of research, including research that uses probability and non-probability samples and cross-sectional and longitudinal studies; that all of these methodologies are valid; and that the type of method that is necessary "depend[s] on the question that's been asked."[4] (Ab. 120; R. 1978).[5]

Regarding assertion that there is not enough research:

Misrepresentation: The State says that Plaintiffs' expert witnesses stopped short of saying that the research on parenting by gay people is "thorough."

The record: Dr. Lamb testified that numerous studies on children of gay parents conducted over 25 years establish that these children develop just as well as other children. He further testified that this is sufficient information to reach this conclusion, and the suitability of gay parents is a well-settled scientific question, not an issue about which there is any

[4] The State also points to Dr. Berlin's own research on clinical populations (which are not studies based on random samples) and suggests that this shows a weakness in the research on gay parents and their children. (Rep. 2, 8, citing AB. 106-07, 110; R. 1952, 1959). But the research Dr. Berlin was discussing was his research on pedophiles and sex offenders. It had nothing to do with gay people or children of gay parents.

[5] The only other "support" the State offered for its assertion that the research is flawed is a law review article written by a lawyer advocating a position, not by social scientists. (Rep. 7-8).

disagreement in the field. (Ab. 137-42, 146-47, 342-43; Supp. Ab. 4, 14-15; R. 2021-27, 2033-34, 2041-43, 2522-24).

Misrepresentation: The State says that Dr. Berlin testified to the "sad realit[y]" that there is not enough data "in this area." (Rep. 2, citing AB. 107; R. 1953).

The record: The State misleadingly suggests that Dr. Berlin was talking about data on children of gay parents when, in fact, he was discussing research on the prevalence of pedophilia in the general population. (Ab. 107; R. 1953). This testimony had nothing to do with gay people or children of gay parents.[6]

The State also seems to be asserting that there is not enough research available for the Circuit Court to have rejected the State's assertions that gay people pose a higher risk of drug abuse, instability, child neglect, domestic violence, sexual abuse and diseases. (Rep. 3, n. 3). Prior to trial, the State expressly abandoned domestic violence, pedophilia and HIV as rationales for the exclusion (Ab. 293; R. 2401), and it did not put on any testimony regarding these subjects. And it offers no argument as to why the Court committed error when it relied on the

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[6] The State also notes that the studies on children raised by gay parents are not studies of foster children. But as Dr. Lamb explained, the same factors that predict healthy adjustment for other children apply to foster children too, with an additional factor being that foster parents need to be able to work towards reunification (and, he testified, there is no reason gay foster parents would be less able to facilitate reunification). (Ab. 126-27, 164-65; Supp. Ab. 5; R. 1998-99, 2074-75, 2086-87). He further testified that there are also no studies of children in foster care with other specific types of families, e.g., single foster fathers. (Ab. 164-65; R. 2087-88).

testimony of Plaintiffs' expert witnesses that refuted these assertions. The only thing the State has to say about any of these subjects is the following unsupported statement:

> Appellees' assertion that children are not at risk of contracting HIV from an HIV+ household member is 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.

(Rep. 3-4). This antiquated misconception about HIV and the State's assumption that being gay is a proxy for having HIV were refuted by the testimony of an infectious disease expert. (Ab. 179-82; R. 2120-27). Moreover, the State stipulated that the individualized screening process for foster applicants, which includes medical examinations of household members, ensures that only those capable of providing a safe, healthy home will be approved. (Add. 867, 869-70, 728).

There is extensive evidence in the record that the scientific research on children of gay parents about which Dr. Lamb testified is reliable research that followed accepted scientific methods. (Ab.137-43, 146-47, 342-43, 357; Supp. Ab.3-4, 14-15; R.2021-35, 2041-43, 2522-25, 2553-54). And there is extensive evidence in the record that this is a significant, well-developed body of research that provides sufficient information to know that children of gay parents are just as likely to develop healthily as other children, and that the suitability of gay parents is a scientific question that has been answered. *Id.* Indeed, in addition to Dr. Lamb's testimony about the quality, quantity and significance of the research on children raised by gay parents, the evidence showed that all of the major children's health and welfare organizations recognize that gay people can be good parents and have issued statements opposing restrictions on parenting, adopting or fostering by lesbians and gay men. (Ab.198-200; R.2161-65). Moreover, the State did not offer a single study finding that children of gay parents are harmed in any way. Finally,

there is extensive undisputed evidence in the record refuting each of the asserted justifications for the exclusion offered by the State. Thus, the Court's finding that there is no child welfare basis for the exclusion was based on ample evidence in the record; it was not clear error.

2. The Circuit Court's finding that nothing about gender *per se* affects one's ability to be a good parent is based on extensive evidence in the record.

The State further asserts that the Circuit Court erred in rejecting its assertion that children do best with a mother and a father, instead, finding that both men and women have the capacity to be good parents and that there is nothing about gender *per se* that affects one's ability to be a good parent. (Add. 868). To support its assertion, the State relies on the following misrepresentation of the testimony of Plaintiffs' expert witness:

Misrepresentation: "Appellees' expert testified that children are better served with both a mother and a father. (Ab. 163; R. 2084) As such, the parties are in agreement on that point and the trial court's finding was in error."

