IN THE SUPREME COURT OF THE STATE OF ARKANSAS

THE STATE OF ARKANSAS, *et al.*,

APPELLANTS/
CROSS-APPELLEES,

vs. NO. 10-00840

SHEILA COLE, *et al.*,

APPELLEES/
CROSS-APPELLANTS.

ON APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SECOND DIVISION

THE HONORABLE CHRISTOPHER C. PIAZZA, CIRCUIT JUDGE

APPELLEES/CROSS-APPELLANTS' SUPPLEMENTAL ABSTRACT, BRIEF AND SUPPLEMENTAL ADDENDUM

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APPELLEES' RESPONSE TO JURISDICTIONAL STATEMENT

1. State-Appellants

State-Appellants contend that this review of their appeal raises no questions of legal significance for jurisdictional purposes. Yet the State's appeal clearly raises issues of substantial public interest involving the rights of couples in intimate relationships. It will also affect children in State care as well as parents who have designated individuals in same-sex or unmarried heterosexual relationships as caregivers for their children in the case of parental death or incapacitation.

2. Intervenor-Appellants

First, Intervenor-Appellants contend that this review raises issues concerning whether the Due Process and Equal Protection Clauses of the Arkansas Constitution require the State to accord cohabiting adults the same privileges as married couples in the context of adoption and foster care. That is not an issue in this appeal. Rather, the issue is whether Act 1 impermissibly burdens the fundamental right of citizens of Arkansas to engage in intimate relationships in their homes.

Second, Intervenor-Appellants characterize Act 1 as creating a marriage preference. Act 1 does no such thing. Neither Act 1 nor existing Arkansas law prefers married couple applicants over single applicants when

APPELLEES' POINTS ON APPEAL

As the State Defendants and Intervenor Defendants (collectively, "Appellants") have raised different Points on Appeal and in different order, Plaintiffs ("Appellees") respectfully cite the following issues:

1. **The Circuit Court correctly ruled that Act 1 impermissibly burdens the rights to privacy and intimate relations guaranteed by the Arkansas Constitution and is, therefore, unconstitutional.**

   ARK. CONST. art. 2, § 2
   Jegley v. *Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002)

2. **Act 1 is unconstitutional under both a strict scrutiny and rational basis analysis.**

   Jegley v. *Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002)
   City of Cleburne, Tex. v. *Cleburne Living Center*, 473 U.S. 432 (1985)

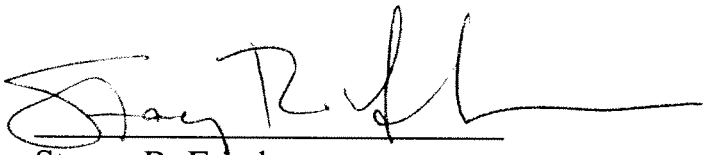
3. **The judgment below may be affirmed on other grounds asserted by Appellees/Cross-Appellants.**

   ARK. CONST. art. 2, §§ 3, 8, 21
   U.S. CONST. amend. 14, § 1.

placing children in foster or adoptive care.

Third, Intervenor-Appellants claim that this review presents an issue of first impression because upholding the Circuit Court's decision would require this Court to overrule numerous cases, including decisions permitting a court to condition a divorced parent's custody of biological children upon an agreement not to cohabit. No case need be overruled to affirm the judgment below. Those custody cases allow the individualized case-by-case review that Act 1 forbids.

I express a belief, based on a reasoned and studied professional judgment, that the statements made by the appellant in the appellants' Jurisdictional Statement to which I have taken exception are material to understanding correctly the nature of this appeal and its disposition in the appropriate appellate court.



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STATEMENT OF THE CASE

In *Dep't Human Servs. and Child Welfare Agency Review Bd.* v. *Howard*, 367 Ark. 55, 65, 238 S.W.3d 1, 7 (2006), this Court struck down, as a violation of the separation of powers, an agency regulation banning gay persons, including same-sex couples, from serving as foster parents. Thereafter, Intervenor, the Family Council, proposed a voter initiative that would, in its own words, "blunt the gay agenda." State Add 40. That proposed initiative, Act 1, was approved by the electorate in November 2008, and became law on January 1, 2009. Arkansas and Utah are the only states that categorically ban cohabiting adults from adopting or serving as foster parents; no state has a categorical ban on all adoptions by gay men and lesbians. *See In re Doe*, 2008 WL 5006172 at *21 (Fla. Cir. Ct. Nov. 25, 2008). Plaintiffs filed suit challenging this law on December 30, 2008, ultimately raising thirteen claims under the Arkansas and United States Constitutions.

By its terms, Act 1 categorically bans persons from applying to adopt or provide foster care for a child in State custody if that person is "cohabiting" outside of a recognized marriage "with a sexual partner." ARK. CODE ANN. § 9-8-304 (West 2010). Act 1 does not ban single people from applying to adopt or foster. Act 1 bans individuals cohabiting in intimate relationships from acting as foster parents, or forming permanent, loving families through adoptions, while permitting them to care for children as guardians. This ban applies without regard

for the best interests of children, without consideration of placement with relatives and, indeed, requires the Arkansas Department of Human Service ("DHS") to remove a child from a foster home if it is determined that the foster parents are engaging in a prohibited sexual relationship. In Arkansas, other than the Act 1 ban, only those convicted of violence, sex crimes and other serious crimes are similarly banned from adopting or fostering children.

The Circuit Court's decision, if affirmed, means that those now categorically banned from applying to adopt or foster a child because of their intimate relationships will be able to apply, and then be subjected to the same individualized fitness review the State performs on other applicants. Supp Abs 15-16, 160; Supp Add 19 (¶ 32). No child is placed with an applicant unless the State (and, at times, the courts) confirms that such person is qualified to be an adoptive or foster parent and can meet the individualized needs of the child.

Count 10 of the Fourth Amended Complaint – the basis on which the Circuit Court found Act 1 to be unconstitutional – was brought by several Plaintiffs: (1) Sheila Cole, already raising a child in a 10-year relationship with her same-sex partner, seeking to adopt her granddaughter out of State care – the only blood relative of the child willing to do so, State Add 659; (2) Stephanie Huffman and Wendy Rickman, professors at University of Central Arkansas in a 10-year relationship, successfully raising two children including a special needs child

adopted in Arkansas in 2003 and now seeking to adopt a second (possibly special needs) child, State Add 660; (3) Frank Pennisi and Matt Harrison, two Little Rock residents in a committed relationship for eight years, seeking to foster or adopt a child, State Add 660-61; and (4) Curtis Chatham and Shane Frazier, a speech therapist and hospital administrator, who learned through their church group about a 12-year-old boy available for adoption and started the adoption process, but were barred from proceeding solely because of Act 1, State Add 662-63.

Act 1 bars each of these Plaintiffs from even applying to adopt or foster a child because of their intimate relationships. Only if these Plaintiffs cease their long-standing intimate relationship or move out of the homes they have each created with their partners, can they become eligible to apply to adopt and foster. (Same-sex couples may not marry in Arkansas. ARK. CONST. amend. 83 § 1.) Each of these Plaintiffs seeks no more than the ability afforded to all other citizens to be subject to an individualized fitness review process conducted by the State, *see, e.g.*, Supp Abs 71-72, 92-95, 97-98, 114-116; Supp Add 22-23 (¶ 40), and, if certified as fit, to proceed to explore and perhaps develop an adoptive or a foster parent relationship with a child in State custody.

