**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI**
**AT KANSAS CITY**

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| LISA JOHNSTON,<br><br>Petitioner,<br><br>v.<br><br>MISSOURI DEPARTMENT OF SOCIAL SERVICES, CHILDREN'S DIVISION, and FRED SIMMENS, in his official capacity as Director, Missouri Department of Social Services, Children's Division,<br><br>Respondents. | ) | Case No. 0516-CV09517<br><br>Division No. 1 |

**PETITONER'S MOTION FOR SUMMARY JUDGMENT**

Petitioner Lisa Johnston respectfully moves the Court for entry of summary judgment for Petitioner and against Respondent Missouri Department of Social Services, Children's Division, and Respondent Fred Simmens, in his official capacity as Director, Missouri Department of Social Services, Children's Division (collectively, "DSS"). The reasons therefor are set forth in the accompanying Suggestions in Support of Petitioner's Motion for Summary Judgment, which is incorporated by reference into this motion, as well as the Statement of Uncontroverted Material Facts herein. Petitioner requests oral argument on her motion.

## STATEMENT OF UNCONTROVERTED MATERIAL FACTS

Lisa Johnston and Dawn Roginski

1. Ms. Johnston is 41 years old. Administrative Record ("AR") at 73; Johnston Decl. ¶ 1 (Ex. A).[1]

2. Ms. Johnston holds a bachelor's degree in human development and family services, with a special emphasis on early childhood development, from the University of Kansas. AR at 41-42, 45-46, 73, 123; Johnston Decl. ¶ 2.

3. As a part of her studies, Ms. Johnston completed a practicum working with parents of at-risk children to improve their parenting skills. AR at 45-46, 124.

4. Before obtaining her degree, Ms. Johnston worked for several years providing child care for young children. AR at 45.

5. After obtaining her degree, Ms. Johnston worked in the education department of a Kansas City public television station, developing educational programming, including educational programming for young girls. AR at 46-47, 124.

6. Subsequently, Ms. Johnston worked for The Children's Place, a facility that provides services to children who have been neglected or abused. AR at 47-48, 123-24; Johnston Decl. ¶ 3.

7. Among other services, The Children's Place conducts home studies and trains foster parent applicants on behalf of DSS. AR at 48, 124; Johnston Decl. ¶ 3.

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[1] As set forth in the accompanying Motion to Correct and Supplement Administrative Record, the administrative record lodged with the Court by the agency improperly omitted the declarations of Ms. Johnston and Ms. Roginski, which were submitted to the agency by Ms. Johnston on January 21, 2004. Copies of these declarations are attached to this motion as Exhibits A and B.

8. Ms. Johnston worked for The Children's Place as a lead teacher in a team setting, developing developmentally appropriate activities and providing care for infants with developmental delays in the day treatment program. AR at 48-49, 123-24; Johnston Decl. ¶ 3.

9. Ms. Johnston currently works for KCMC Child Development Corporation, a Head Start program that helps underprivileged children prepare to enter school. AR at 49, 123, 124; Johnston Decl. ¶ 3.

10. Ms. Johnston works for KCMC Child Development Corporation as an education consultant, working with child care facilities on developmentally appropriate curricula. AR at 50, 123; Johnston Decl. ¶ 3.

11. Ms. Johnston has been in a loving and committed relationship with her lesbian partner Ms. Roginski for over four years. AR at 58; Johnston Decl. ¶ 4.

12. Ms. Johnston and Ms. Roginski have celebrated their union with a commitment ceremony. Id.

13. Ms. Roginski is 40 years old. AR at 73; Roginski Decl. ¶ 1 (Ex. B).

14. Ms. Roginski holds a master's degree in counseling from St. Mary's University and a master's degree in divinity from Luther Seminary. AR at 59, 124; Roginski Decl. ¶ 2.

15. As a part of her studies, Ms. Roginski interned at a domestic violence shelter and at a day treatment program for kindergarteners, and completed a thesis addressing the effects of domestic violence on young children. AR at 59, 124.

16. Ms. Roginski also holds a bachelor's degree in psychology from the University of Minnesota. AR at 59, 124; Roginski Decl. ¶ 2.

17. Ms. Roginski currently works as a therapist and a chaplain at Marillac, a psychiatric treatment center for at-risk children with emotional and behavioral disorders. AR at 61; Roginski Decl. ¶ 3.

18. In addition to working with children assigned to Marillac by juvenile courts, Ms. Roginski works with children who have had difficulty with prior foster care placements. AR at 61-62; Roginski Decl. ¶ 3.

19. Many of these children have been neglected or exposed to drugs. Roginski Decl. ¶ 3.

20. Ms. Johnston and Ms. Roginski are active in their church, which includes as its members both same-sex and opposite-sex couples with children. AR at 50, 62-63; Johnston Decl. ¶ 5.

21. Ms. Johnston and Ms. Roginski assist with Sunday school classes and church services. AR at 50, 62-63, 124; Johnston Decl. ¶ 5.

22. Ms. Johnston serves on the church council, and has volunteered for the "Parents Day Out" program, where she has provided child care for children of other members of the congregation. AR at 50, 124; Johnston Decl. ¶ 5.

23. Ms. Johnston and Ms. Roginski are close to, and rely on the support of, fellow church members, as well as their pastor. Johnston Decl. ¶ 5.

24. Ms. Johnston feels a personal calling to help children with developmental challenges. Johnston Decl. ¶ 6.

25. Ms. Johnston has pursued this calling in both educational and professional settings and seeks to do so as a foster parent as well. Id.