The record: The following exchange between Dr. Lamb and the State's counsel appears on page 2084 of the record:

> Q. Okay. Is there any benefit to a child having both a mother and a father in the home versus we got one parent, we got two parents, as long as it's a loving parent, that's all that matters?
> A. Well, no. As I indicated, children benefit from quality of relationships with both of their parents, so that a child who has good relationships with both parents is at an advantage relative to one who has a relationship with only one.

The State turns Dr. Lamb's testimony on its head. Throughout his testimony, Dr. Lamb made it perfectly clear that while the <u>number</u> of parents is relevant to children's adjustment, the <u>gender</u> is not, and that this is well-established within the child development field. (Ab. 130-35, 155, 353-55, 360-64; R. 2005-17, 2063, 2545-50, 2560-69). He specifically testified that there is no

evidence to support the notion that a child needs both a male and female parent to develop healthily. (Ab. 134; R. 2013-14).

The Court's findings regarding the significance of parental gender and its rejection of this asserted justification as a factual matter (Add. 868-70) was amply supported by the evidence at trial; it was not clear error. Furthermore, as the Circuit Court ruled, the State's asserted preference for married couple placements is not relevant to this case because the legislature has stated that single people may foster (Ab.280-81, 284-87; R.2378-79, 2384-89); Ark. Code Ann. § 9-28-402(13). And as discussed in Appellees' brief (pp. x-arg. 13-14), there is no rational connection between excluding families with gay members—including married heterosexual couples—and promoting placement with married heterosexual couples.

3. The Circuit Court's rejection of the State's assertion that gay foster parents are less able to facilitate reunification is supported by extensive evidence in the record.

The State repeated the assertion that the exclusion is justified because if biological parents are biased against gay people, it could affect foster children's reunification with their families. This justification was not accepted by the Circuit Court, which found that the exclusion is not rationally connected to foster children's welfare. (Add. 866-67, 888). Now, the State offers nothing more than the testimony of its expert witness, Dr. Rekers (Rep. 8-9, citing Ab. 271-72; R. 2361-62), whose testimony was not credited by the Court. (Add. 886-87). Ample evidence supported the Court's rejection of this asserted rationale for the exclusion. For example, Dr. Lamb and Dr. Rekers both testified 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, not just disapproval of homosexuality. (Ab. 164-65, 306, 350-51; R. 2086-87,

2432, 2541-42). Moreover, the former director of DCFS 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 placement decisions for that child, but is not a basis to ban the group. (Ab. 170, 210-11, 350-51; R. 2097, 2191-92, 2541). Thus, the rejection of this rationale was supported by ample evidence in the record; it was not clear error.

4. The Circuit Court's finding that the exclusion may harm children by shrinking the pool of foster parents is based on extensive evidence in the record.

The State also argues that the Court's finding that the regulation may in fact be harmful to children by excluding a pool of effective foster parents (Add. 867) is not supported because there is no evidence of the number of families excluded by the policy. While it is not known how many foster families the children of Arkansas are deprived of because of the exclusion, the Circuit Court found, based on undisputed evidence, that the State needs more qualified foster parents in order to make good placements (Add. 365, 867)(Ab. 193-96; R. 2152-58); therefore, even if it were just the three plaintiff families, that's three more families than the State can afford to lose. Thus, this finding was based on ample evidence; it was not clear error.

B. The State fails to support the conclusion that "public morality" is a stand-alone legitimate State interest justifying the disparate treatment.

As discussed in Appellees' brief, both this Court and the United States Supreme Court have rejected moral disapproval of gay people divorced from any separate legitimate State interest as a basis to disadvantage this group. *Lawrence v. Texas*, 539 U.S. 558, 571, 577 (2003); *Jegley v. Picado*, 349 Ark. 600, 633-34, 637, 80 S.W.3d 332, 350-51, 353 (2002). The State's only response to this authority is to argue that these cases have no meaning beyond their specific

facts—criminal sodomy law prosecutions. But the important principle articulated by this Court in *Jegley*— "the police power may not be used to enforce a majority morality on persons whose conduct does not harm others" (*Jegley*, 349 Ark. at 637, 80 S.W.3d at 353)—was not limited to those particular facts. Indeed, the Court's equal protection holding was built on *Romer v. Evans*, 517 U.S. 620 (1996), *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and other cases arising in non-criminal contexts that recognized that the equal protection guarantee means that the government may not disadvantage a group of people based on its disapproval of that group or deference to the public's disapproval. *Jegley*, 349 Ark. at 635, 80 S.W.3d at 352. Nor is there any basis for the State's cramped reading of the Supreme Court's pronouncement in *Lawrence*.