Defendants Department of Human Services ("DHS") and the Child Welfare Agency Review Board ("CWARB") are responsible for approximately 3,800 children in State care. Supp Add 97; Supp Abs 242. Because of the

shortage of willing applicants, many children stay in State custody for years. In 2009, 248 children aged out of the foster care system after reaching age 18 without finding a permanent family, Supp Add 106, a result that is damaging to most children's well-being. Supp Abs 454-456; FCAC Add 492-93 (¶ 41). Presently, over 500 children in State custody are awaiting adoption. Supp Add 113. The State system does not have sufficient adoptive and foster parent resources to meet the needs of all children in State care. Supp Abs 162-63, 172-73, 466; Supp Add 11 (¶ 9).

Defendants and Intervenors moved to dismiss, and the Circuit Court initially granted the motion only as to Count 11 (not at issue in this appeal). Thereafter, discovery ensued resulting in the following uncontested facts:

> Arkansas has, at any given time, approximately 1600 children in need of foster and adoptive families, who cannot be placed with their biological family. Supp Add 97; Supp Abs 242-43.
>
> The State's individualized review process to determine the fitness of applicants to foster and adopt is effective and works equally well for applicants whether they are married, single or cohabiting. Supp Abs 19, 21-22, 24-26, 33-34, 102, 174, 474; Supp Add 130-131; *see also* Supp Add 27-28 (¶ 59).
>
> Adoptions in Arkansas can occur only if a court determines that the adoption is in the best interests of a child. *See* Supp Abs 105-11; *see also* Supp Add 26 (¶ 54).
>
> DHS and CWARB agree that individual screening, rather than categorical bans such as that created by Act 1, is the only effective way to determine whether applicants will be a good "fit" as an adoptive or foster parent for any particular child in

State custody. Supp Abs 17-19, 325-26, 382; *see also* Supp Add 19, 25 (¶¶ 32, 50).

Act 1 prevents some children in State care from being placed with a family that would be in the best interests of that child, including relatives. Supp Abs 15-16, 250, 290, 327, 404-06; *see also* Supp Add 21 (¶ 37).

The consensus in the professional child welfare field – including professionals at DHS and CWARB – is that categorical bans excluding same-sex couples and cohabiting heterosexual couples from fostering or adopting children are contrary to the well-being of children in State care. Supp Abs 13, 23, 27, 47-48, 52-53, 100-01, 117, 250, 476-77; *see also* Supp Add 37-39 (¶ 96).

Officials at DHS and CWARB cannot identify a single child welfare purpose that is served by Act 1's categorical exclusion. Id. (Indeed, Act 1 conflicts with a decision made by DHS in October 2008 that it was in the best interests of children in its care to rescind an internal ban on cohabiting couples from serving as foster parents. FCAC Add 130B-C; Supp Add 42 (¶¶ 108, 109).)

All parties moved for summary judgment. In an Order dated April 16, 2010, the Circuit Court (1) granted Plaintiffs' motion for summary judgment on Count 10; (2) held it "unnecessary to address the remaining [State] claims "in light of the Court's ruling on Count 10"; and (3) granted Defendants' motion for summary judgment on all U.S. Constitutional claims. The subsequent judgment entered by the Circuit Court conformed with the Order, except that it included a dismissal with prejudice on all State constitutional claims (save Count 10) which the Order had specifically stated were "unnecessary" to address. This appeal and cross-appeal followed.

APPELLEES' ARGUMENT

SUMMARY OF ARGUMENT

Contrary to the theme of the case briefed by Appellants, this case does not involve anyone's "right" to adopt, being "granted" a child, anyone's right to marriage, or which factors may be considered in individual child placement decisions. Nor does this case present the issue of whether children in State custody might be better off with biological parents; Act 1 is about children in State care who have been taken from their biological parents. This case is not about placement with married parents, either. Arkansas does not bar single people from adopting or fostering; indeed, Arkansas prohibits any preference for married applicants over single applicants. *See* ARK. CODE ANN. § 9-28-903 (foster parents are "free from discrimination . . . on marital status"); Supp Abs 23, 442-43. This case raises a narrow question regarding what the Circuit Court found to be an "unreasonably broad" law, State Add 1008: whether the State may penalize private consensual, non-commercial acts of sexual intimacy between unmarried adults in the home they have created together by forbidding such persons, *because* of their acts of intimacy in their home, from even applying to be considered by the State, through its rigorous screening process, as potential adoptive or foster parents. Under several cases, including *Jegley* v. *Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), the State may not so burden such a relationship under our Constitution.

In order to overcome the Arkansas Constitution's long-standing respect for privacy in one's home and the choices adults make about their consensual intimate relationships and to sustain Act 1, which directly impinges on those protections, the State must demonstrate that Act 1 is narrowly tailored to serve a compelling government interest. In light of the overwhelming evidence that Act 1 harms, not helps, children in State care, Appellants do not claim that they can meet this standard. As the State admits its individualized screening process effectively selects qualified foster and adoptive parents, Act 1 serves no purpose but to exclude those who would otherwise be deemed qualified foster or adoptive parents. This broad sweep is the antithesis of serving any child welfare purpose and flatly fails the narrow tailoring required by heightened scrutiny.

Rather than attempt to defend the law under the strict scrutiny test, Appellants suggest that the right to privacy and intimate relations, and the respect for the home long recognized by *Jegley* and other decisions of this Court, are not implicated by Act 1 because Plaintiffs can avoid the burden of Act 1 by "simply" moving out of the homes they have shared with their partners in intimate relationships for many years. To suggest that the Arkansas Constitution protects the privacy of one's consensual intimacy at home, but that such protection is not infringed by the State penalizing Arkansans for having those intimate relationships with a partner with whom one shares a home, is nonsensical. Moreover, even

assuming, contrary to established law, that Act 1 is subject to a rational basis rather than strict scrutiny test, Act 1 nevertheless fails. Although the parties agree that protecting children is a legitimate government purpose, the classifications created by Act 1 are *not* rationally related to furthering that or any other legitimate government interest for at least the following reasons:

First, Act 1 eliminates from serving as foster or adoptive parents only those applicants who, after a rigorous and effective State screening process, would be *approved* by the State as fit parents. Indeed, Defendants DHS and CWARB, in accordance with the views of leading child welfare organizations, agree that Act 1's categorical exclusion arbitrarily reduces the number of qualified homes available for children and thus does not promote children's well-being.

Second, the text of Act 1 does not support the banning of cohabitors for reasons associated with child welfare. Although Appellants question the parenting abilities of all cohabitors to suggest a reason to exclude them categorically from adopting or fostering, the plain text of Act 1 allows precisely these same people to serve as guardians, which unlike fostering or adopting requires minimal oversight from the State. If cohabiting couples are fit to apply to be guardians and care for children in their home, there is no rational basis to forbid them from applying to foster or adopt. *Florida Dept. of Children and Families* v. *Adoption of X.X.G.*, No. 3D08-3044, 2010 WL 3655782 at *5 (Fla. App. Dist.

Sept. 22, 2010).