26. Ms. Johnson and Ms. Roginski recognize the great need for foster parents who not only have their professional experience caring for children with developmental delays but also share their personal dedication to these children. Johnston Decl. ¶ 6; Roginski Decl. ¶ 4.

27. Ms. Johnston and Ms. Roginski believe that a child with developmental challenges would benefit significantly from the love, support, knowledge, and skills that they would bring as caretakers. AR at 51, 63, 124; Johnston Decl. ¶ 6.

Application Denial and Administrative Appeal

28. On August 20, 2003, Ms. Johnston completed and submitted an application for a foster parent license. AR at 73-76; Johnston Decl. ¶ 8.

29. Ms. Johnston listed Ms. Roginski as a member of the household. Id.

30. Ms. Johnston expressed openness to children of any racial or religious background. Id.

31. Ms. Johnston also expressed interest in fostering children with developmental delays, such as those experienced by children with pre-natal drug exposure. AR at 26, 71; Johnston Decl. ¶ 8.

32. Describing her as "caring, loving, [and] responsible," AR at 78, Ms. Johnston's references noted that she "has years of experience with daycare and child support services," AR at 79, "utilizes her training (human development/family care) from her college degree," id., and "is great with [children]," AR at 82.

33. Expressing "no reservations," AR at 80, Ms. Johnston's references concluded that she "would make an excellent foster/adoptive parent," AR at 81.

34. By means of a home study, DSS employee Tricia Rothweiler ensured that Ms. Johnston and Ms. Roginski's home satisfied DSS criteria. AR at 7, 9-10, 12, 13, 21, 22, 71; Johnston Decl. ¶ 9.

35. Ms. Johnston and Ms. Roginski lived in an apartment with a bedroom and a smaller room, in addition to common areas such as a kitchen. Johnston Decl. ¶ 9.

36. Ms. Johnston and Ms. Roginski had converted the smaller room into a nursery with a crib, a changing table, and other items that they had anticipated would be helpful in caring for an infant with developmental challenges. Id.

37. Ms. Rothweiler ensured that Ms. Johnston otherwise satisfied DSS criteria. AR at 24-26 (attesting to the fact that Ms. Johnston is an exceptionally qualified applicant); see also AR at 71, 122.

38. Ms. Johnston and Ms. Roginski qualified for a training program for prospective foster parents. AR at 11, 12-13, 22-23, 71, 122; Johnston Decl. ¶ 11.

39. Ms. Johnston and Ms. Roginski attended the first seven of nine scheduled classes without incident. Johnston Decl. ¶ 12.

40. Then, on October 8, 2003, Ms. Rothweiler and, separately, her supervisor Theresa Mapel informed Ms. Johnston that DSS was declining to place any foster child with her. AR at 17, 72; Johnston Decl. ¶¶ 12-13.

41. On October 15, 2003, Ms. Mapel's supervisor Wendy Austin informed Ms. Johnston that she and Ms. Roginski could no longer attend the training program. Johnston Decl. ¶ 14.

42. In a letter dated October 16, 2003, Ms. Austin formally notified Ms. Johnston that DSS was denying her application for a Missouri foster parent license. AR at 83.

43. The letter stated in relevant part as follows: "During the training and assessment process, you informed Children's Division staff that you have had a monogamous relationship with your female partner, Dawn. Missouri case law, as it stands, does not support legal custody of a child with a lesbian couple. Since all foster homes are potential permanent homes, the juvenile courts under present court ruling, would not be able to assure permanency for a child placed in your home. Your foster/adoptive home license is being denied for the above reason." Id.

44. The letter reiterated that Ms. Johnston and Ms. Roginski could no longer attend the training program. Id.

45. On October 23, 2003, Ms. Johnston timely noticed an administrative appeal. AR at 72, 124; Johnston Decl. ¶ 16; Ex. C.[2]

46. Administrative proceedings were had before a neutral fact finder, including a hearing on January 27, 2004. AR at 6, 121.

47. During the course of the administrative proceedings, DSS articulated three additional reasons for its denial of Ms. Johnston's application for a foster parent license. In addition to its original assertion that lesbian and gay individuals offer no hope of permanent placement on account of Missouri case law precluding adoption by lesbian and gay people (AR at 17, 29, 31, 38, 39, 72, 83, 122), DSS asserted that (1) lesbian and gay people do not possess reputable character on account of Missouri statutory law

[2] See Motion to Correct and Supplement Administrative Record.

criminalizing private, consensual, adult, non-commercial same-sex sodomy (AR at 100-01, 126), (2) foster children placed with lesbian or gay people might suffer harm because they might be stigmatized (AR 33, 122), and (3) foster children placed with lesbian or gay individuals might suffer harm because their biological parents might object to such placement (AR at 32-33, 39, 122).

48. DSS conceded that the sexual orientation of a foster parent is otherwise irrelevant to the best interests of a child. AR at 21-22.

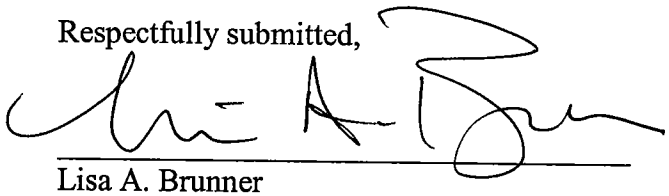
49. On March 11, 2005, DSS issued a final decision and order affirming its denial of Ms. Johnston's application for a foster parent license. AR at 121-28.

50. DSS's findings of fact confirm that Ms. Johnston and Ms. Roginski have exceptional qualifications to be foster parents. AR at 122, 125.

51. DSS's findings of fact confirm that it denied Ms. Johnston's application for a foster parent license for the sole reason that she is in a lesbian relationship. AR at 122, 124.

