IN THE ARKANSAS SUPREME COURT

DEPARTMENT OF HUMAN SERVICES, *et al.*,

APPELLANTS,

vs.

No. 05-814

MATTHEW HOWARD, *et al.*,

APPELLEES.

ON APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY

THE HONORABLE TIM FOX CIRCUIT JUDGE

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; CHILDREN OF LESBIANS & GAYS EVERYWHERE; FAMILY PRIDE; HUMAN RIGHTS CAMPAIGN; HUMAN RIGHTS CAMPAIGN FOUNDATION; NATIONAL GAY & LESBIAN TASK FORCE; PARENTS, FAMILIES & FRIENDS OF LESBIANS & GAYS; AND STONEWALL DEMOCRATIC CLUB OF ARKANSAS IN SUPPORT OF APPELLEES

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INTERESTS OF *AMICI CURIAE*

Amici are national and Arkansas organizations dedicated to advancing the civil rights of gay men and lesbians. Each *amicus* organization is described more fully in the statements of interest included with the accompanying Motion for Permission to File Brief *Amici Curiae*. *Amici* believe that the foster care regulation at issue in this case violates the constitutional rights of gay and lesbian Arkansans by demanding as the condition of service as a foster parent that they sacrifice their fundamental right to enter into private adult relationships. *Amici* submit this brief to explain that the foster care regulation is subject to strict scrutiny – which it cannot survive – because it infringes on the appellees' fundamental State and federal constitutional rights to privacy and autonomy, affirmed in recent Arkansas and U.S. Supreme Court precedents to apply fully to gay and lesbian citizens.

PRELIMINARY STATEMENT

In 2002 this Court declared that Arkansas's prohibition on sodomy between same-sex partners violates State constitutional guarantees because it denies the fundamental right to privacy and the right to equal protection. *See Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002). The U.S. Supreme Court followed on this Court's heels a year later in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), declaring that Texas's similar same-sex sodomy prohibition violates the federal constitutional guarantee of personal liberty. Both landmark decisions hold that the government may not without sufficient justification burden the liberty and autonomy of gay men and lesbians to engage in private sexual intimacies. *Jegley* and *Lawrence* direct that courts must enforce the substantive limits contained in the Arkansas and federal Constitutions on the power of

government to regulate the intimate details of private sexual relations between two consenting adults. The State may not, without overriding need, impose conditions on this personal and important area of its citizens' lives.

Recognizing that sodomy prohibitions did more than place gay men and lesbians in criminal jeopardy for their private intimacy, this Court and the U.S. Supreme Court were fully cognizant that if let stand such prohibitions would continue to be used by the government to justify unwarranted discrimination against gay men and lesbians in the civil sphere as well. *See, e.g.*, *Jegley*, 349 Ark. at 621, 80 S.W.3d at 343 ("our sodomy statute has been used outside the criminal context in ways harmful to those who engage in same-sex conduct prohibited by the statute"); *Lawrence*, 539 U.S. at 575, 123 S. Ct. at 2482 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."). Thus *Jegley* and *Lawrence* vindicated the fundamental right of gay and lesbian people to engage in private sexual intimacy without being subject for doing so to government condemnation and discrimination in the civil realm as well.

The foster parent licensing regulation struck down by the court below does exactly what *Jegley* and *Lawrence* have declared to be unconstitutional: it imposes an impermissible government burden on the fundamental right of consenting adults to engage in certain kinds of private sexual intimacy. The regulation, promulgated in 1999, carried into the civil sphere the same government brand of condemnation for engaging in sodomy with a partner of the same sex declared unconstitutional just a few years later in *Jegley* and *Lawrence*. Drawing from the Arkansas and Texas criminal sodomy laws at

issue in those cases, the regulation singles out for exclusion from service as foster parents "homosexuals" who engage in precisely the type of activity declared constitutionally protected in *Jegley* and *Lawrence*.[1] It imposes a severe civil penalty – disqualification to serve as a foster parent – on gay men and lesbians who exercise their fundamental right to form intimate relationships with same-sex partners.

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[1] The foster care regulation provides:

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

Arkansas Child Welfare Review Board, Minimum Licensing Standards § 200.3.2 (1999).

The sexual conduct specified in the regulation was prohibited under Arkansas's sodomy law, overturned in *Jegley*:

> A person commits sodomy if such person performs any act of sexual gratification involving: 1) The penetration . . . of the anus or mouth of . . . a person by the penis of a person of the same sex. . . ; or 2) The penetration, however slight, of the vagina or anus of . . . a person by any body member of a person of the same sex. . . .

Ark. Stats. § 5-14-122. Texas's "Homosexual Conduct Law," struck down in *Lawrence*, similarly prohibited "deviate sexual intercourse with another individual of the same sex," the definition of which included "any contact between any part of the genitals of one person and the mouth or anus of another person." Tex. Penal Code §§ 21.06(a) and 21.01(1).