Third, the "empirical evidence" cited by Intervenors touting the average outcomes of children raised by their married parents has no bearing on Act 1's purported rationality. As is the consensus in the child welfare field, it is irrational to rely on studies about average outcomes which say nothing about whether any particular applicant, whether married, single, or cohabiting, would be a suitable adoptive or foster parent. Just as it would be irrational to exclude all men from serving as adoptive parents despite studies showing that men are overwhelmingly the perpetrators of child abuse, or conversely to approve all female applicants using the same statistic, it is irrational to ban all same-sex and heterosexual cohabitors as unsuitable when it is undisputed that the State's individualized screening process is thorough and effective.

Moreover, the studies cited by Intervenors evaluate the outcomes for children raised by their *biological married parents*. By definition, the choice faced by children in State care is not placement with their biological parents, married or not. No study offered by Intervenors or the State speaks to the choice actually faced by children who feel the burden of Act 1: either (i) adoption or foster care by those who have been deemed fit after individualized review or (ii) continued State care in a group home or other institution, until they age out of the system altogether. All the evidence establishes that State care is worse for these children.

In light of the severe shortage of qualified applicants, forbidding those who would have been deemed fit from even applying to adopt or foster is simply not rational.

Appellants' reliance on this "evidence" to make further irrelevant comparisons goes further. Whatever Appellants may believe about the heterogeneous group of cohabitors—including unmarried couples living together solely because of an unplanned pregnancy, dire economic circumstances, or other reasons—these statistics have no bearing on the discrete group of people who are penalized by Act 1: those who have elected to bring a child into their home and will pass the rigorous and undisputedly effective individualized review process employed by Arkansas. Appellants *have no evidence* that child welfare outcomes differ for children raised by these couples when compared to similarly situated married couples, making it irrational to exclude them from the application process.

Fourth, even if average outcome statistics were relevant, there is no rational basis to categorically exclude same-sex couples. Appellants do not dispute that the evidence establishes that the average outcomes for children of same-sex couples are not different than average outcomes for those raised by married heterosexual couples. FCAC Add 491 (¶ 29) (decades of scholarship show that "children raised by same-sex couples are no more likely to have adjustment problems than children of married heterosexual couples"); *see also* Supp Abs 422. Indeed, the underpinning of this Court's decision in *Howard* was to the same

effect: an agency ban on gay persons, including same-sex couples, from serving as foster parents was *ultra vires* because "there was no rational relationship between the regulation's blanket exclusion and the health, safety, and welfare of the foster children." *Howard*, 367 Ark. at 65, 238 S.W.3d at 8.

Finally, with respect to Intervenors' assertion that it is rational to believe that children do best with a married mom and dad, it is irrational to conclude that Act 1 does anything to promote children being raised in such households. Act 1 does not bar single people, who constitute 17% of the foster and adoptive placements in the State, from applying. *See* Supp Add 159. Nor does Arkansas law create a preference for married applicants.

Thus, the classification created by Act 1 is irrational and no "empirical evidence" cited by Defendants is relevant or suggests otherwise.

STANDARD OF REVIEW

"On appellate review, this court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered." *Jegley*, 349 Ark. at 610, 80 S.W.3d at 336; *Repking* v. *Lokey*, No. 09-1024, 2010 WL 3787823 at *2 (Ark. Sept. 30, 2010). "The burden of sustaining the motion for summary judgment is always on the moving party," but "[s]ummary judgment is proper when the party opposing the motion fails to show that there is a genuine issue of

material fact, and the moving party is entitled to judgment as a matter of law." *Jegley*, 349 Ark. at 610, 80 S.W.3d at 336. This Court's "review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties." *Id.* at 611, 80 S.W.3d at 336; *see also* ARK. R. CIV. P. 56(c) (West 2010).

ARGUMENT

I. THE CATEGORICAL EXCLUSION OF ACT 1 IMPINGES UPON THE FUNDAMENTAL RIGHT TO PRIVACY UNDER THE ARKANSAS CONSTITUTION.

By its plain terms, Act 1 penalizes citizens of Arkansas who decide to live together in an intimate relationship. By virtue of making that private determination, intimate couples who make their home together are barred from doing what all other Arkansas citizens (save those convicted of serious crimes) may do: applying to be adoptive or foster parents. Although Defendants have at times offered contradictory or incomprehensible testimony concerning how they would monitor compliance with Act 1, *see, e.g.*, Supp Abs 25-26, 196-97, 478-79, it is clear that Act 1 cannot be applied without the State wading into the intimate lives of couples who share a home. Because the State believes it must remove a child placed with a person who later runs afoul of Act 1's categorical ban, Supp Abs 481; *see also* Supp Add 37 (¶ 94), it also is plain that to apply Act 1 the State would monitor unmarried foster parents' private sexual activity in their own home.

In *Jegley*, this Court recognized that the fundamental right to privacy

was inherent in the explicit guarantee in Act 2, Section 2 of the Constitution for all citizens to "pursu[e] their own happiness." ARK. CONST. art. 2 § 2; *Jegley*, 349 Ark. at 627, 80 S.W.3d at 347. The Court, reviewing the history of several statutes and cases, concluded that there is "a public policy of the General Assembly supporting a right to privacy." *Id.* at 628-29, 80 S.W.3d at 347-48. Likewise, the Court repeatedly took note of the right of citizens to be secure in their homes. *Id.* at 627, 80 S.W.3d at 347; *see also id.* at 639, 80 S.W.3d at 354 (Brown, J., concurring) ("If anything has been sacrosanct over the past hundred and fifty years under the common law of Arkansas, it is the principle that a person's home is his castle."). In light of the constitutional guarantee to pursue happiness, the sanctity of the home, and the history of these rights in Arkansas, the Court concluded that "Arkansas has a rich and compelling tradition of protecting individual privacy and that a fundamental right to privacy is implicit in the Arkansas Constitution." *Id.* at 631-32, 80 S.W.3d at 349-50. As this Court explained, "[w]hen a statute infringes upon a fundamental right, it cannot survive unless a compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest." *Id.* at 632, 80 S.W.3d at 350 (citation omitted). Consequently, the Court found the statute at issue in *Jegley* to be unconstitutional because the fundamental right to privacy encompasses "all private, consensual, noncommercial acts of sexual intimacy between adults." *Id.* After *Jegley*, this

Court continued to recognize the right of Arkansas citizens to privacy in their homes. *See, e.g., Polston* v. *State*, 360 Ark. 317, 331-32, 201 S.W.3d 406, 414 (2005). "[T]he legal principle that a person's home is a zone of privacy is as sacrosanct as any right or principle under our state constitution and case law." *State* v. *Brown*, 356 Ark. 460, 469, 156 S.W.3d 722, 729 (2004).

Just as the statute at issue in *Jegley* "burdens certain sexual conduct . . . and infringes upon the fundamental right to privacy," 349 Ark. at 632, 80 S.W.3d at 350, so too Act 1 infringes on and burdens the identical fundamental right. Act 1 directly penalizes intimate relationships of unmarried citizens who elect to make a home together. Act 1 "significantly burdens non-marital relationships and acts of sexual intimacy between adults because it forces them to choose between becoming a parent and having any meaningful type of sexual relationship outside of marriage." State Add 1008. Consequently, Act 1 can survive only if it is the least restrictive means to achieve a compelling government interest. *See, e.g., Jegley*, 349 Ark. at 632, 80 S.W.3d at 350.

