NO. 05-814

BEFORE THE ARKANSAS SUPREME COURT

DEPARTMENT OF HUMAN SERVICES
CHILD WELFARE AGENCY REVIEW BOARD — APPELLANT

v.

MATTHEW LEE HOWARD
CRAIG STOOPES
ANNE SHELLEY — APPELLEES

On Appeal From The Circuit Court of Pulaski County

The Honorable Timothy Davis Fox, Presiding Judge

BRIEF OF AMICI CURIAE

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INTERESTS OF AMICI

Amici are leaders of faith-based communities and professors of law in Arkansas. This brief is submitted to assist the Court's deliberations by offering an analysis of the problems associated with morals-based justifications for unequal treatment by the government . While we support the respondents' broader arguments, we focus this brief specifically on the particular risks raised by the trial court's embrace of a public morals rationale because of the special harms that flow from that determination. Our names, institutional affiliations, and brief biographies are set out in the Motion for Leave to File Brief of Amici Curiae filed at the time of tender of this brief.

SUMMARY OF THE ARGUMENT

The trial court's flawed embrace of public morals as a stand-alone justification for government action that discriminates against a group of people presents serious problems for the State's courts and the State itself. Most obviously, it conflicts directly with recent determinations by this Court and the United States Supreme Court that morals rationales cannot justify singling out groups of people for disadvantage. See Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002); Lawrence v. Texas, 539 U.S. 558 (2003). Perhaps even more dangerously, it threatens the rights of all minorities by suggesting that impermissible interests, such as hostility or dislike, can satisfy constitutional review if they are cloaked in the mantle of morality. Moreover, the embrace of morals-based rationales threatens judicial legitimacy by forcing courts to evaluate and choose among conflicting moral views.

ARGUMENT

I. This Court And The U.S. Supreme Court Have Already Held That "Public Morality" Alone Is Insufficient To Justify Government Action That Singles Out And Burdens Groups Of People.

The ruling of the court below that "public morality" – in particular, moral disapproval of homosexuality – constitutes a "stand alone legitimate state interest" to justify disparate treatment of gay people, Howard v. Child Welfare Agency Review Bd., Addendum to State's Brief ("St. Br. Add.") at 895, both ignores and defies the rejection of this justification by this Court and the United States Supreme Court. See Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002), Lawrence v. Texas, 539 U.S. 558 (2003). If left standing, the trial court's holding risks creating a loophole for invidious discrimination against unpopular minorities by the government.

A. The Trial Court's Embrace Of Morals Rationales Directly Contradicts Jegley v. Picado And Lawrence v. Texas.

This is the unusual case in which a lower court has staked out a position that directly contradicts settled doctrine. The court held that despite the absence of any child welfare rationale, "public morality" provides an independent, legitimate justification for having different rules for foster parent applicants who have gay household members and those who don't.[1] Yet as this Court and the U.S. Supreme Court have made clear, moral disapproval of

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[1] The Regulation at issue in this case ("the Regulation"), Section 200.3.2 of the Minimum Licensing Standards for Child Welfare Agencies, provides:

homosexuality does not constitute a legitimate basis on which government can distinguish between groups of constituents.

In Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002), the Court considered whether Arkansas' sodomy statute, which distinguished between gay and non-gay adults much like the foster care regulation here, could be justified as an exercise of the traditional police power over public morals. The rejection of this argument could not have been more forthright: "[T]he police power may not be used to enforce a majority morality on persons whose conduct does not harm others." Id. at 637, 80 S.W.3d at 353 (2002).

The Court acknowledged, of course, that the State has full authority to respond to actual harms. See id. ("[T]he State has a clear and proper role to protect the public from offensive displays of sexual behavior, to protect people from forcible sexual contact, and to protect minors from sexual abuse by adults."). No such harm had been identified in connection with the consensual sexual intimacy of gay and lesbian adults, however. "There is no contention that same-sex sodomy implicates the public health or welfare, the efficient administration of government, the economy, the citizenry, or the promotion of the family unit." Id. Consequently, the Court concluded, the State could not impose different rules of

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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.

conduct on its citizens "under the cloak of police power or public morality." Id. Embracing a similar ruling by the Kentucky Supreme Court, this Court could "'attribute no legislative purpose to [the sodomy] statute except to single out homosexuals for different treatment.'" Id. (quoting Commonwealth v. Wasson, 842 S.W.2d 487, 499 (Ky. 1992)).