In order to meet the government's eligibility requirement to participate in the important civic and personal role of foster parent to a needy child, the regulation forces gay and lesbian adults to forego engaging with another adult in "the most private human conduct" that can be "but one element in a personal bond that is more enduring." *Lawrence*, 539 U.S. at 567, 123 S. Ct. at 2478. There is no such restriction for heterosexuals, whether married or unmarried. The government thus substantially and directly penalizes gay and lesbian citizens for exercising their fundamental right to form intimate adult relationships. After the Courts' recognition of the constitutional right of gay and lesbian people to enter into important personal relationships and "still retain their dignity as free persons," *id.*, it should be clear that the State cannot penalize gay people for doing so absent a compelling government justification which the regulation is narrowly tailored to meet. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S. Ct. 1322, 1331 (1969); *Jegley*, 349 Ark. at 632, 80 S.W.3d at 350.

No one could seriously pretend that the regulation's blanket prohibition survives strict scrutiny. The court below found after a trial and careful consideration of the credibility of the witnesses and evidence that the foster care regulation is not even rationally related to promoting the health, safety, or welfare of foster children. *See* Addendum ("Add.") 867-70, 874-88. While the decision below should be affirmed on that basis, the Court should make clear that this regulation is subject to more searching scrutiny because of the impingement on appellees' fundamental rights protected under the Arkansas and federal Constitutions. The lower court in *dicta* erroneously suggested otherwise, relying on the Eleventh Circuit's flawed analysis of *Lawrence* in *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004), and utterly

neglecting to apply the independent State constitutional rights identified in *Jegley*. *See* Add. 890-95. *Amici* respectfully submit this brief to explain that, though the regulation cannot survive any level of review, it is subject under both *Jegley* and *Lawrence* to strict scrutiny.

ARGUMENT

The foster care regulation singles out gay men and lesbians and infringes on their fundamental right to liberty and privacy in the personal adult relationships they forge. While leaving the liberties of heterosexuals untrammeled, the regulation burdens the rights of gay and lesbian citizens protected by the State and federal guarantees of due process and equal protection, under which appellees claim in this action. *See* Plaintiffs' First Amended Complaint, Add. 22-25 (asserting State and federal privacy and equal protection claims).

A law burdening individual fundamental rights is subject to strict scrutiny under due process principles and permitted to stand only if the government demonstrates that it is narrowly drawn to further a compelling government interest. *See, e.g., Jegley,* 349 Ark. at 632, 80 S.W.3d at 350 (government regulation challenged under due process guarantee subject to strict scrutiny if it burdens fundamental right). A similar test applies under equal protection principles to laws that deny fundamental rights to members of one group. *See, e.g., Shapiro,* 394 U.S. at 634, 89 S. Ct. at 1331 (applying strict scrutiny in equal protection challenge to government regulation burdening fundamental right to travel). *See also Zablocki v. Redhail*, 434 U.S. 374, 387-88, 98 S. Ct. 673, 681-82 (1978) (heightened scrutiny applied in equal protection challenge to government regulation burdening fundamental right to privacy). Thus whether analyzed under appellees' claims

for violation of the right to privacy or to equal protection, as a matter of both State and federal law the foster care regulation is subject to strict scrutiny.

The government cannot evade its heightened burden solely because there is no independent "fundamental right" to serve as a foster parent, or based on the false claim that the rights of a suspect class are not at issue here. Strict scrutiny is required under appellees' claims for violations both of due process and equal protection for the independent reason that the regulation impinges the fundamental privacy rights of gay and lesbian Arkansans to engage in intimate adult relationships without government regimentation of the details of that intimacy. The government thus bears the heavy burden – which it cannot meet – to demonstrate a compelling government need for the regulation that could not be served by any other means.

I. *Jegley* Affirmed That Gay Men And Lesbians Have A Fundamental Right Under The Arkansas Constitution To Engage In Private Intimate Conduct, Which The Government Can Burden Only Through Regulations Narrowly Tailored To Serve A Compelling Government Interest

The foster care regulation impermissibly invades the zone of privacy shielding gay and lesbian Arkansans under their State Constitution from government interference into their intimate relationships conducted behind closed bedroom doors. The regulation burdens and expresses condemnation of the private sexual activity of gay and lesbian adults by depriving them of the cherished opportunity to be foster parents to needy children, while allowing heterosexuals full freedom to engage in identical sexual conduct and yet still serve this government role. But *Jegley* teaches that the State can no more intrude in the lives of its gay and lesbian citizens in this private realm than it can in the lives of heterosexuals. The lower court erred in disregarding Arkansas's "rich and

compelling tradition of protecting individual privacy" and its State constitutional guarantee of the fundamental right to privacy. *Jegley,* 349 Ark. at 632, 80 S.W.3d at 349-50.