Appellants do not contend that Act 1 can meet the strict scrutiny test required under *Jegley*. Rather, Appellants seek to rescue Act 1 by claiming that (1) a fundamental right is not at issue because Act 1 burdens "only" cohabiting, rather than intimate relationships (State Arg 13-18; Intervenors Arg 3-10); (2) that courts making decisions about individual child custody decisions following divorce

take into account the cohabiting status of the adults involved in a particular case (State Arg 10-11; Intervenors Arg 9-11); (3) that any burden caused by Act 1 is not substantial (State Arg 11-14; Intervenors Arg 7-9, 13-15); and (4) that, in Intervenors' view, a cascade of horrors will befall the State if Act 1 is declared invalid (Intervenors Arg 11-13). Each of these contentions lacks merit.

Act 1 penalizes "only" cohabiting. Appellants contend that a fundamental right is not at issue because Act 1 prevents only cohabiting which is not a fundamental right. Appellants reach the illogical conclusion that *Jegley* is not dispositive because, in their view, Plaintiffs are not penalized for having intimate relations; rather, Plaintiffs are only penalized for having intimate relations with a partner with whom they have built and shared their home.

Appellants' effort to parse the language of both Act 1 and *Jegley* out of context and beyond recognition is without merit. Plaintiffs are not claiming, and the Circuit Court did not find, a "new" fundamental right to cohabit. Act 1 does not bar people from adopting or fostering children because they cohabit in the sense that they live together as non-intimate roommates. Rather, the entire thrust of the statute is to penalize people in intimate relationships they have in their homes—conduct that is protected under *Jegley*. It would be hollow, indeed nonsensical, to view *Jegley* as recognizing a fundamental right to sexual intimacy, but carving out an exception for intimacy with a life partner with whom one shares

a home. Indeed, if the right to "pursue happiness"— the underpinning of the fundamental right to privacy—and the right to be left alone in one's home have any meaning at all, a couple's sexual relationship in the home they share should be entitled to *more*, not less, protection than sexual relations outside of a shared life and home.[1]

Appellants' mis-framing of the issue was considered and rejected by the Supreme Court in *Moore* v. *City of East Cleveland Ohio*, 431 U.S. 494 (1977), which challenged a housing ordinance that prevented a woman and her grandchild from living together. The issue in that case was the right to familial association. Defendants argued that the housing statute did not prevent Mrs. Moore from associating with her grandson; the two could certainly associate, as long as they lived in separate residences. But, the Supreme Court recognized that forbidding the two from living in the same home impermissibly burdened the fundamental right of familial association. *Id.* at 499-506. Here, too, suggesting that the couple

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[1] Appellants continue to rely on *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), and *U.S. Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), to support their "no fundamental right to cohabit" argument. Neither case is relevant to Act 1, however, because neither case dealt with the fundamental right of privacy recognized by *Jegley* and penalized by Act 1.

could choose not to have an intimate relationship (or choose not to live together) does not change the fact that Act 1 burdens the right to privacy. *Moore* shows Appellants' argument for what it is: a failure to comprehend what it means to burden a fundamental right.

Individual child custody determinations. Appellants' reliance on individual child custody decisions by courts assessing the best interests of a particular child in a particular case after divorce are equally misplaced (*see* State Arg 22; Intervenors Arg 9-11). Although Appellants suggest that these cases support their strained distinction between sexual relationships, which they concede are protected under *Jegley*, and "cohabiting," these custody cases say nothing about whether a categorical exclusion of individuals in unmarried relationships is constitutionally permissible in the adoption or foster care context. In divorce cases, the courts are called upon to resolve disputes between warring parents about the custody and care of children who are facing the separation of their parents. The courts must assess the impact each parent's subsequent relationships and living arrangements might have on children who were previously living with both parents. Here, the couple-Plaintiffs are seeking to adopt or foster children together and to form a family. There is no dispute between parents to be mediated.

Moreover, the custody context allows and requires the individualized case-by-case review that Act 1 forbids. This Court has already strongly suggested

that a blanket ban, such as that imposed by Act 1, which undertakes no individualized review, would be unconstitutional. In *Taylor* v. *Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003), the Court held that a trial court abused its discretion in transferring custody away from the mother, because she shared her home and bed with another woman, based on the speculation that this would be harmful to the children. The Court demanded that "evidence-based factors must govern," and because the evidence showed that the children were thriving in their mother's care and "had not been adversely affected by [their mother's] living arrangement," held the lower court erred in changing custody based solely on the fact that she was cohabiting in an unmarried relationship. *Id.* at 83-84, 110 S.W.3d at 739-40. In *Alphin* v. *Alphin*, 364 Ark. 332, 340-42, 219 S.W.3d 160, 165-67 (2005), cited heavily by Appellants, this Court once again looked to evidence of the well-being of the child, not the cohabitation of the custodial parent alone.

In contrast to the evidence-based standard employed in custody cases, Act 1 does not address what is in the best interests of an individual child—indeed it *forbids* any consideration of children's best interests in the application of the statute. In cases such as that of Plaintiff Sheila Cole, who was adjudged by DHS and the Circuit Court of Benton County to be the person best suited to care for her grandchild (Order, *Arkansas DHS* v. *Caldwell*, dated January 13, 2009 (FCAC Add 130E-F)), Act 1 forbids the State and its child welfare professionals from acting in

W.H's best interests. Striking down Act 1 would say nothing about individual child custody cases, where any established relevant factors may be considered if, as the Court ruled in *Taylor* v. *Taylor*, 353 Ark. 69, 110 S.W.3d 731, those factors are supported by evidence.

The better analogy to Act 1 would be, for example, a law that categorically banned all Methodists from applying to adopt—obviously an unconstitutional infringement on a fundamental right. The fact that it would be unconstitutional to categorically ban all Methodists from applying to adopt does not mean that religion may not be a factor to consider in appropriate individual child custody decisions. *See, e.g.*, *Rownak* v. *Rownak*, 103 Ark. App. 258, 261-62, 288 S.W.3d 672, 674-75 (2008); *Hicks* v. *Cook*, 103 Ark. App. 207, 212, 288 S.W.3d 244, 248 (2008). Appellants raised a similar argument in *Howard* with respect to placement of children with gay men and lesbians, and the Court rejected it in that case just as it should reject it here. *See* Supp Add 179-80.

The custody cases on which Appellants rely thus do not undermine the Circuit Court's decision. Affirming the Circuit Court here simply means that Plaintiffs will undergo the same individualized review as any other citizen who applies to foster or adopt a child and will have their individual qualifications to provide a loving family evaluated in the same way. Such a result is entirely consistent with the individualized approach in custody cases.

The burden of Act 1 on the right to privacy is direct and substantial. Appellants next claim that categorically depriving citizens of the ability to *even apply* to foster or adopt because that person has established an intimate relationship with another in their home creates only an "indirect and insubstantial" infringement (State Arg 13; *see also* Intervenors Arg 13). This is not a law that incidentally affects people who exercise the right to form intimate relationships with their partners. The very object of Act 1 is to target those who live in intimate relationships in a shared home. Act 1 creates a categorical ban for those who exercise the right to privacy, preventing them from applying to become a parent because of the very conduct our Constitution protects. *See Howard*, 367 Ark. at 68, 238 S.W.3d at 10 (Brown, J., concurring). The State recognizes as much as it concedes that the ban in *Howard* "penalized homosexuals for having sex." State Arg 21. Here, too, Act 1 means Plaintiffs and others who wish to be considered as potential foster or adoptive parents must forego becoming adoptive or foster parents for the sole reason that they have exercised their fundamental right recognized in *Jegley* to form an intimate relationship with a partner.