Petitioner respectfully requests that the Court sustain Petitioner's Motion for Summary Judgment and order relief consistent therewith.

Respectfully submitted,



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Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 21st day of July, 2005, a true and accurate copy of Petitioner's Motion for Summary Judgment was mailed, first-class, postage-prepaid, to:

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Robert L. Ortbals, Jr.
Earl D. Kraus
Office of the Attorney General
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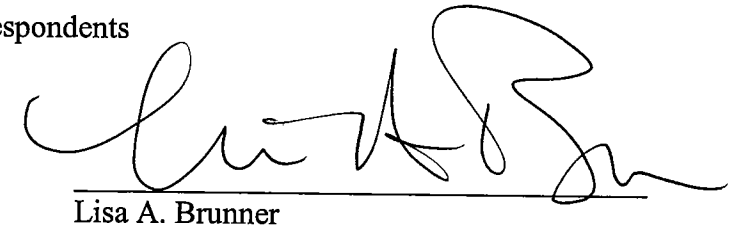
Jefferson City, MO 65102

Attorneys for Respondents



Lisa A. Brunner

Re: Foster/Adoptive Parent Application of Lisa Johnston
Hearing Officer: Thad Taylor
Hearing Number: 1640-FHL-FY04KC
Case Type: FHL

Declaration of Lisa Johnston

I submit this declaration in connection with the above referenced matter.

1. I am 39 years old. I have lived at 4812 N.E. Winn Road, Kansas City, MO 64119 since February 2002.
2. I have a bachelor's degree in Human Development and Family with a special emphasis on child development from the University of Kansas. I graduated in 1996.
3. I have worked in Missouri for the last five years. I am currently employed at KCMC Child Development Corporation where I consult with childcare homes on developmentally appropriate curricula. Prior to joining KCMC in September 2003, I worked as a lead teacher, providing supervision and care to infants in the day treatment program for The Children's Place, a facility that provides services to children who have been neglected or abused. Among other services, The Children's Place conducts home studies and trains foster care applicants on behalf of the Division of Family Services.
4. I have been in a committed relationship with Dawn Roginski for over three years. We celebrated our union in a commitment ceremony on August 10, 2001.
5. Dawn and I are very active in our church, which counts both same-sex couples and opposite-sex couples and their children among the membership. We have developed strong ties with the pastor and many people in the congregation. I serve on the church council. Both Dawn and I assist with Sunday school and the church service. I volunteered for the "Parents Day Out" program to provide day care for the children of other members of the congregation.
6. I personally felt called to help children with developmental challenges in both educational and professional settings. I would like to continue helping children as a foster parent. I am confident there are many children who would benefit from the skills and experience Dawn and I have gained while caring for children with developmental delays.
7. Through my work, I have seen how critical the first three years of life are in our development as humans. It is not unusual for children who have been neglected or abused to have difficulty sitting up, crawling, walking and even saying their first words. I believe that with love and support Dawn and I can help a child grow in ways that would not be possible without the proper nurturing.
8. In August 2003, I completed a Foster/Adopt Home Assessment Application for the Division of Family Services ("DFS" or the "Division"). I listed Dawn as a member of the household. I expressed an interest in fostering children with developmental delays, such as those experienced by children with pre-natal drug exposure. I also expressed an openness to children of any racial, ethnic or religious background. Due to my affiliation with The Children's Place, it was agreed that Tricia Rothweiler, an

Exh. A

employee of the Division, would conduct the required home study instead of one of my co-workers.

9. Ms. Rothweiler visited our home to ensure that it met state guidelines. As Ms. Rothweiler was able to observe, we live in an apartment with one bedroom and a smaller room in addition to common areas including a kitchen. We had converted the smaller room into a nursery with a crib, a changing table and other items we expected to be helpful in caring for an infant with developmental needs.
10. During the visit, Ms. Rothweiler did not suggest there would be any difficulty with my application. In fact, she confirmed that I would be listed as the primary license holder with Dawn listed as an adult in the household. Although we were originally only interested in fostering, we expressed interest in the possibility of adopting.
11. Ms. Rothweiler invited me to attend the STARS program for prospective foster care parents provided by The Children's Place. It was my understanding that admittance to the class indicated preliminary approval of my application. Dawn was required to attend as well.
12. Dawn and I attended the first seven out of the nine scheduled STARS classes. No one suggested there was any problem with my application. On October 8, during a scheduled visit to my workplace, Ms. Rothweiler announced that I had been "kicked out" of the foster care program. When I asked for further information, Ms. Rothweiler directed me to her supervisor, Theresa Mapel.
13. I called Ms. Mapel the same day. She informed me that the Division of Family Services was "opting out." She also referred to a written policy addressing the situation. I requested a copy of the policy and a written account of how the Division decided to opt out. Ms. Mapel took my address and phone number and told me that she would have this information sent to us. Shortly after this initial call, I called back to ask Ms. Mapel also to send a copy of the contents of the Division's file on the case.
14. On October 15, after giving Ms. Mapel time to send the information I requested, I followed up with a registered letter. I also spoke with Wendy Austin, Ms. Mapel's supervisor and Northwest Regional Coordinator. Ms. Austin said she would send a letter describing the policy Ms. Mapel had mentioned. She also informed me that Dawn and I could no longer attend the STARS training classes. The letter, dated October 16, arrived soon after this conversation. The letter claims that my application to be a foster parent was being denied because my relationship with Dawn somehow undermined the chances that a child could be placed with me permanently under Missouri law. (Exh. 1.)
15. Even though I had a right to a hearing to review the decision to deny my application and even though we had completed the first seven of the nine training classes, Ms. Austin's letter confirmed we could not continue the classes. (Exh. 1.)
16. On October 23, based on information from Ms. Austin, I delivered a letter asking for an administrative hearing to Ms. Rothweiler.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 1/21/04

Lisa Johnston

Re: Foster/Adoptive Parent Application of Lisa Johnston
Hearing Officer: Thad Taylor
Hearing Number: 1640-FHL-FY04KC
Case Type: FHL

Declaration of Dawn Roginski

I submit this declaration in connection with the above referenced matter.