This Court ruled in *Jegley* that the right to privacy implicit in the Arkansas Constitution independently prohibits the State from "restrain[ing] the liberty of those who wish to engage in private, consensual acts of same-sex sodomy," regardless of federal constitutional standards. *Id.* at 635, 80 S.W.3d at 352. This State-guaranteed right "protects *all* private, consensual, noncommercial acts of sexual intimacy between adults." *Id.* at 632, 80 S.W.3d at 350 (emphasis added). The sodomy law – like the foster care regulation under challenge here – "infringes upon the fundamental right to privacy guaranteed to the citizens of Arkansas" because of the "burdens" it imposes on "sexual conduct between members of the same sex." *Id.*

The Court further held that infringements on such a fundamental right are subject to the highest level of judicial scrutiny; they "cannot survive unless 'a compelling state interest is advanced by'" the regulation, and it "'is the least restrictive method available to carry out [the] state interest.'" *Id.*, quoting *Thompson v. Arkansas Soc. Servs.*, 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984). The government's only purported interest in burdening the right of gay men and lesbians to engage in the same private consensual intimacy that heterosexuals may enjoy without penalty – to express moral disapproval of homosexuality – did not serve even "a legitimate public interest," *Jegley,* 349 Ark. at 638, 80 S.W.3d at 353, and could not withstand strict scrutiny review. *Id.* at 632, 80 S.W.3d at 350.

Jegley instructs that government regulation of the private intimacies of gay and lesbian Arkansans through not only criminal but also civil sanctions "burdens" the fundamental right to privacy that is jealously guarded under the State Constitution. The Court understood in *Jegley* that though no Arkansan had ever been prosecuted under the sodomy law for private consensual adult conduct, the prohibition still hung like "a sword of Damocles over the heads" of lesbian and gay citizens of the State, *id.* at 639, 80 S.W.3d at 354 (Brown, J., concurring), purporting to justify precisely the kind of discrimination in the civil sphere that the foster care regulation embodies. These citizens "suffer the brand of criminal impressed upon them by a[n] . . . unconstitutional law." *Id.* at 622, 80 S.W.3d at 343 (majority opinion). *See also id.* at 639, 80 S.W.3d at 354 (Brown, J., concurring) (the unenforced sodomy law harms gay and lesbian Arkansans by "brand[ing]" them "with a scarlet letter"). Citing with disapproval an earlier case holding that homosexuality is a relevant factor for withholding custody of children, the Court specifically acknowledged that the sodomy prohibition's use "outside the criminal context in ways harmful to those who engage in same-sex conduct" was reason for the Court to relieve gay and lesbian Arkansans of its stigma. *Id.* at 621, 80 S.W.3d at 343 (majority opinion), citing *Thigpen v. Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987).

There is no doubt that the foster care regulation under challenge is derivative of the sodomy law and cannot be distinguished in its unconstitutional effects. Indeed, the regulation was cited to the Court in *Jegley* as an application of Arkansas's sodomy law to stigmatize and discriminate against gay men and lesbians. As the *Jegley* record demonstrates, the foster care regulation specifically was enacted in reliance on the

sodomy law's now discredited "brand of criminal." Child Welfare Agency Review Board member Robin Woodruff, the regulation's sponsor, justified the regulation because "Arkansas still has [homosexual] sodomy laws on the books. . . . So based on that law, I believe it's wrong to place our foster children in a homosexual home." Elizabeth McFarland, *Foster-Care Ban Still Sought for Gays But Not Singles,* Ark. Dem.-Gaz., Aug. 26, 1998, at B1, submitted in *Jegley,* No. 01-815, Appellees' Supp. Abstract, Brief and Supp. Addendum filed Oct. 29, 2001, at 61. *See also id.* at xv, 39-40, 60; *Jegley,* Appellants' Supp. Brief and Addendum filed April 23, 2001, at 228-29.

The foster care regulation thus unabashedly leverages the stigma of pre-*Jegley* government condemnation of homosexuality to justify depriving gay and lesbian adults of the State-conferred opportunity to serve as foster parents. As a direct infringement on the fundamental right to privacy, the regulation is subject to the same strict scrutiny that applied in *Jegley*.

II. *Lawrence* Affirmed The Fundamental Federal Constitutional Right Of Gay And Lesbian Adults To Form Intimate Relationships And Requires That The Foster Care Regulation Be Subject To Strict Scrutiny

As *Jegley* did before it, *Lawrence* declared sodomy laws unconstitutional under the Fourteenth Amendment because they violate existing rights protected by the federal substantive due process guarantee. *Lawrence* firmly rejected the use of such laws and the moral condemnation they express to justify government discrimination against gay people in and beyond the criminal sphere. *Lawrence* rejected and overturned the Supreme Court's earlier decision in *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986), which had upheld Georgia's sodomy law as a legitimate penalty expressing moral disapproval of gay and lesbian adults and their intimate relationships. Instead, *Lawrence*

instructs that the recognized fundamental right of adults to form intimate, private associations is shared by gay and lesbian adults. *See, e.g.*, *Lawrence*, 539 U.S. at 567, 123 S. Ct. at 2478. Independent of the strict scrutiny required here under *Jegley*, such scrutiny is likewise required to safeguard appellees' *federal* liberty interest in engaging in private consensual intimacy without undue penalty.