Indeed, government actions conditioning less significant benefits and privileges on the cessation of a fundamental right have regularly been analyzed under strict scrutiny. *See, e.g., Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 640 (1974) (employment as a teacher); *Mem'l Hosp.* v. *Maricopa County*, 415 U.S.

250, 257-58 (1974) (free non-emergency medical care); *Shapiro* v. *Thomson*, 394 U.S. 618, 634 (1969) (welfare benefits), *overruled in part on other grounds*, *Edelman* v. *Jordan*, 415 U.S. 651, 652 (1974).[2]

Appellants' argument that applying to adopt or foster is a "privilege" (Intervenors Arg 13) and is a significant benefit is exactly the point. Absent a compelling justification, the State may not deny access to that significant privilege of citizenship solely because a person has exercised a fundamental right. (For the same reason, the State's suggestion (State Arg 10-11) that Act 1 must be upheld because other child welfare regulations such as a residency requirement burden other fundamental rights, such as the right to travel, is meritless. The State plainly has a compelling justification in ensuring that it has oversight over those it entrusts

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[2] *Lyng* v. *Castillo*, 477 U.S. 635 (1986), (State Arg 12), is not to the contrary. *Lyng* challenged the establishment of food stamp eligibility based on *income* of those living together (recognizing that certain economies of scale occur when individuals live together). But the government was not penalizing people *because* they were married or cohabiting or had otherwise formed family units or had sexual relations. In contrast, Act 1 does more than incidentally affect people who exercise the right to form committed intimate relationships; excluding people because they enter into such relationships is its very objective.

to care for children in State care that warrants a requirement that foster parents reside in Arkansas or apply through the Interstate Compact on the Placement of Children, a formalized process that allows oversight for placements that occur across State lines. Intervenors' claim to the contrary is akin to arguing that the child welfare system is not subject to constitutional scrutiny. It is, and must be. *See Howard,* 367 Ark. at 65-66, 238 S.W.3d at 7-9.

The consequences of invalidating Act 1. Finally, Intervenors' proffered array of dire consequences should the judgment be affirmed again misunderstands what this case is about. (Intervenors Arg 11-13.) Act 1 burdens the right to privacy because it is precisely the exercise of that fundamental right that is the sole basis used to exclude people from eligibility to adopt or foster. Act 1 is not about promoting marriage—Act 1 does not prevent single persons from applying to adopt or foster. Nor, in light of the number of single persons serving as adoptive and foster parents, could eligibility to adopt or foster possibly be viewed as an incident of marriage. (*Cf.* Intervenors Arg 13.)

And Act 1 is not about, for example, seeking eligibility for tax treatment (Intervenors Arg 12): Plaintiffs do not seek to be treated like married applicants in this case and they are not barred from applying because they are unmarried. Rather, they seek the same ability to apply to foster and adopt that all single individuals in Arkansas (save those who live with an intimate partner) are granted.

Holding that such a burden on the fundamental right to form intimate relationships violates the constitution says nothing about whether the State can, separately, give some benefits to people who are married and not to those who are unmarried (regardless of their sexual relationships).[3]

The judgment below is merely the application of well-settled law that the State may not impinge upon and penalize the exercise of a fundamental right unless it does so in a narrowly tailored way to advance a compelling government interest. Finding Act 1 to be unconstitutional does not lead to the list of "horrors"

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[3] While the State may not under *Jegley* penalize certain sexual conduct, *Jegley* does not hold that all those who engage in that conduct must be treated the same as married couples for tax or all other purposes. Intervenors' predictions of what bad things might happen following this Court's decision, did not follow after this Court issued its opinion in *Jegley*. So too here, recognizing that a law that targets people solely because of their intimate relationships in their homes is unconstitutional does not mean that people in such intimate relationships thereby have an automatic right to every benefit conferred on every citizen. The State may create eligibility requirements for various activities, but it may not directly penalize the exercise of a fundamental right unless it does so narrowly and to advance a compelling government interest.

Intervenors suggest because none of the examples proffered by Intervenors actually deprive a citizen of access to a State program or benefit *because* that citizen engaged in precisely what has been recognized to be a fundamental right.

II. ACT 1 IS NOT NARROWLY TAILORED TO MEET ANY COMPELLING GOVERNMENT JUSTIFICATION.

Because Act 1 impermissibly burdens the fundamental right to privacy it may survive constitutional challenge only if Act 1 is narrowly tailored to achieve a compelling government interest. *See, e.g., Jegley*, 349 Ark. at 632, 80 S.W.3d at 350. Act 1 is not tailored to serve any such purpose. *See* SC 4 to SC 5, *supra*. As the Circuit Court found, Act 1 "casts an unreasonably broad net over more people than is needed to serve the State's compelling interest [in protecting children]." State Add 1008. The fact that Act 1 cannot meet strict scrutiny is not contested in this appeal.

III. ACT 1 CANNOT MEET EVEN THE RATIONAL BASIS TEST.

Even assuming Appellants' illogical conclusion is correct—that laws impinging upon private acts of intimacy are subject to strict scrutiny, but laws impinging upon such acts of intimacy in the home two people share are subject to rational basis review—Act 1 still must fail. Act 1 is not rationally related to a legitimate government interest.

There is no doubt that the welfare of children in State care is a legitimate government interest. Act 1 fails, however, because not only is it not

rationally related to that goal, but it is—as the State Defendants DHS and CWARB, and leading child welfare professionals, agree—actually harmful to children in State care. And, while courts have a limited role under the rational basis test, courts do—contrary to Appellants' suggestion—have a constitutional duty to review statutes. As this Court held in *Arnold* v. *Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991), statutory classifications "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." 306 Ark. at 303; 813 S.W.2d at 775. In other words, when the connection between the law's exclusion and the proffered government purpose is so "attenuated as to render the distinction arbitrary or irrational," the rational basis test is not met. *City of Cleburne, Tex.* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985); *Romer* v. *Evans*, 517 U.S. 620, 632 (1996).

Moreover, the connection between the government purpose and the law must be grounded in a "factual context" to pass rational basis review. *Romer*, 517 U.S. at 632-33, 635; *Heller* v. *Doe*, 509 U.S. 312, 321 (1993) ("the proffered objective must have footing in the realities of the subject addressed by the legislation"); *Cleburne*, 473 U.S. at 448 ("mere negative attitudes, or fear" do not meet rational basis); *Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 533-39 (1973) ("unsubstantiated" charge that "hippies" are more likely to commit fraud does not meet rational basis). As this Court has held, to meet equal protection requirements,

a law that classifies people differently must "rest on real and not feigned differences." *Smith* v. *State*, 354 Ark. 226, 235, 118 S.W.3d 542, 547 (2003).

The question raised by Act 1 is whether categorically banning those in cohabiting and sexual relationships from applying to adopt or foster (and who would actually become foster or adoptive parents only after an exhaustive review by the State and, in the case of adoption, court approval) is rationally related to promoting the welfare of children in State care. As shown below, Act 1 is not rationally related to child welfare when the actual relevant "factual context" is examined. *See Romer*, 577 U.S. at 623.