1. I am 38 years old. I have lived at 4812 N.E. Winn Road, Kansas City, MO 64119 since February 2002.
2. I completed a master's degree from St. Mary's University in Minnesota in December 1996. In December 2002, I earned a master's degree in divinity from Luther Seminary, also in Minnesota. I also have a bachelor's degree in psychology from the University of Minnesota.
3. I work as a therapist and as chaplain at Marillac, a psychiatric treatment center for children and adolescents with emotional and behavioral disorders. In addition to children assigned to Marillac by juvenile court judges, I work with children who have had difficulty with their prior foster placements. Many of these children have been exposed to drugs or have been neglected by their families.
4. I have been in a committed relationship with Lisa Johnston for over three years. I fully support Lisa's application to become a foster parent. I feel that we both have the skills and the desire to be good caretakers for the many children in need.
5. I am eager to help Lisa serve as a foster parent for Missouri children in need, and I look forward to welcoming them into our home.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 1-21-04

Dawn Roginski

Exh. B

October 23, 2003

Tricia Rothweiler
Clay County Division of Family Services
7000 Liberty Dr.
Liberty, MO 64068

Dear Ms. Rothweiler,

I received Ms. Austin's letter on October 16, 2003. In this letter, she indicated that I have 10 days to request an administrative hearing. Per my conversation with her on October 15, 2003, she also indicated that this letter should be sent to you, Tricia Rothweiler. Consider this letter the required written request for an administrative hearing through the Department of Social Services Legal Services Division.

Sincerely,

Lisa Johnston

cc: Theresa M. Mapel
cc: Wendy Austin

OCT 24 2003

CLAY COUNTY
DIVISION OF FAMILY SERVICES
7000 LIBERTY DRIVE
LIBERTY, MO 64068



Exh. C

**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI**
**AT KANSAS CITY**

| | | |
|---|---|---|
| LISA JOHNSTON,<br><br>Petitioner,<br><br>v.<br><br>MISSOURI DEPARTMENT OF SOCIAL SERVICES, CHILDREN'S DIVISION, and FRED SIMMENS, in his official capacity as Director, Missouri Department of Social Services, Children's Division,<br><br>Respondents. | ) | Case No. 0516-CV09517<br><br>Division No. 1 |

**SUGGESTIONS IN SUPPORT OF**
**PETITONER'S MOTION FOR SUMMARY JUDGMENT**

## INTRODUCTION

Respondent Missouri Department of Social Services, Children's Division, and Respondent Fred Simmens, in his official capacity as Director, Missouri Department of Social Services, Children's Division, (collectively, "DSS") denied Petitioner Lisa Johnston's application for a Missouri foster parent license notwithstanding their own findings of fact which confirm that Ms. Johnston and her lesbian partner Dawn Roginski have exceptional qualifications to be foster parents. Because DSS's denial of Ms. Johnston's application for a foster parent license is unsupported by competent and substantial evidence in the record and is arbitrary and capricious, it must be reversed.

## ARGUMENT

### I. STANDARD OF REVIEW

Under the Missouri Administrative Procedure Act (MAPA), RSMo §§ 536.010, *et seq.*, a reviewing court must reverse where agency action is "[u]nsupported by competent

and substantial evidence upon the whole record," RSMo § 536.140(2)(3), or "[i]s arbitrary, capricious or unreasonable," RSMo § 536.140(2)(6). See, e.g., Hutchings v. Roling, 151 S.W.3d 85, 88 (Mo. Ct. App. 2004). In determining whether agency action is unsupported by competent and substantial evidence in the record or is arbitrary or capricious, a reviewing court defers to the agency with respect to findings of fact. See, e.g., State Bd. of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146, 152 (Mo. 2003) ("A reviewing court will refrain from substituting its judgment for that of the [agency] on factual matters.") (citation omitted); Kansas City v. Missouri Comm'n on Human Rights, 632 S.W.2d 488, 490 (Mo. 1982) ("The Court may not substitute its judgment for that of the [agency], and must defer to the [agency's] findings of fact.") (citation omitted). With respect to conclusions or applications of law, however, a reviewing court exercises independent judgment. See, e.g., Tendai v. Missouri State Bd. of Registration for the Healing Arts, 161 S.W.3d 358, 365 (Mo. 2005) ("When the [agency] has interpreted the law or the application of facts to law, the review is *de novo*.") (citation omitted); Kansas City, 632 S.W.2d at 490 ("[W]here the decision is clearly based upon an interpretation or application of law, the [agency's] conclusions of law, and the decisions based thereon, are matters for independent judgment of the reviewing court.") (quotation omitted).