The trial court misread *Lawrence* and relied instead on another court's flawed reading of the Supreme Court precedent. In that case, *Lofton*, 358 F.3d 804, the court of appeals upheld Florida's ban on adoption by gay and lesbian adults. The Eleventh Circuit panel relied on a thin reed to claim that *Lawrence* did not invoke a right of fundamental dimension and that Florida's adoption ban was therefore subject only to rational review. After failing to apply *Lawrence's* central holding that extends an *existing* fundamental right to gay and lesbian people, the federal court then deemed it adequate to uphold the Florida law on what it called an "unprovable assumption[]" that heterosexual couples make better parents than gay people. *Id.* at 819 (quotations omitted). The findings of the trial court below in this case demonstrate that this "assumption" is not just "unprovable" but patently untrue and contrary to any credible evidence. *See* Add. 867-70, 874-88. It does not establish a rational basis for the regulation and certainly cannot satisfy any form of heightened scrutiny. After *Lawrence* a state can no longer discriminate against gay people without providing a far more substantial, weighty, and tailored government justification for infringing on their protected privacy rights.

A. *Lawrence* Holds That The Fundamental Right To Engage In Private Consensual Sexual Conduct Protects Gay And Lesbian Adults

The Supreme Court in *Lawrence* overruled *Bowers* and declared that the Texas sodomy prohibition unconstitutionally infringes the Due Process Clause of the Fourteenth Amendment, which protects the liberty of adults to make decisions regarding private consensual sexual conduct. The Court's analysis unmistakably invoked a long-established protected constitutional right of fundamental dimension, and held that it protects gay and lesbian adults as it does heterosexuals. The *Lofton* decision's interpretation of *Lawrence* as other than an application of the settled fundamental right to liberty in sexual privacy is unfaithful to the text and clear import of the Supreme Court decision. *See also Lofton v. Sec'y of Dept of Children and Family Servs.*, 377 F.3d 1275, 1303-14 (11th Cir. 2004) (Barkett, J., dissenting from denial of reh'g *en banc*) (cogently responding to the *Lofton* panel's misreading of *Lawrence*). *Lofton's* jaundiced view of *Lawrence* is not binding and should not be adopted here.

Throughout its opinion the *Lawrence* Court used sweeping language – applying only to the most fundamental of liberty interests – to describe the constitutional right at stake. From its opening paragraph, the Court emphasized that the case "involves liberty of the person both in its spatial and more transcendent dimensions." *Lawrence*, 539 U.S. at 562, 123 S. Ct. at 2475. The Court recognized a "due process right to demand respect for conduct protected by the substantive guarantee of liberty," *id.* at 575, 123 S. Ct. at 2482. This is a "*full* right," to be engaged in "without intervention of the government," part of "a realm of personal liberty which the government may not enter," *id.* at 578, 123 S. Ct. at 2484 (emphasis added) (quotations omitted). The government "cannot demean" gay and lesbian people or "control their destiny by making their private sexual conduct a

crime." *Id.* at 578, 123 S. Ct. at 2484. Indeed, this right is "an integral part of human freedom." *Id.* at 577, 123 S. Ct. at 2483.

Disregarding what the *Lawrence* majority actually *said* and *held*, *Lofton* presumed that, had the Supreme Court intended to invoke a right of fundamental dimension, it would have followed the steps often taken when the Court identifies a new fundamental right by asking whether the right is deeply rooted in history and providing a "careful description" of it. *See Lofton*, 358 F.3d at 816-17. But the Supreme Court was simply applying a *well-established* fundamental right, not identifying a *new* one, and so had no need to apply that analysis.

Moreover, *Lofton* also disregarded the use of current as well as past history and tradition in *Lawrence* and other cases. Just as there is no long history and tradition of criminalizing the sexual intimacy of gay people specifically, *Lawrence*, 539 U.S. at 567-73, 123 S. Ct. at 2478-81, so too is there no history and tradition of penalizing that intimacy through laws and regulations regarding foster parenting.