The State's only other argument regarding the issue of morality is its suggestion that the custody cases involving restrictions on unmarried parents' cohabitation mean that the Court agrees that purely moral judgments about parents are child welfare considerations. (Rep. 5). But this Court has made it clear that non-cohabitation/overnight guest provisions in custody orders are not imposed to make moral judgments about parents. "The purpose of such an order 'is to promote a stable environment for the children, and is not imposed merely to monitor a parent's sexual conduct.'" *Hamilton v. Barrett*, 337 Ark. 460, 468, 989 S.W.2d 520, 524 (1999), *quoting Campbell v. Campbell*, 336 Ark. 379, 389, 985 S.W.2d 724, 730 (1999). Moreover, the State does not explain how excluding all gay people—regardless of whether they live with a partner or have overnight guests when the children are present—protects children's morality; this is nothing but moral disapproval of gay people, which is not a legitimate government interest under *Jegley* and *Lawrence*.

C. The State offers no other legitimate State interest to justify the exclusion.

The State asserts that the exclusion furthers the interest of preventing children from being placed in homes where cohabitation and non-marital sex occurs. And the State once again points to custody cases concerning cohabitation by parents and the assertion that the State bars cohabiting couples from fostering. But none of this has any bearing on this case because the exclusion at issue is based on sexual orientation, not cohabitation or having non-marital sex in the home. Families with gay members are excluded from fostering regardless of whether the gay household member lives with or is intimate with a partner in the home when the children are present. Therefore, however the State treats cohabiting parents[7] and foster parents[8] is irrelevant to the constitutionality of the challenged regulation.

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[7] The cases cited by the State recognize that the primary consideration in child custody determinations is the welfare of the child and that cohabitation by a parent does "not necessarily affect the welfare of the child." *Hepp v. Hepp*, 61 Ark. App. 240, 254, 968 S.W.2d 62, 70 (1998). In *Hepp*, *Powell v. Marshall*, 2004 WL 2453934 (Ark. App. 2004), and *Watts v. Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986), the court held that a parent's cohabitation did *not* adversely affect the children's welfare, and thus, did not warrant a change of custody. In *Powell*, the court reversed the circuit court's change of custody, noting that the lower court had allowed its "desire to punish [the cohabiting mother] to override the primary consideration in the case, which was the welfare of the child, and this is not proper." *Powell*, 2004 WL 2453934, at *4.

The State's reliance on the fact that the regulation excludes only non-celibate gay people is similarly misplaced because the exclusion is based on sexual orientation, not celibacy. The State does not demand celibacy of heterosexual foster applicants whether married or single. Moreover, as discussed in Appellees' brief, the Court's findings about the suitability of gay parents were not based on studies of celibate gay parents; indeed, a number of the studies examined same-sex couples raising children. (Ab. 210, 352; R. 2190, 2544).

With no legitimate government interest being furthered by the exclusion, the State suggests that the Equal Protection Clause does not even apply because there is no right to be a foster parent and being a foster parent is "more akin to unpaid volunteering" than a "benefit." (Resp. 2-3). Of course no one has the right to be a foster parent and applicants must make it through a rigorous screening process to be approved. But there is a right to equal protection and because the blanket exclusion of gay people from the screening process is not rationally related to the furtherance of any legitimate government interest, it violates the Equal Protection Clause. And it makes no difference that the unequal treatment does not affect a "benefit."[9] The State cannot arbitrarily treat a group of citizens differently than everyone else. Just like the State could

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[8] The State asserts that the licensing standards' requirement that married couples apply jointly constitutes a rule against cohabitation. It is hard to understand how this language would bar an <u>individual</u> applicant who happens to live with an unmarried partner.

[9] But surely the State would agree that serving as a foster parent is a rewarding and enriching experience for individuals who offer their homes and hearts to children in need of care.

not exclude brunettes or lawyers from fostering without a rational basis for doing so, it cannot exclude families with gay members without at least satisfying the rational basis test.

IV. The exclusion violates the right to privacy/intimate association.

The State argues that the exclusion does not violate the right to privacy because foster applicants invite the State into their home to be scrutinized. Plaintiffs are not seeking to avoid the State's scrutiny; they are seeking to be subjected to it rather than disqualified before the State assesses what kind of foster parents they would make. Plaintiffs' argument is that they have a fundamental right to intimate association (sometimes referred to as a right to privacy or autonomy) and, thus, the State cannot penalize them for exercising this right, which the challenged regulation does, without a compelling reason. *See* Appellees' brief, x-arg. 20-25.

The State's response is to argue that *Lawrence* did not establish a fundamental right and applied the rational basis test. While there has been disagreement among courts and academics about the meaning of *Lawrence*, this Court clearly stated in *Jegley* that there is a fundamental right under the Arkansas Constitution to form intimate relationships, and burdens on that right trigger strict scrutiny. 349 Ark. at 632, 80 S.W.3d at 350.

The State's assertion that the exclusion does not penalize people who exercise the right to form intimate relationships is disconnected from reality. If the State excluded people who already have children, for example, no one would disagree that this would penalize them for exercising their fundamental right to procreate and, therefore, have to be justified by a compelling state interest. Likewise, the challenged exclusion penalizes people who exercise the fundamental right recognized in *Jegley* to form intimate relationships and, thus, also triggers strict scrutiny.

Dated: February__, 2006

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Leslie Cooper

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

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

Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I, Leslie Cooper, certify that on February 17, 2006, I caused the foregoing document to be served by Federal Express on the following persons at the addresses indicated:

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

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

____
Leslie Cooper