### A. Agency Action Must Be Supported by Competent and Substantial Evidence in the Record

The analytical framework set forth by MAPA ensures that a reviewing court defers, but does not capitulate, to the agency with respect to findings of fact. A reviewing court must determine whether a finding of fact is supported by competent and substantial evidence in the record. Competent evidence is "relevant and admissible

evidence that is capable of establishing the fact in issue, that which the very nature of the thing to be proven requires." Knapp v. Missouri Local Gov't Employees Retirement Sys., 738 S.W.2d 903, 913 (Mo. Ct. App. 1987) (quotation and citation omitted). Substantial evidence – which "includes only competent evidence, not incompetent evidence" – is "evidence that if true has probative force upon the issues." Id. (citation omitted). Evidence is not competent and substantial "where a reasonable mind would not accept it as sufficient to support a particular conclusion, even when granting all reasonable inferences." Hutchings, 151 S.W.3d at 89 (citation omitted). For example, "witnesses' conclusions, where devoid of any factual support, do not rise to the level of substantial and competent evidence." Id. (citation omitted).

Where a question of law presents itself in the course of a competent and substantial evidence inquiry, a court reviews *de novo* the conclusion of law reached by the agency. For example, in Tendai, the Supreme Court reversed disciplinary action by an agency against a physician for gross negligence, concluding that the agency action was not supported by competent and substantial evidence in the record. Tendai, 161 S.W.3d at 368. In determining whether the agency action was supported by competent and substantial evidence in the record, the Court reviewed *de novo* the applicable standard of care, a question of law. Id. at 367.

Where agency action is unsupported by competent and substantial evidence in the record, a reviewing court must reverse. See, e.g., Tendai v. Missouri State Bd. of Registration for the Healing Arts, 161 S.W.3d 358 (Mo. 2005) (reversing disciplinary action against physician); State Bd. of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo. 2003) (same); Kansas City v. Missouri Comm'n on Human Rights,

632 S.W.2d 488 (Mo. 1982) (reversing finding of Equal Pay Act violation); Hutchings v. Roling, 151 S.W.3d 85 (Mo. Ct. App. 2004) (reversing denial of mental retardation support services); Davis v. Dep't of Soc. Servs., Div. of Child Support Enforcement, 21 S.W.3d 140 (Mo. Ct. App. 2000) (reversing order of child support); Knapp v. Missouri Local Gov't Employees Retirement Sys., 738 S.W.2d 903 (Mo. Ct. App. 1987) (reversing denial of disability benefits); State ex rel. Church's Fried Chicken, Inc. v. Board of Adjustment, 581 S.W.2d 861 (Mo. Ct. App. 1979) (reversing revocation of building permit).

### B. Agency Action May Not Be Arbitrary or Capricious

Agency action not only must be supported by competent and substantial evidence in the record but also may not be arbitrary or capricious. "[T]he idea of 'arbitrariness' focuses on whether a rational basis for [a] decision exists." State ex rel. Div. of Transp. v. Sure-Way Transp. Inc., 948 S.W.2d 651, 655 n.4 (Mo. Ct. App. 1997) (citing D.L. Dev., Inc. v. Nance, 894 S.W.2d 258, 259 (Mo. Ct. App. 1995)). "'[C]apriciousness' concerns whether [a] decision was whimsical, impulsive or unpredictable." Id. (citation omitted). "To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or 'gut feeling.' An agency must not act in a totally subjective manner without any guidelines or criteria." Missouri Nat'l Educ. Ass'n v. Missouri State Bd. of Educ., 34 S.W.3d 266, 281 (Mo. Ct. App. 2000) (citations omitted).

Citing Nance, Sure-Way defines the term "arbitrariness" by reference to the term "rational basis." In Nance, the Court of Appeals held that, even if a landlord "had all the

justification in the world for withholding consent [to a sublease]," she nevertheless acted arbitrarily "because she failed to even consider, or obtain the sublease before withholding consent, and failed to state reasons for doing so in the letter to the tenant." Nance, 894 S.W.2d at 259-260. By focusing on the justification, if any, at the time that consent was withheld – *not* on "all the justification in the world" – Nance confirms that the proper inquiry is whether a rational basis exists *in the record.* See Stephen & Stephen Props., Inc. v. State Tax Comm'n, 499 S.W.2d 798, 804-05 (Mo. 1973) ("For a court to infer findings from the ultimate decision of an administrative agency, defeats [the] limited review provision, as it allows the court to find both the law and the facts on appeal . . . . [In addition,] the agency [may not] put the cart before the horse . . . by making a decision and then later making findings of fact and conclusions of law which will support that decision . . . . [P]rotect[ing] against careless or arbitrary action . . . [is] defeated, unless an administrative agency is required to make its findings of fact and conclusions of law as a part of reaching a decision on the merits and at the time thereof."); see also Leeco, Inc. v. Hays, 965 F.2d 1081, 1085 (D.C. Cir. 1992) ("On the record before us, we are unable to sustain the ALJ's conclusion . . . . We require a reasoned decision, whether supplied by the [agency] itself or through its approval of the adequate reasoning of an ALJ . . . . Judicial deference . . . to an agency's interpretation . . . cannot occur in a vacuum. In the absence of any explanation . . . we are unable to sustain the [agency's] decision as 'reasonably defensible.'") (citation omitted); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 525, 531 (D.C. Cir. 1983) ("[O]ur deference to its ultimate choice does not relieve EPA of the duty to explain why 1.10 gplg is an appropriate standard. A simpleminded argument that 'gasoline lead is bad and our rule reduces

gasoline lead' does not satisfy that duty . . . . [T]he agency must make a reasonable effort to develop the facts. Where it has not made that effort, EPA cannot regulate on the basis of a guess about what the facts might be . . . . [The] agency has no power to act on hunches or wild guesses.") (quotation omitted).

Where, based on the record, agency action is arbitrary or capricious, a reviewing court must reverse. See, e.g., Barry Serv. Agency Co. v. Manning, 891 S.W.2d 882, 892-94 (Mo. Ct. App. 1995) (reversing denial of interest rate schedule request).