The Court expressly invoked its earlier jurisprudence identifying a fundamental substantive due process right of privacy and autonomy in intimate matters and relationships and explicitly grounded its holding in *that* fundamental right. The Court directed that "the most pertinent beginning point" was its decision in *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965), invalidating a law against contraception because it violated the "right to privacy" of married couples. *Lawrence*, 539 U.S. at 564, 123 S. Ct. at 2476. The *Lawrence* Court explained that decisions following *Griswold*, including *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1972), *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973), and *Carey v. Population Servs. Int'l*,

431 U.S. 678, 97 S. Ct. 2010 (1977), made clear that this right to privacy applies beyond married couples, to encompass the "right . . . to make certain fundamental decisions affecting [an individual's] destiny," regardless of marital status or other factors. *Lawrence,* 539 U.S. at 565, 123 S. Ct. at 2477. *See also id.* (*Roe* "confirmed once more" that the "liberty" protected by the Due Process Clause "has a substantive dimension of *fundamental* significance in defining the rights of the person"); *id.* (describing the privacy right at issue in *Eisenstadt* as a "*fundamental*" human right) (emphasis added). The Court also quoted at length from its decision in *Planned Parenthood of Se. Pennsylvania v. Casey,* which had emphasized that "matters [] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." 505 U.S. 833, 851, 112 S. Ct. 2791, 2807 (1992). *See Lawrence,* 539 U.S. at 574, 123 S. Ct. at 2481. The language the Court used to describe these cases – on which it explicitly based its holding – demonstrates that it was applying a pre-existing and fundamental right. Indeed, this analysis would have been entirely superfluous had *Lawrence* been invoking a right of less than "fundamental significance."

The Court explicitly adopted as controlling Justice Stevens' analysis in his dissent in *Bowers, id.* at 577-78, 123 S.Ct. at 2483-84, which also was squarely based on the *Griswold/Carey* line of fundamental rights cases. There Justice Stevens wrote:

> In consideration of claims of this kind, the Court has emphasized the individual interest in privacy, but its decisions have actually been animated *by an even more fundamental concern*. . . . The Court has referred to such decisions [affecting an individual's "destiny"] as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition.

Bowers, 478 U.S. at 217, 106 S.Ct. at 2857-58 (Stevens, J., dissenting) (emphasis added) (quotations omitted).

The Court's intention to bring the private intimacy of gay men and lesbians under the established cloak of the fundamental right to privacy is further demonstrated by *Lawrence's* explicit rejection of *Bowers'* narrow and condemning description of the right at stake. *Bowers* had framed the issue as whether there is a "fundamental right . . . [of] homosexuals to engage in sodomy." *Lawrence,* 539 U.S. at 566, 123 S. Ct. at 2478. The *Lawrence* Court rebuked the *Bowers* majority for "[h]aving misapprehended the claim of liberty there presented to it." *Id.* at 567, 123 S. Ct. at 2478. That framing, the Court said in *Lawrence,* reflects a "failure to appreciate the extent of the liberty at stake," *id.*, which led to *Bowers'* application of a rational basis test. *Lofton* repeated *Bowers'* error. The Court meant in *Lawrence* not that "the liberty at stake" was *less* than "fundamental," but rather that *Bowers* had *understated* its basic character as a fundamental right, held by all, to make intimate personal choices. *Id.* at 567, 123 S. Ct. at 2478.

Lofton compounded its misreading of *Lawrence* by insisting that *Lawrence* applied only a deferential rational basis review, not the scrutiny required for deprivation of a fundamental liberty interest. This strained reading rests on a single line in *Lawrence*, to which the federal court attached undue significance. But the Supreme Court's statement that the Texas law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," is not an endorsement of a rational basis test, as the *Lofton* court reasoned, and indeed *conflicts* with rational basis standards. *Id.* at 578, 123 S. Ct. at 2484. *See also Lofton*, 358 F.3d at 817.

The Court in *Lawrence* rejected the purported purpose of the sodomy ban – the desire to "condemn homosexual conduct as immoral," 539 U.S. at 571, 123 S. Ct. at 2480 – as not even a "legitimate" state interest. *Id.* at 578, 123 S. Ct. at 2484. The Court's reliance on the black letter constitutional requirement that a government purpose be at least "legitimate" was not some talisman converting *Lawrence* from a fundamental rights case into one where only rational review was required. Rather, that term is relevant to *all* levels of review under the Fourteenth Amendment: *any* government action, regardless of the level of scrutiny that applies, must at minimum be "legitimate." *See, e.g., Roe*, 410 U.S. at 155, 93 S. Ct. at 728 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the *legitimate* state interests at stake.") (emphasis added); *see also Weber v. Aetna*, 406 U.S. 164, 173, 92 S. Ct. 1400, 1405 (1972) ("The essential inquiry in all [equal protection] cases is . . . a dual one: What *legitimate* state interest does the classification promote? What *fundamental personal rights* might the classification endanger?") (emphasis added); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228, 115 S. Ct. 2097, 2113 (1995) ("The point of carefully examining the interest asserted by the government in support of a racial classification . . . is precisely to distinguish *legitimate* from *illegitimate* uses of race in governmental decisionmaking.") (emphasis added).