First, no reasonable person could conclude that Act 1 is rationally related to promoting children's welfare, as it is the consensus of the child welfare field, *including of the Defendants in this case, DHS and CWARB*, that categorical bans on cohabiting applicants arbitrarily exacerbate the shortage of foster and adoptive placements at the expense of children in State care. *See* Supp Abs 76, 250, 409. Indeed, the State's own testimony is that Act 1 is not rationally related to child welfare. *See, e.g.,* Supp Abs 24 (Act 1 inconsistent with best practices in the social work field), 27 (no CWARB interest furthered by Act 1), 52-53 (no DHS interest furthered by Act 1), 117, 343-44, 481. Several policymakers were of the view that Act 1 affirmatively harms children in State care by reducing the number of suitable applicants to adopt or foster a child, *see, e.g.,* Supp Abs 76, 250, 409;

Howard, 367 Ark. at 63, 238 S.W.3d at 7, and for this reason, after substantial hearings, DHS eliminated its internal ban on cohabiting same-sex and heterosexual couples fostering children in 2008, before Act 1 passed. FCAC Add 130B-C. As explained by DHS Director John Selig, this cohabitation ban was eliminated because "it's important to expand our recruitment base so that we can to [sic] find a family that meets the needs of every child." FCAC Add 130B. In addition to the State's own testimony, the long, unbroken list of professional organizations that reject categorical bans in favor of individual review—including The Child Welfare League of America, The National Association of Social Workers, and The North American Council on Adoptable Children—further shows the irrationality of Act 1's categorical exclusion. FCAC Add 223-24 (¶¶ 25-28); *see also Howard*, 367 Ark. at 62-65, 238 S.W.3d at 6-8.

Indeed, the uncontested evidence shows that the State's individualized review process is effective, *see, e.g.*, Supp Abs 46-47, 244-45, 343-44, and equally so for cohabiting, single and married applicants, Supp Abs 244-45, 471, such that Act 1 only prevents children in State care from being placed in the home of an applicant the State would have approved as a caregiver for that child. In the case of adoption, Act 1 prevents judges from ordering adoptions that are in a child's best interest, for example, in the case of plaintiff W.H., her grandmother Sheila Cole. *See* ARK. CODE ANN. § 9-9-214(c). A law purportedly related to child

welfare that serves no purpose but to exclude applicants who would be deemed qualified parents is irrational.

Second, there is nothing rational about excluding cohabitors from fostering and adopting given that the plain text of Act 1 acknowledges that those same individuals are qualified to care for children. Act 1 makes an inexplicable distinction between foster parenting and adoption on the one hand, and guardianship on the other, banning cohabiting couples from the former, while allowing them to serve as guardians for children in State care. ARK. CODE ANN. § 9-8-304. This is particularly irrational given that guardianships have less oversight and monitoring than foster care or adoptive relationships. *See, e.g.,* ARK. CODE ANN. §§ 28-65-203, 28-65-322; *see also* Supp Abs 233-34. Accordingly, it would be irrational to believe that concerns about children's safety and well-being warrant a categorical exclusion from adopting or fostering, but pose no threat at all in the guardianship context. Indeed, the Florida District Court of Appeal recently examined a very similar issue, when it struck down that state's ban on adoption by gay people (and couples). *Adoption of X.X.G.*, 2010 WL 3655782 at *10. The court found that the fact that Florida permitted gay people to serve as guardians and foster parents rendered any purported child-welfare justification for barring them to be adoptive parents entirely irrational. *Id.* ("This factor does not provide an argument for allowing [guardianship and foster] placements while prohibiting

adoption. We reject the Department's remaining arguments for the same reason: they do not provide a reasonable basis for allowing homosexual foster parenting or guardianships while imposing a prohibition on adoption.").

Third, the State Defendants and the child welfare field more broadly agree that the asserted "empirical evidence" offered by Intervenors about average outcomes is irrelevant because those statistics say nothing about whether any particular applicant, whether married, single, or cohabiting in a sexual relationship, would be a suitable adoptive or foster parent. Instead, it is undisputed that individual screening is the only way to determine whether applicants will be a good "fit" for any particular child. *See* Supp Abs 26-27, 46-47, 343-44. By way of example, studies show that men are overwhelmingly the perpetrators of child abuse. FCAC Add 41 (¶ 14), 492 (¶ 33). Yet, it would be irrational to exclude all men from serving as foster or adoptive parents based on these studies, or conversely to approve all female applicants using the same statistics. In other words, it is irrational to ban all cohabitors based on statistics that do not predict individual behavior, when it is undisputed that the State's individualized screening process is thorough and effective. *See Moreno*, 413 U.S. at 536-37 (existence of screening process to detect fraud in federal food stamps program showed irrationality of relying on stereotypes to predict likelihood of committing fraud).

More fundamentally, and putting Intervenors' failure to be faithful to

the record aside,[4] Intervenors' statistical evidence simply misses the point (*see* Intervenors Arg 22-29). The statistical evidence cited by Intervenors largely compares average outcomes of children raised by cohabitors with average

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[4] Intervenors wrongly claim that Plaintiffs' experts conceded that "[p]oorer outcomes apply to both heterosexual and homosexual cohabiters," Intervenors Arg 24, that "cohabiters generally have lower quality relationships than married couples and less relationship satisfaction," *id.* at 24, and that "there is a significant association between marriage and improved child outcomes," *id.* at 27. No expert *on either side* stated that children raised by same-sex couples had poor average outcomes, or that those outcomes were worse than outcomes for children raised by married heterosexual parents. *See* FCAC Add 491; Supp Abs 422. All of Plaintiffs' experts explained that only if one grouped together the diverse set of people who might be deemed cohabitors—including young unwed mothers, people living together in short-term relationships because of economic necessity, and others—into an imaginary "average cohabiting individual" would they agree with any of the generalizations asserted by Intervenors. As all these experts clarified, however, there is no basis to believe that cohabiting itself predicts or causes poor outcomes for children, or poor relationship quality among those couples who might apply to foster or adopt. *See* Supp Abs 269-72, 343, 495.

outcomes of biological "children in intact married households" (*Id.* at 23, 24, 28).

Being raised by their biological parents in intact households is not an option for the children Act 1 supposedly protects, and outcomes for children raised in that manner are not relevant to any issue in this case. The option for children in State care—and the only one Act 1 can address—is continued State care or placement in approved homes. As all parties admit, there is zero evidence in the record that children fare better in institutional state care than placement with approved families—even with approved families with parents cohabiting in a sexual relationship. There simply is no evidence at all, averages or otherwise, that children fare better in State care than they do with approved cohabiting couples. FCAC Add 226, 490-93, 898. Thus, the evidence cited by Appellants to support their rational basis argument is not in any way grounded in a relevant "factual context." *Romer*, 517 U.S. at 632-33; *see also* cases cited at Arg 21-22, *supra*.

Appellants try to make their point by looking at the wrong "evidence" in another respect as well—there is no evidence that the individuals excluded by Act 1 would make any worse parents than married couples. Appellants focus on unmarried couples living together for a variety of reasons, ranging from unplanned pregnancy to economic troubles. The couples who are seeking to foster and adopt are different; they have affirmatively elected to bring a child into their home and will be scrutinized by Arkansas's undisputedly effective individualized review

process. *See* Supp Abs 46-47; 244-45, 343-44. There is no evidence that married couples are any better at raising children than cohabiting couples who would be deemed qualified by the State—the actual targets of Act 1.