## II. DSS'S DENIAL OF MS. JOHNSTON'S APPLICATION FOR A FOSTER PARENT LICENSE IS UNSUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD AND IS ARBITRARY AND CAPRICIOUS

### A. DSS's Denial of Ms. Johnston's Application for a Foster Parent License on the Ground that Lesbian and Gay People Do Not Possess Reputable Character on Account of Missouri Statutory Law Criminalizing Private, Consensual, Adult, Non-Commercial Same-Sex Sodomy Is Unsupported by Competent and Substantial Evidence in the Record and Is Arbitrary and Capricious

In its final agency decision and order, DSS articulated a single rationale for denying Ms. Johnston's application for a foster parent license: Because Missouri statutory law "provides that homosexual activity in the State of Missouri is unlawful," lesbian and gay people cannot fulfill the "require[ment] that a foster parent must have a reputable character." Administrative Record ("AR") at 126. DSS's decision, however, is unsupported by competent evidence in the record establishing that there is enforceable Missouri statutory law criminalizing private, consensual, adult, non-commercial same-sex sodomy. In other words, it is unsupported by evidence in the record "capable of establishing the fact in issue, that which the very nature of the thing to be proven requires." Knapp, 738 S.W.2d at 913 (quotation and citation omitted). In addition,

DSS's decision is inherently arbitrary and capricious – and, indeed, an abuse of discretion – because it is predicated entirely on the erroneous conclusion of law that there is enforceable Missouri statutory law criminalizing private, consensual, adult, non-commercial same-sex sodomy.

In Lawrence v. Texas, 539 U.S. 558 (2003), the United States Supreme Court held that the Fourteenth Amendment to the United States Constitution precludes states from criminalizing private, consensual, adult, non-commercial same-sex sodomy. See id. at 574 ("Persons in a homosexual relationship may seek autonomy for [purposes of intimate and personal choices], just as heterosexual persons do."). In doing so, the Court expressly overruled – indeed, wholly repudiated – Bowers v. Hardwick, 478 U.S. 186 (1986), a case in which it had reached the opposite result. Lawrence, 539 U.S. at 578 ("Bowers was not correct when it was decided, and it is not correct today."). In light of Lawrence, RSMo § 566.090, State v. Walsh, 713 S.W.2d 508 (Mo. 1986) (upholding RSMo § 566.090 as it existed at the time), and Bowers – all of which DSS invoked in support of its conclusion that there is enforceable Missouri statutory law criminalizing private, consensual, adult, non-commercial same-sex sodomy, AR at 100-01, 126 – are no longer good law.[1]

Because "[t]he State cannot demean [the] existence or control [the] destiny [of lesbian and gay people] by making their private sexual conduct a crime," Lawrence, 539 U.S. at 578, any evidence in the record purporting to establish that there is enforceable

[1] Even before Lawrence, RSMo § 566.090 – which was amended after State v. Walsh, 713 S.W.2d 508 (Mo. 1986) – did not criminalize same-sex sodomy where it was consensual. State v. Cogshell, 997 S.W.2d 534, 537 (Mo. Ct. App. 1999) ("In order to convict a person of sexual misconduct pursuant to § 566.090, the State must prove that the sexual contact alleged occurred without the consent of the victim.").

Missouri statutory law criminalizing private, consensual, adult, non-commercial same-sex sodomy is incompetent evidence. Moreover, any conclusion that there is enforceable Missouri statutory law criminalizing private, consensual, adult, non-commercial same-sex sodomy is legal error and therefore an inherently arbitrary and capricious basis for agency action. Thus, DSS's denial of Ms. Johnston's application for a foster parent license is unsupported by competent and substantial evidence and is arbitrary and capricious, and must be reversed.

### B. DSS's Denial of Ms. Johnston's Application for a Foster Parent License on the Ground that Lesbian and Gay People Offer No Hope of Permanent Placement on Account of Missouri Case Law Precluding Adoption by Lesbian and Gay People Is Unsupported by Competent and Substantial Evidence in the Record and Is Arbitrary and Capricious

In its denial letter, DSS articulated a different rationale for denying Ms. Johnston's application for a foster parent license: Because "Missouri case law . . . does not support legal custody of a child with a lesbian [or gay] couple," lesbian and gay people cannot "assure permanency for a child placed in [their] home." AR at 83. To the extent that this is the rationale underlying DSS's decision, however, it is unsupported by competent and substantial evidence in the record establishing that there is valid Missouri case law categorically precluding adoption by lesbian and gay people. In addition, it is inherently arbitrary and capricious – and, indeed, an abuse of discretion – because it is predicated entirely on the erroneous conclusion of law that there is valid Missouri case law categorically precluding adoption by lesbian and gay people.

Simply put, no valid Missouri case law disqualifies lesbian and gay people from adopting children solely because of their sexual orientation. To the contrary, in the custody and visitation context, the Supreme Court has held that the sexual orientation of a

parent is irrelevant to the best interests of a child. J.A.D. v. F.J.D., 978 S.W.2d 336, 339-40 (Mo. 1998).[2] In J.A.D., the Court stated that, "[w]ithout question, the guiding star in a custody determination is the best interest of the children." Id. at 339. Because the sexual orientation of a parent does not inform the best interests of a child, it is irrelevant to a custody determination. Id. ("A homosexual parent is not *ipso facto* unfit for custody of his or her child."). Rather, it is the misconduct of a parent, regardless of his or her sexual orientation, that informs the best interests of a child and is therefore relevant to a custody determination. Id. ("It is not error . . . to consider the impact of homosexual *or* heterosexual *misconduct* upon the children in making a custody determination.") (citation omitted) (emphases added).