Further, the statement in *Lawrence* that Texas had not demonstrated a "legitimate state interest which can *justify its intrusion* into the personal and private life of the individual," *Lawrence*, 539 U.S. at 578, 123 S. Ct. at 2484 (emphasis added) – is *inconsistent* with application of a rational basis test. Standard rational basis analysis is

not concerned with the "intrusiveness" of a law into the personal and private life of the individual but only with whether the law is "rationally related to a legitimate government interest." *See, e.g., City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440, 105 S. Ct. 3249, 3254. The *balancing* of the state's interest against the individual's interest, on the other hand, is a hallmark of heightened scrutiny. *See, e.g., Cruzan v. Director, Mo. Dep't of Health,* 497 U.S. 261, 279, 110 S. Ct. 2841, 2851-52 (1990) ("[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether [the individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'") (citations omitted).

Nor does the fact that the Court did not expressly say it was applying strict or heightened scrutiny mean that it was applying rational review instead. *See United States v. Extreme Assocs., Inc.,* No. 05-1555, 2005 WL 3312634 *7 (3d Cir. Dec. 8, 2005) (that Supreme Court's analysis in right to privacy jurisprudence did not use "constitutional brand name does not negate its precedential value"); *United States v. Marcum,* 60 M.J. 198, 205 (C.A.A.F. 2004) ("What *Lawrence* requires is searching constitutional inquiry."). In many important decisions prior to *Lawrence* striking down laws burdening fundamental rights the Court has used other than "strict scrutiny" terminology while requiring the government still to demonstrate a very weighty state interest justifying the intrusion on the right. The particular scrutiny applied has depended on State and third party interests also at stake, if any. *See, e.g., Casey,* 505 U.S. at 874-75, 112 S. Ct. at 2819 (1992) (analyzing abortion restrictions for whether they placed "undue burden" on women's fundamental rights); *Cruzan*, 497 U.S. at 279, 110 S. Ct. at 2851-52 (balancing

patient's right to refuse medical treatment against state's interest); *Zablocki*, 434 U.S. at 388, 98 S. Ct. at 682 (government had burden to show that restriction on obtaining a marriage license for failure to pay child support was justified by "sufficiently important state interests" and "closely tailored to effectuate only those interests"). *See also Linder v. Linder*, 348 Ark. 322, 348, 72 S.W.3d 841, 855 (2002).

Finally, in *Lawrence*, as in *Jegley*, the state already had conceded that the statute was indefensible under stricter tests, and so there was no need for it to do a fuller analysis. *See* Brief of Petitioner, *Lawrence*, No. 02-102, 2003 WL 152352 *4, 26.

Lawrence, read with the fidelity due a U.S. Supreme Court precedent, must be understood as expressing the fundamental right of gay and lesbian citizens to choose to engage in private intimate conduct, government intrusions on which must be subject to strict scrutiny.

B. *Lawrence* Does Not Permit The Government To Discriminate On The Basis Of Private Sexual Intimacy In Criminal Laws *Or* Civil Matters

The *Lawrence* Court made clear that in overruling *Bowers* it was doing more than decriminalizing an act – it was affirming the right of gay people to form and sustain loving personal relationships and lead their private lives free of government restriction and legal condemnation. The Court declared that gay people "are entitled to respect for their private lives." *Lawrence*, 539 U.S. at 578, 123 S. Ct. at 2484. It recognized that government may not "seek to control a personal relationship that . . . is within the liberty of persons to choose," in which intimate sexuality may be "but one element in a personal bond that is more enduring." *Id.* at 567, 123 S. Ct. at 2478. The decision's application beyond the criminal context – and to the regulation before this Court – was made plain.

Indeed, concern about discrimination in civil as well as criminal contexts is in part what drove the majority to analyze the law under the due process guarantee and not the equal protection clause. The Court explained it was doing so because if the sodomy law "remain[ed] unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." *Id.* at 575, 123 S. Ct. at 2482. The Court sought to prevent states from doing exactly what the Arkansas foster care board is attempting to do here – to discriminate against gay and lesbian people in the civil realm because of their private sexual lives and relationships.

> When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case. . . . Its continuance as precedent demeans the lives of homosexual persons.

Id.

Likewise, echoing this Court's words in *Jegley*, Justice O'Connor observed in her concurrence on equal protection grounds that sodomy laws "brand[] all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else." *Id.* at 581, 123 S. Ct. at 2486 (O'Connor, J., concurring). She noted that these laws had been abused to "legally sanction[] discrimination" against gay people "in a variety of ways unrelated to the criminal law, including in the areas of employment, family issues, and housing." *Id.* at 582, 123 S. Ct. at 2486. (O'Connor, J., concurring) (quotations omitted).