In the case at bar, there has been, likewise, no finding that the challenged Regulation serves state interests in protecting against harm. To the contrary, the court determined that the Regulation "not only doesn't promote the health, safety, and welfare of minor children, it may actually run contrary to furthering such state interests." Howard, St. Br. Add. at 892. Thus, the police power over public health and welfare is not at issue here.

With this Court's guidance that public morals rationales are inadequate in the absence of public health or welfare concerns, this should have been the proverbial easy case. Yet the court below inexplicably insisted that the State could rely on public morality alone to distinguish between its gay and non-gay constituents. The trial court did not identify the nature of the moral concerns it believed might justify the Regulation. See Howard, St. Br. Add. at 893 ("[T]here is no need for this court to make a decision by judicial fiat as to what the public policy is with respect to 'public morality' in this area."). But however those moral interests might be characterized, this Court has made clear that the desire to express and impose majoritarian morality does not supply a stand-alone justification for legislation that disadvantages a particular group. See supra.

In holding that the police power does not grant governments license to impose majoritarian morality, this Court did not limit its analysis to moral disapproval as a rationale in the criminal law context. Instead, the Court in Jegley affirmed that public morality does not

provide the "real or substantial relationship to the protection of public health, safety and welfare" that is required to insure against arbitrary invasions of rights. Jegley, 349 Ark. at 637, 80 S.W.2d at 353.

U.S. Supreme Court jurisprudence reinforces the seriousness of the error of the court below in finding that public morality might justify the State's singling out of foster care applicants who have gay household members for special burdens. See Lawrence v. Texas, 539 U.S. 558 (2003). Like Jegley, Lawrence addressed a sodomy statute that criminalized sexual intimacy between consenting adults of the same sex but left different-sex couples free to engage in precisely the same conduct. See id., 539 U.S. at 563. As in Jegley, too, the State of Texas sought to justify its Homosexual Conduct Law by relying on majoritarian moral disapproval of homosexuality. See id. at 582 (O'Connor, J., concurring) ("Texas attempts to justify its law, and the effects of the law" based on "the legitimate government interest of the promotion of morality."). And, as this Court anticipated in its ruling in Jegley, "public morality" did not suffice to justify the different treatment. "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." Lawrence, 539 U.S. at 577 (internal punctuation and citation omitted).

In her concurrence, Justice O'Connor also pointedly condemned the public morality rationale as a justification for measures such as the Regulation at issue here. "Moral disapproval of [lesbians and gay men], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause," she wrote. Id. at 582 (O'Connor, J., concurring).

B. The United States Supreme Court Has Never Upheld A Law That Disadvantages A Group Of People On Public Morals Grounds And Avoids Endorsing Public Morals Rationales Altogether.

The Supreme Court has never upheld a law – either civil or criminal – that disadvantaged a class of people on public morals grounds, other than in Bowers v. Hardwick, 478 U.S. 186 (1986), overruled by Lawrence v. Texas, 569 U.S. 558 (2003), the Court not only overruled in Lawrence but also declared was "not correct when it was decided." Lawrence, 539 U.S. at 578.

The Court's other decisions that implicate morals-based rationales are not equal protection cases. They involve measures that do not select among populations for the burdens they impose. Virginia v. Black, 538 U.S. 343 (2003), for example, was cited by the trial court for the proposition that a law can serve "a legitimate social interest in morality." Howard, St. Br. Add. at 888. But Black, like R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), also referenced in Howard, St. Br. Add. at 888, concerned a cross-burning statute applicable to all. And Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), which is quoted in both Black and R.A.V. regarding "the social interest in order and morality," did not concern a law that targeted a particular group of people. It involved, instead, the application of a statute barring "the addressing of any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, or calling him by any offensive or derisive name" to a man who had cursed at a police officer. Id. at 572, 569.

The sexuality-related regulations sustained by the Court likewise have not singled out groups for their burdens. For example, Barnes v. Glen Theatre, 501 U.S. 560 (1991), also cited in Howard, St. Br. Add. at St. Br. Add. at 894 n.2, for the proposition that "'a

substantial government interest [exists] in protecting societal order and morality,'" id. (quoting Barnes, 501 U.S. at 569 (plurality op.)), involved a universally applicable ban on nudity that was challenged on First Amendment grounds.