Fourth, there is nothing rational about excluding same-sex couples from fostering or adopting children. Appellants cite no evidence and no facts (indeed, there are none) to even suggest that children raised by same-sex couples on average have poorer outcomes than children raised by married couples on average. Rather, the undisputed evidence showed the contrary, namely, that child outcomes are not better or worse for same-sex or married couples. *See* FCAC Add 491; Supp Abs 422; *Howard*, 367 Ark. at 65, 238 S.W.3d at 7. Even Appellants' experts agree that same-sex couples may not only be acceptable adoptive parents, but they may be the *best* adoptive parents for certain children. Supp Abs 182, 277-78, 423. As this Court held in *Howard*, a categorical ban on gay people fostering a child is not rationally related to child welfare. *Howard*, 367 Ark. at 65, 238 S.W.3d at 7-8. Not only have Appellants failed to cite any evidence suggesting that the social science analysis has changed since *Howard* was decided in 2004, but Intervenors rely on the same rejected evidence they cited as *amicus* in *Howard*, No. 05-814, 2006 WL 2134558 (Ark. Feb. 6, 2006), and fail to even mention *Howard* in their brief. Only by ignoring what is among this Court's most relevant decisions to the issue on appeal can Intervenors make their argument. Appellees

respectfully submit that on this record, this Court's *Howard* decision is dispositive at least with respect to the unconstitutionality of Act 1's exclusion of persons in same-sex relationships.

And the repeated personal musings of Intervenors (*see, e.g.*, Intervenors Arg 20) about the inferiority of same-sex couples are based on stereotypes rather than fact, and are no more valid than the hypothesis rejected in *Moreno*—that "hippies" commit fraud. As the Circuit Court noted in light of the evidence that Act 1 was proposed in response to this Court's decision in *Howard*, "it is especially troubling that one politically unpopular group has been specifically targeted for exclusion by the Act." State Add 1008. Where legislation targets such a group, it suggests "the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634. This is not a rational basis.

Lastly, with respect to Intervenors' assertion that it is rational to believe that children do best with a married mom and dad, this justification cannot support Act 1. Act 1 does not bar single people, who constitute 17% of the foster and adoptive placements in the State. *See* Supp Add 159. Act 1 does not even bar singles in non-cohabiting intimate relationships, regardless of the nature or frequency of their sexual activities. Act 1 does not change the fact that Arkansas, as a matter of law, does not prefer married couple applicants over single applicants when placing children in foster or adoptive care. Supp Abs 23, 442-43. Indeed,

nothing in Arkansas law creates such a preference. *Id.* This is unsurprising, as the State Defendants agree that for some children, placement with a single parent or an unmarried couple may be in their best interests. Supp Abs 15-16, 90-91, 260, 343-44. Act 1 is so utterly divorced from this purported "marriage" justification as to make it impossible to credit. *Romer*, 517 U.S. at 635.

There is simply no rational basis for Act 1. Not only is Act 1 not rationally related to promoting child welfare, it actually harms the children that Act supposedly was intended to protect.

IV. THE JUDGMENT OF UNCONSTITUTIONALITY MAY BE AFFIRMED ON OTHER GROUNDS ASSERTED BY PLAINTIFFS.

If this Court does not affirm the result below that Act 1 unconstitutionally burdens the right to privacy and intimate relations, the Court may nevertheless affirm the judgment of unconstitutionality on the basis of other claims asserted in the Complaint by Plaintiffs. *See* State Add 677-90 (¶¶ 92-137, 141-159). For the reasons stated in the brief submitted by Plaintiffs in their cross-appeal, Act 1 also is unconstitutional under any of the claims asserted in counts one through nine of the Fourth Amended Complaint (which also were the subject of Plaintiff's Motion for Summary Judgment).

CONCLUSION

Act 1 deprives a category of Arkansans of the ability to apply to foster or adopt solely because such persons engage in intimate relations with their partner

in their shared home. Act 1 thus impinges on a fundamental right, and is neither tailored to meet a compelling government interest, nor is it even rationally related to a legitimate state goal. Appellees respectfully request that the Court affirm the judgment below and allow Arkansas citizens who have formed unmarried intimate relationships in their home to apply to adopt or foster, be considered after exhaustive State review, and thereafter provide a loving home to a child in need.

CROSS-APPEAL

CROSS-APPELLANTS' INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL?

The Intervenor-Appellants are appealing from the same order, and the Plaintiff-Appellees are cross-appealing from the same order.

II. BASIS OF SUPREME COURT JURISDICTION

See Jurisdictional Statement.

(___) Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

(1) X Construction of Constitution of Arkansas
(2) __ Death penalty, life imprisonment
(3) __ Extraordinary writs
(4) __ Elections and election procedures
(5) __ Discipline of attorneys
(6) __ Discipline and disability of judges
(7) __ Previous appeal in Supreme Court
(8) __ Appeal to Supreme Court by law

III. NATURE OF APPEAL?

(1) __ Administrative or regulatory action
(2) __ Rule 37
(3) __ Rule on Clerk
(4) __ Interlocutory appeal
(5) __ Usury
(6) __ Products liability
(7) __ Oil, gas, or mineral rights
(8) __ Torts
(9) __ Construction of deed or will
(10) __ Contract
(11) __ Criminal

The Plaintiffs below filed a civil lawsuit challenging the validity of Act 1, an initiative approved by Arkansas voters on November 4, 2008. Act 1 provides: "A minor may not be adopted or placed in a foster home if the individual seeking to adopt or to serve as a foster parent is cohabiting with a sexual partner outside of a marriage that is valid under the Arkansas Constitution and the laws of this state." ARK. CODE ANN. § 9-8-304(a). The Act "applies equally to cohabiting opposite-sex and same-sex individuals." ARK. CODE ANN. § 9-8-304(b).

The Plaintiffs brought thirteen Counts, arguing that Act 1 is unconstitutional under both the United States Constitution and the Arkansas Constitution. The Pulaski County Circuit Court determined that Act 1 violates the constitutionally-protected privacy rights of individuals who cohabit with a sexual partner outside of marriage under the Arkansas Constitution (Count 10) and therefore declared the law to be unconstitutional. The trial court determined that Act 1 does not violate any other rights under the Arkansas Constitution or the United States Constitution (all other Counts). The trial court stayed enforcement of its judgment pending appeal in accordance with Rule 62 of the Arkansas Rules of Civil Procedure. This is an appeal the trial court's judgment in favor of the Plaintiffs on Count 10 of their Complaint, under the Arkansas Constitution.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT?

No.

V. EXTRAORDINARY ISSUES?

(___) appeal presents issue of first impression, appeal involves issue upon which there is perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,
(_X_) appeal involves federal constitutional interpretation,
(_X_) appeal is of substantial public interest,
(___) appeal involves significant issue needing clarification or development of the law, or overruling of precedent,
(___) appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

VI. CONFIDENTIAL INFORMATION?

(1) Does the appeal involve confidential information as defined by Sections III(A)(11) and VII(A) of Administrative Order 19?

__X__ Yes _____No

(2) If the answer is "yes," then does this brief comply with Rule 4-(d)?

__X__ Yes _____ No

JURISDICTIONAL STATEMENT

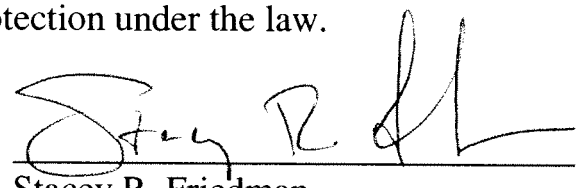
1. The Pulaski County Circuit Court found that Act 1 impermissibly burdens the right to privacy and intimate relations guaranteed by the Arkansas Constitution and therefore declared the law unconstitutional. The Circuit Court also went on to address the remaining issues of federal constitutional law and found that Act 1 was constitutional under the United States Constitution. Although the Circuit Court's Order did not address the remaining claims under the state constitution, in its judgment, the court dismissed with prejudice Plaintiffs' remaining State constitutional claims.