After *Lawrence* the states are forbidden not only to criminalize the sexual intimacies of gay people, but also to leverage the stigma of this government condemnation to justify restrictions in other spheres of their lives. In a ringing

renunciation of *Bowers* and the legacy of discrimination it had sanctioned, the Court declared that "*Bowers* was not correct when it was decided, and it is not correct today." *Id.* at 578, 123 S. Ct. at 2484 (majority opinion). *Lawrence* thus made clear that ongoing applications of sodomy laws in the civil context – as in the 1999 foster care regulation – to discriminate against gay people are unconstitutional as well.

III. The Foster Care Regulation Is Subject To Strict Scrutiny Because It Directly And Significantly Burdens Exercise Of The Fundamental State And Federal Rights Identified In *Jegley* And *Lawrence*

The foster care regulation's substantial and direct burden on the fundamental rights of gay and lesbian people to engage in private intimate conduct could not be more evident. Heterosexuals seeking to be foster parents, whether married or single, are not asked what sexual acts they perform in private, yet the State brazenly pries into the bedroom intimacies of gay and lesbian Arkansans. The regulation draws a stark classification excluding from service as foster parents those who engage in the very physical intimacy declared to be constitutionally protected under *Jegley* and *Lawrence*. Gay and lesbian Arkansans who seek to be foster parents are given the cruel and demeaning choice between being branded by their government as unworthy to serve this vitally important State and personal role, or sacrificing the intimate adult relationships that are "an integral part of human freedom." *Id.* at 577, 123 S. Ct. at 2483.

When the government directly burdens a fundamental right of the dimension affirmed in *Jegley* and *Lawrence*, the regulation can stand only if "narrowly drawn" to achieve a "compelling state interest." *Roe*, 410 U.S. at 155, 93 S. Ct. at 728; *see also Speiser v. Randall*, 357 U.S. 513, 528-29, 78 S. Ct. 1332, 1343-44 (1958). "[A]ny classification which serves to penalize the exercise of [a fundamental] right, unless

shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Shapiro*, 394 U.S. at 634, 89 S. Ct. at 1331. Lesser forms of heightened scrutiny apply only where the State or third parties have very significant countervailing interests at stake with which exercise of the right demonstrably and substantially conflicts. *See, e.g., Linder*, 348 Ark. at 348, 72 S.W.3d at 855. That is not the case here.

Strict scrutiny is required not only of criminal prohibitions on the protected activity, as in *Jegley* and *Lawrence*, but also when a *civil* regulation directly and substantially burdens a fundamental right. *See, e.g., Shapiro*, 394 U.S. 618, 89 S. Ct. 1322*; Speiser*, 357 U.S. 513, 78 S. Ct. 1332 (applying strict scrutiny to strike down state law entitling veterans to property tax exemption only if they took a loyalty oath); *Linder*, 348 Ark. at 348, 72 S.W.3d at 855 (applying strict scrutiny to grandparent visitation requirement burdening parent's fundamental right to raise her child).

Moreover, it applies when the state entirely conditions a government benefit or privilege, to which one has no independent constitutional claim, on foregoing exercise of a fundamental right. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 374, 91 S. Ct. 1848, 1853 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"); *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S. Ct. 1790, 1795 (1963) ("[C]onstruction of the statute [cannot] be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

Shapiro v. Thompson, for example, applied strict scrutiny to a one-year residency requirement for eligibility for welfare benefits because the policy burdened a protected constitutional interest – the right to interstate travel. *Shapiro*, 394 U.S. at 629-30, 89 S. Ct. at 1329. The residency requirement neither imposed a criminal penalty nor barred anyone from moving into a state, just as the foster care regulation here is neither a criminal law nor an absolute prohibition on sodomy between same-sex partners. Further, as the Supreme Court recognized, the public assistance benefits at issue in *Shapiro* were "a 'privilege' and not a 'right,'" *id.*, at 627 n.6, 89 S. Ct. at 1327 n.6, just as there is no constitutional right in itself to serve as a foster parent. The Court concluded nonetheless that because "the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest," a standard it failed to meet. *Id.* at 638, 89 S. Ct. at 1333. *See also Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 263, 94 S. Ct. 1076, 1085 (1974) (state residency requirement to receive non-emergency public medical care "penalizes" exercise of right to travel and would be subjected to strict scrutiny); *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S. Ct. 1790, 1794 (1963) (strict scrutiny applied to unemployment compensation benefit requirement that "forces [the employee] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."); *Guaranteed Auto Finance, Inc. v. Dir., ESD*, No. E 04-377, 2005 WL 2235444 (Ark. Ct. App. Sept. 14, 2005) (denial of unemployment benefits to employee who quit job because he was required to work on his religious Sabbath was unconstitutional burden on his fundamental rights).