Applying these principles, the Court struck down a visitation restriction that "prohibit[ed] the children from being in the presence of any person known by J.A.D. to be lesbian or known by J.A.D. to be one who engages in lesbian sexual activity." Id. at 340. The Court recognized that the visitation restriction was "too broad" because it did not "apply *only* to those individuals whose presence and conduct [were] *contrary to the*

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[2] J.A.D. is consistent with a national trend. See, e.g., Damron v. Damron, 670 N.W.2d 871 (N.D. 2003) (holding that custody may not be conditioned on sexual orientation); Eldridge v. Eldridge, 42 S.W.3d 82 (Tenn. 2001) (same); Fox v. Fox, 904 P.2d 66 (Okla. 1995) (same); Van Driel v. Van Driel, 525 N.W.2d 37 (S.D. 1994) (same); S.N.E. v. R.L.B., 699 P.2d 875 (Alaska 1985) (same); Jacoby v. Jacoby, 763 So. 2d 410 (Fla. Ct. App. 2000) (same); Hassenstab v. Hassenstab, 570 N.W.2d 368 (Neb. Ct. App. 1997) (same); Inscoe v. Inscoe, 700 N.E.2d 70 (Ohio Ct. App. 1997) (same); In re Marriage of R.S., 677 N.E.2d 1297 (Ill. Ct. App. 1996) (same); D.H. v. J.H., 418 N.E.2d 286 (Ind. Ct. App. 1981) (same); Stroman v. Williams, 353 S.E.2d 704 (S.C. Ct. App. 1987) (same); Weigand v. Houghton, 730 So. 2d 581 (Miss. 1999) (holding that visitation may not be conditioned on sexual orientation); Boswell v. Boswell, 721 A.2d 662 (Md. 1998) (same); In re Marriage of Walsh, 451 N.W.2d 492 (Iowa 1990) (same); In re Marriage of Cabalquinto, 669 P.2d 886 (Wash. 1983) (same); In re Marriage of Dorworth, 33 P.3d 1260 (Colo. Ct. App. 2001) (same); In re R.E.W., 471 S.E.2d 6 (Ga. Ct. App. 1996) (same); In re Marriage of Birdsall, 243 Cal. Rptr. 287 (Cal. Ct. App. 1988) (same); Conkel v. Conkel, 509 N.E.2d 983 (Ohio Ct. App. 1987) (same).

*best interests of the children.*" Id. (emphases added). In other words, the Court recognized that the proper inquiry is focused on misconduct, regardless of sexual orientation, that adversely affects the best interests of a child – *not* on sexual orientation. See Gould v. Dickens, 143 S.W.3d 639, 644 (Mo. Ct. App. 2004).[3]

In sum, there is no valid Missouri case law precluding adoption by lesbian and gay people. Any "witnesses' conclusions . . . devoid of any factual support" to the contrary "do not rise to the level of substantial and competent evidence." Hutchings, 151 S.W.3d at 89. Moreover, any conclusion that there is valid Missouri case law precluding adoption by lesbian and gay people is legal error and therefore an inherently arbitrary and capricious basis for agency action. Thus, DSS's denial of Ms. Johnston's application for a foster parent license is unsupported by competent and substantial evidence and is arbitrary and capricious, and must be reversed.

### C. DSS's Denial of Ms. Johnston's Application for a Foster Parent License on the Ground that Foster Children Placed with Lesbian or Gay People Might Suffer Harm Because They Might Be Stigmatized Is Unsupported by Competent and Substantial Evidence in the Record and Is Arbitrary and Capricious

In the administrative record, DSS makes reference to an additional rationale for denying Ms. Johnston's application for a foster parent license: Foster children placed with lesbian or gay people might suffer harm because they might be stigmatized. AR at 33, 122. To the extent that this is the rationale underlying DSS's decision, however, it is

[3] DSS invoked pre-J.A.D. case law of the Court of Appeals in support of its conclusion that there is valid Missouri case law precluding adoption by lesbian and gay people. J.A.D. makes express, however, that such case law does not support such a conclusion. Id. at 339 ("A homosexual parent is not *ipso facto* unfit for custody of his or her child, *and no reported Missouri case has held otherwise.*") (emphasis added). Regardless, to the extent that such case law conflicts with J.A.D., it is no longer good law.

unsupported by competent and substantial evidence in the record. In addition, it is inherently arbitrary and capricious – and, indeed, an abuse of discretion – because it is predicated entirely on a constitutionally impermissible consideration.

Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, governmental discrimination cannot be justified by mere disapproval of a disfavored class. In United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973), the United States Supreme Court held that disapproval of hippies is an inherently illegitimate governmental interest that cannot justify governmental discrimination. Id. at 534. As the Court famously declared, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id. In Romer v. Evans, 517 U.S. 620 (1996), the Court made clear that this fundamental principle of constitutional law applies equally where disapproval of lesbian and gay people is concerned. Id. at 634-35.

The identity of the source of the disapproval does not change the analysis. As the United States Supreme Court has held, the government may no more discriminate simply because the community wants it to do so than it may discriminate simply because it wants to do so. For example, in Palmore v. Sidoti, 466 U.S. 429 (1984), the Court reversed an order that had transferred custody of a child to a father from a mother, a white woman who had married a black man, on account of "social stigmatization" that the child might suffer as a result of her association with the interracial relationship. Id. at 431. In doing so, the Court held as follows:

> The question . . . is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an

> infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. *Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.*

Id. at 433 (quotation and footnote omitted) (emphasis added). Similarly, in City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985), the Court struck down a zoning ordinance that discriminated against the mentally retarded, holding that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." Id. at 448. The government "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." Id.; see also Lawrence, 539 U.S. at 578 (holding that community disapproval of lesbian and gay people is not a legitimate governmental interest); see also id. at 582 (O'Connor, J., concurring).