Moreover, even in these types of cases that involve generally applicable laws rather than measures that single out groups for disadvantage, the Court has moved steadily away from rhetorical support for morals rationales, let alone reliance on those rationales to justify government action. See generally Suzanne B. Goldberg, Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas, 88 Minn. L. Rev. 1233 (2004). Indeed, since the mid-twentieth century, the Court has *never* relied exclusively on a morals-based justification in a majority opinion that is still good law. Id.

The language of Black, R.A.V., and Chaplinsky, on which the trial court relied, reflects this reluctance to rely exclusively on morals. In these cases, the Court did not provide a stand-alone endorsement of morals-based lawmaking but instead affirmed a joint interest in morals *and* societal order. This interest in societal order, which the Court treated as separate from government's morals rationale, encompasses other aspects of the state's police power, such as protection of public health and safety. See also City of Erie v. Pap's A.M, 529 U.S. 277 (2000) (sustaining a public nudity law's application to a sex-related business on public health and safety grounds rather than for morals-based reasons).

In short, as Justice O'Connor wrote in her Lawrence concurrence, "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." Lawrence, 539 U.S. at 582 (O'Connor, J., concurring).

This is thus the rare case in which past precedent could not be more on point: moral disapproval of a group of people – and of lesbians and gay men in particular –does not provide a legitimate justification for discriminatory treatment by the government.

II. Judicial Deference To Majoritarian Moral Sentiment In Equal Protection Analysis Interferes With Meaningful Review And Puts The Rights Of Minorities At Heightened Risk Of Infringement.

This Court and the U.S. Supreme Court have refused to rely on public morals justifications for discriminatory laws for two good reasons: 1) these justifications fail to provide a meaningful explanation for differentiating between groups; and 2) judicial deference to popular moral views impedes the review necessary to insure that moral disapproval is not merely a cover for impermissible hostility toward targeted groups of people.

A. Morals-Based Rationales Cannot *Explain* The State's Disadvantaging Of A Group Of People As Equal Protection Law Requires.

The purpose of the equal protection guarantee is to insure that government's power is not misused to discriminate against minorities. As this Court has explained, "The guarantee of equal protection serves to "[protect] minorities from discriminatory treatment at the hands of the majority. Its purpose is not to protect traditional values and practices, but to *call into question* such values and practices when they operate to burden disadvantaged minorities . . . ." Jegley, 349 Ark. at 633, 90 S.W.3d at 351 (internal quotations and citation omitted) (emphasis in original). The U.S. Supreme Court has similarly observed that equal protection review aims to "ensure that classifications are not drawn for the purpose of" harming the disadvantaged group. Romer v. Evans, 517 U.S. 620, 633 (1996).

The rational basis test thus requires that all official classifications serve a legitimate, "independent" government interest. Romer, 517 U.S. at 633. Simply put, a rationale for

government action that disadvantages a group of people must *explain why* the government selected the targeted group for disadvantage rather than merely describe or restate that distinction. See, e.g., id., 517 U.S. at 631 ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.").

Moral disapproval does not suffice for this purpose. As Justice O'Connor explained in Lawrence, "moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" Lawrence, 539 U.S. at 583 (O'Connor, J., concurring) (quoting Romer, 517 U.S. at 633).

In other words, one problem with the moral disapproval argument is that it is circular – government expresses its disapproval of a group by imposing a legal burden on group members. The public morals justification seeks to treat the state's expression of disapproval as justification for that disapproval. As Justice O'Connor wrote in connection with Texas's Homosexual Conduct Law, this is description, not explanation. "Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy." Id. (O'Connor, J., concurring).

B. Morals-Based Rationales Impede Meaningful Judicial Review By Concealing Impermissible Hostility Toward Minorities.

An additional problem with morals rationales is that deference to majoritarian moral sentiment compromises the judicial review necessary to insure against the majority's misuse of morality as a benign cover for arbitrary or invidious aims. Minorities who are the targets of popular hostility and disapproval are particularly at risk of having their rights infringed in this

way if morals-based rationales are permitted to justify government action that burdens select groups of people.