This is not to say that all classifications that touch on fundamental rights are subject to strict scrutiny. *Cf. Lyng v. Castillo*, 477 U.S. 635, 639, 106 S. Ct. 2727, 2729-30 (1986) (food stamp program designed to encourage households to purchase and prepare meals as single economic units had little effect on exercise of fundamental rights and was not subject to strict scrutiny). But where the government act impacts the fundamental right directly (as opposed to only incidentally), or when the activity affected is a significant (as opposed to trivial) part of life, Supreme Court precedent teaches that strict scrutiny is required.

The foster care regulation at issue here is no mere tangential, incidental burden on appellees' fundamental rights. It imposes a direct and substantial penalty on their liberty to choose to enter into an intimate adult relationship. Appellees face a coercive Hobson's choice between exercising a fundamental right on the one hand and eligibility to serve as a foster parent to needy children on the other. The government may not channel its gay and lesbian citizens' sexual lives in such a manner without showing a compelling government need that cannot be achieved through any less harsh means.

IV. The Regulation Fails Strict And Heightened Scrutiny

The foster care regulation is a blanket prohibition that effectively bars gay and lesbian Arkansans from serving as foster parents no matter how qualified they are to provide a nurturing home. It neither serves a compelling or even substantial government interest nor is properly tailored to further such a government end.

The court below concluded on the basis of an extensive fact-finding hearing that "[t]he testimony and evidence overwhelmingly showed that there was no rational relationship between [the regulation's] blanket exclusion and the health, safety, and

welfare of the foster children." Add. 888. The court rejected as flatly unsupported by the evidence the Board's speculative contentions that gay and lesbian parents are in anyway deficient as compared to heterosexual parents, pose any risks to the children they raise, or make anything but fit and able foster parents. *See, e.g.*, Add. 867-69, 874-88.

Further, after *Jegley* and *Lawrence*, the State cannot assert that it has a compelling need to express moral disapproval of homosexuality; that desire is not "a legitimate public interest" under any standard. *Jegley*, 349 Ark. at 638, 80 S.W.3d at 353. As this Court held in *Jegley*, the State "cannot act, under the cloak of police power or public morality, arbitrarily to invade personal liberties of the individual citizen." *Id.* In the words of concurring Justice Brown, "[P]ronouncing moral judgments for bedroom behavior . . . of this class of citizens . . . amounts to little more than a government morality fixed by a majority . . . . That flies in the face of the basic constitutional rights of independence, freedom, happiness, and security." *Id.* at 641, 80 S.W.3d at 355.

The *Lawrence* Court likewise held that there can be "no legitimate state interest" in the desire to "condemn homosexual conduct as immoral." 539 U.S. at 571, 578, 123 S. Ct. at 2480, 2484. The Court acknowledged the "profound and deep convictions" some hold against homosexuality "shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Id.* at 571, 123 S. Ct. at 2480. Yet the Court concluded that "the power of the State" may not be used to "enforce these views on the whole society." *Id.* The courts must "define the liberty of all, not . . . mandate our own moral code." *Id.* (quotations omitted). *See also id.* at 582, 123 S. Ct. at 2486 ("we have never held that moral disapproval, without any other asserted state

interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.) (O'Connor, J., concurring).

Further, the Court held that the broad "right to liberty under the Due Process Clause gives [gay and lesbian persons] the full right to engage in their conduct without intervention of the government." *Id.* at 578, 123 S. Ct. at 2484. "This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship *or to set its boundaries absent injury to a person* or abuse of an institution the law protects." *Id.* at 567, 123 S. Ct. at 2478 (emphasis added). The Court thus instructed that absent evidence that a gay person's intimate relationship actually harms anyone – which as the trial court conclusively found is not the circumstance here – the government has no basis to restrict or intrude upon it.

The legitimate concerns the State has in not placing foster children in homes with any particular adults – heterosexual or gay – is addressed by the case-by-case evaluation and screening processes already mandated in the State for licensing and monitoring foster parents. *See* Add. 728, 740-41, 750-51, 866-67, 869-70. The regulation's wholesale exclusion of gay and lesbian adults imposes an unconstitutional and undeserved brand on these citizens that is intolerable in a free society. It is impossible to reconcile the conclusion that many gay and lesbian people parent well with any purported need for a regulation that makes a sweeping judgment condemning gay men and lesbians as invariably unsuited to be foster parents. The regulation's blanket ban, resting on condemnation of protected private conduct, cannot survive any level of scrutiny, much less the strict scrutiny to which it must be subject.

CONCLUSION

For the foregoing reasons, *amici* respectfully assert that the foster care regulation invades a fundamental right and is subject to strict scrutiny, which it does not survive. Accordingly, the judgment of the court below striking down the regulation should be affirmed.

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CERTIFICATE OF SERVICE

I, Gary L. Sullivan, certify that on December _____, 2005, I caused the above and foregoing **Brief *Amici Curiae* of Lambda Legal Defense and Education Fund, Inc., *et al.*, In Support of Appellees** to be served by U.S. mail, postage pre-paid, on the following persons at the addresses indicated:

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