Because community homophobia is a constitutionally impermissible consideration, any evidence in the record purporting to establish that foster children placed with lesbian or gay people suffer harm because they are stigmatized is incompetent evidence. That said, there is no such evidence in the record. Rather, there is only "[a] witness['s] conclusion[] . . . devoid of any factual support" – mere speculation – which "do[es] not rise to the level of substantial and competent evidence." Hutchings, 151 S.W.3d at 89. Moreover, because community homophobia is a constitutionally impermissible consideration, it is an inherently arbitrary and capricious basis for agency action. Thus, DSS's denial of Ms. Johnston's application for a foster parent license is

unsupported by competent and substantial evidence and is arbitrary and capricious, and must be reversed.

### D. DSS's Denial of Ms. Johnston's Application for a Foster Parent License on the Ground that Foster Children Placed with Lesbian or Gay People Might Suffer Harm Because Their Biological Parents Might Object to Such Placement Is Unsupported by Competent and Substantial Evidence in the Record and Is Arbitrary and Capricious

In the administrative record, DSS makes reference to a related rationale for denying Ms. Johnston's application for a foster parent license: Foster children placed with lesbian or gay people might suffer harm because their biological parents might object to such placement. AR at 32-33, 39, 122. It, too, is unsupported by substantial evidence in the record and is arbitrary and capricious.

There is no evidence in the record purporting to establish that foster children placed with lesbian or gay people suffer harm because their biological parents object to such placement. Rather, there is only "[a] witness['s] conclusion[] . . . devoid of any factual support" – mere speculation – which "do[es] not rise to the level of substantial and competent evidence." Hutchings, 151 S.W.3d at 89. Indeed, the sole witness testifying in support of this rationale conceded that, in her seventeen years of service to the agency, she had never encountered a situation in which the biological parents of a foster child objected to placement with a lesbian or gay foster parent. AR at 28, 32-33. Thus, DSS's decision is unsupported by substantial evidence in the record.

Moreover, the *categorical* exclusion of lesbian and gay applicants on this basis is arbitrary and capricious. On the one hand, the categorical ban is egregiously overinclusive. It eliminates an entire category of qualified applicants on account of the mere possibility that, in a few cases, the biological parents of a foster child might object

to placement with a lesbian or gay foster parent. On the other hand, the categorical ban is egregiously underinclusive. Conflict may result from *any* difference between the biological parents of a foster child and *any* applicant. Nevertheless, DSS does not categorically exclude any other class of applicants to whom the biological parents of a foster child might object. Tellingly, DSS did not even attempt to offer an explanation for this arbitrary and capricious distinction. See Missouri Nat'l Educ. Ass'n, 34 S.W.3d at 281 ("[T]o avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or 'gut feeling.' An agency must not act in a totally subjective manner without any guidelines or criteria.") (citations omitted); see also Small Refiner Lead Phase-Down, 705 F.2d at 525, 531 ("[O]ur deference to its ultimate choice does not relieve EPA of the duty to explain why 1.10 gplg is an appropriate standard. A simpleminded argument that 'gasoline lead is bad and our rule reduces gasoline lead' does not satisfy that duty . . . . [T]he agency must make a reasonable effort to develop the facts. Where it has not made that effort, EPA cannot regulate on the basis of a guess about what the facts might be . . . . [The] agency has no power to act on hunches or wild guesses.") (quotation omitted).

Indeed, the categorical exclusion of lesbian and gay applicants on this basis is so overinclusive and underinclusive that it can be logically explained only as a manifestation of disapproval of lesbian and gay people, a constitutionally impermissible consideration. See Romer, 517 U.S. at 632 ("[The amendment's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.");

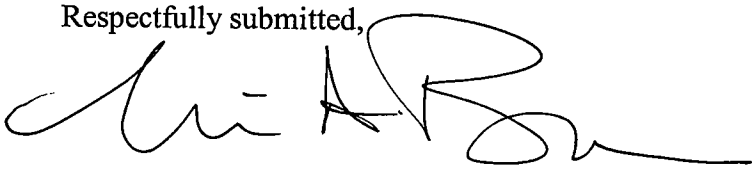
id. at 635 ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.").[4]

Both because it is unsupported by competent and substantial evidence in the record and because it is arbitrary and capricious, DSS's denial of Ms. Johnston's application for a foster parent license must be reversed.

## CONCLUSION

For the foregoing reasons, Ms. Johnston respectfully requests that the Court sustain Petitioner's Motion for Summary Judgment and order relief consistent therewith.

Respectfully submitted,



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[4] The irrationality of the categorical ban is only underscored by the fact that DSS does not inquire into the sexual orientation of an applicant. AR at 125, 126. If DSS were truly concerned about the upheaval that an objection to placement would necessitate, AR 32-33, it would make the inquiry.

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this 21st day of July, 2005, a true and accurate copy of Suggestions in Support of Petitioner's Motion for Summary Judgment was mailed, first-class, postage-prepaid, to:

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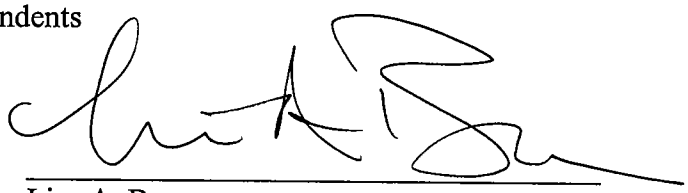

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