Consider, for example, the federal legislation that barred households containing unrelated individuals from receiving food stamps. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973). While the measure had majoritarian support, the Court did not rely on that support to end its analysis. Instead, it looked past the assertions of benign-sounding government interests in preventing fraud, improving nutrition and stimulating the agricultural economy to find that the measure's purpose was actually "to discriminate against hippies." Id. (internal punctuation and citation omitted). As the Court explained in striking down the law, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id.

Yet the trial court's ruling below suggests that had that "bare desire to harm" been recast in terms of moral disapproval of hippies, it could survive today, contrary to the Supreme Court's clear holding. Judicial deference to the majority's moral impulses, in other words, has the effect of shielding impermissible purposes from meaningful judicial review.

The Supreme Court has emphasized further that majoritarian preferences may not be taken to insulate government action from judicial review. In City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985), for example, the Court wrote that "[i]t is plain that the electorate as a whole . . . could not order city action violative of the Equal Protection Clause and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." See also Lucas v. Forty-Fourth General

Assembly, 377 U.S. 713, 736-37 (1964) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be."). Expression of majoritarian preferences in moral terms does not alter this clear command. Jegley at 637, 80 S.W.3d at 353 (2002) (rejecting government's use of the police power to impose "a majority morality").

III. Judicial Legitimacy Is Threatened When Courts Are Required To Evaluate And Choose Among Moral Views.

The trial court's endorsement of public morals as a sufficient justification for government discrimination not only compromises meaningful equal protection review but also threatens judicial legitimacy by forcing courts to choose among the relative merits of purely moral views.

In this case, the Regulation at issue reflected the moral commitments and perceptions of the Child Welfare Agency Review Board. See Howard, Def. Br. Add. At 888 ("What the defendant Board was attempting to do was to legislate public morality."). Yet there are many views of public morality regarding lesbians and gay men in Arkansas and throughout the country that conflict directly with those reflected by the Board's Regulation.

This diversity of moral views can be seen in the statements of prominent religious communities. While some religious bodies have expressed strong disapproval of homosexuality, numerous others have publicly embraced equality and respect for all without regard to sexual orientation, highlighting the strong differences of moral judgment that exist on this issue. For example, in 1988, the United Methodist Church, with more than 8 million members, "insist[ed] that all persons, regardless of . . . sexual orientation are entitled to have

their human and civil rights ensured." United Methodist Church, "Social Principles" (1988), reprinted in The Churches Speak On: Homosexuality 242. (J. Gordon Melton ed., 1991). In 1976, the General Convention of the Episcopal Church (the Church's highest policy-making body), representing more than two million members, expressed "its conviction that homosexual persons are entitled to equal protection of the laws with all other citizens, and call[ed] upon our society to see that such protection is provided in actuality." Episcopal Church, General Convention, "Statement on Homosexuality," Resolution A-71 (1976), *available at* www.episcopalarchives.org/cgbin/acts_new/acts_resolution=1976-A071.

The National Council of the Churches of Christ, an ecumenical organization of Christian faiths that comprises 36 Protestant, Anglican, and Orthodox member denominations with more than 50 million members, similarly opposes discrimination based upon "affectional or sexual preference" and has declared that "as a child of God, every person is endowed with worth and dignity that human judgment cannot set aside. Therefore, every person is entitled to equal treatment under the law." National Council of the Churches of Christ, "Resolution on Civil Rights Without Discrimination as to Affectional or Sexual Preference" (1975). The Reform Jewish Movement, for example, which is the largest Jewish movement in North America with more than 900 congregations and 1.5 million members, likewise resolved in 1977 "to support and defend the civil and human rights of homosexuals." See Resolution (Support for Inclusion of Gay and Lesbian Jews), available at http://www.urj.org/Articles/index.cfm/id=7336&pge_prg_id=29601&pge_id=4590. In short, there is no definitive statewide or national moral code regarding homosexuality. Consequently, there is no way for courts to legitimately choose among the range of conflicting

purely moral views. This makes is impossible for them to meet their obligation to provide reasons for their decisions and, in turn, threatens judicial legitimacy.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court affirm the judgment below and reverse the trial court's determination that public morality suffices as an independent, legitimate basis for government action.

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