This appeal raises extraordinary issues regarding the construction of the Arkansas and Federal Constitutions and the rights granted to Arkansas citizens thereunder.

2. I express a belief, based on a reasoned and studied professional judgment, that this review raises the following questions of legal significance for jurisdictional purposes:

- This appeal involves issues of federal constitutional interpretation regarding the right to form intimate relationships, the due process rights of children in State care, the fundamental rights of parental decision-making, and the equal protection rights of children who have cohabiting persons as their designated caregivers.

- This appeal raises issues of substantial public interest because it concerns some of the most basic state and federal constitutional rights enjoyed by the citizens of Arkansas—the rights of potential parents to form and maintain consensual, intimate relationships; of children in state care to be free from arbitrary harm by the State; of parents to make decisions concerning the care of their children; and of children to Equal Protection under the law.



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Counsel for Appellees/Cross-Appellants

CROSS-APPELLANTS' POINTS ON APPEAL

1. **The Circuit Court's determination of Constitutional Issues not necessary to the judgment or the resolution of this appeal should be reversed as improper advisory opinions.**

   Human Serv. v. *Howard*, 367 Ark. 55, 238 S.W.3d 1 (2006)

2. **The Circuit Court erred in rejecting Plaintiff's claims in Counts One through Nine.**

   A. **Contrary to the Circuit Court's holding, the federal constitution requires heightened scrutiny for laws that burden intimate relationships.**

   Lawrence v. *Texas*, 539 U.S. 558 (2003)
   Witt v. *Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008)

   B. **Act 1 deprives children in State care of their constitutional right to due process.**

   Youngberg v. *Romeo*, 457 U.S. 307 (1982)
   Braam v. *Washington*, 81 P.3d 851 (Wash. 2003)

   C. **Act 1 burdens fundamental rights of parental decision making.**

   Linder v. *Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002)
   Landis v. DeLaRosa, 49 P.3d 410 (Id. 2002)

   D. **Act 1 deprives children with cohabiting designated caregivers of their right to equal protection of the laws.**

   Weber v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972),
   Plyler v. *Doe*, 457 U.S. 202 (1982)

   E. **The judgment below may be affirmed on other grounds asserted by Appellees-Cross Appellants.**

   Romer v. *Evans*, 517 U.S. 620 (1996)
   City of Cleburne, Tex. v. *Cleburne Living Center*, 473 U.S. 432 (1985)

STATEMENT OF THE CASE

Cross-Appellants incorporate by reference Appellees' Statement of the Case. *See* SC 1, *supra.*

SUMMARY OF ARGUMENT

Plaintiffs ("Cross-Appellants") respectfully submit that this Court should affirm the decision below that Act 1 impermissibly burdens the right to privacy and intimate relations under the Arkansas Constitution for the reasons set out in their brief as Appellees. Should the Court reach that result and affirm, the remainder of the judgment should be reversed, as the Circuit Court erred in issuing an advisory opinion by deciding constitutional issues that had no bearing on the result of the case. That portion of the judgment entered against all federal constitutional claims, and that portion of the judgment entered against all State constitutional claims (save for that brought under Count 10), which the Order explicitly stated were "unnecessary" to reach, should be reversed.

Plaintiffs also respectfully submit in this cross-appeal that should this Court need to look beyond Count 10 and the right to privacy under the Arkansas Constitution, the Circuit Court's judgment that Act 1 is unconstitutional may be affirmed on the basis of any of Plaintiffs' other constitutional claims in Counts 1 through 9. While the Circuit Court's judgment was entered against such claims, Plaintiffs in fact have demonstrated that under each of those claims, Act 1 is unconstitutional. Each claim is based on well-recognized constitutional rights—of potential parents to form and maintain consensual, intimate relationships under the U.S. Constitution, of children in State care to be free from arbitrary harm by the

State, of parents to make decisions concerning the care of their children, and of children to Equal Protection. And each claim must be evaluated under heightened scrutiny, which Act 1 cannot withstand.

First, just as Act 1 impinges the State right to privacy that protects the right to intimate association, the Act impinges on the same Federal constitutional right recognized by the U.S. Supreme Court. In *Lawrence* v. *Texas*, 539 U.S. 558 (2003), for example, the Supreme Court applied heightened scrutiny (which is applicable only to laws that infringe on fundamental rights and protected liberties) when it ruled that a Texas law directed against same-sex couples impinged on the right to form intimate relationships. The Court struck down the Texas law because Texas could not "justify its intrusion into the personal and private life of the individual . . . ." *Lawrence*, 539 U.S. at 578. The U.S. Supreme Court's ruling demonstrates that the right to intimate relationships impinged by Act 1 merits heightened protection under the Federal Constitution. Act 1 impermissibly burdens this constitutional right.

Second, the Due Process Clause of both the Arkansas and Federal Constitutions create fundamental rights for children in State care to be free from State-imposed arbitrary harm, and to receive care that is consistent with accepted professional judgment, practice or standards. Plaintiffs S.H., R.P. and E.P., minors in State care at a residential state-licensed facility who yearn for placement in a

"forever home," are entitled to be free from arbitrary rules that restrict the pool of available foster and adoptive parents. There is no dispute that Act 1 decreases the number of acceptable foster and adoptive parents, already substantially deficient in the State of Arkansas. For this reason, in 2008, the State itself concluded that an agency rule that categorically excluded cohabiting couples from serving as foster parents was completely contrary to the best interests of children. Along the same lines, all the leading child welfare associations believe that a categorical ban, such as the one imposed by Act 1, serves no child welfare interest. Importantly, when it comes to Arkansas, the evidence is uncontroverted—all State employees at DHS and CWARB with any policy-making responsibility whatsoever agree that Act 1 serves no child welfare purpose. Act 1 thus directly infringes the Due Process rights of S.H., R.P. and E.P. and all similarly situated children in State care.

Third, Act 1 impermissibly burdens one of the oldest fundamental liberty interests under the United States Constitution and one Plaintiffs respectfully suggest is in our State Constitution as well: the right of parents to make decisions concerning the care, custody and control of their children. Under Act 1, the State must ignore the wishes of Plaintiffs Meredith Scroggin and Benny Scroggin, a married couple with two children, N.S. and L.S., who have decided that it is in the best interests of their young children to designate in their will Meredith's cousin (who is in an intimate, cohabiting relationship with a same-sex partner) to care for

and adopt Plaintiffs' children in the event of parental death or incapacity. Indeed, the State cannot even consider the Scroggins's parental judgment, even though a family member has been designated to adopt their children and even if a judge and DHS professionals fully agree that such an adoption is in the best interests of the children, solely because the designated parent is a gay man in a committed long-term relationship. While these Plaintiffs do not contend they have an absolute right to decide who will adopt their children, they do have a Due Process right to have the State consider their decisions about the care, custody and control of their children, which includes the adoption of their children, and implement those decisions if doing so is in the best interests of the child at issue. The State may not, through Act 1, completely bar consideration of these parents' decisions regarding who is best suited to adopt their own children.

Fourth, Act 1 infringes on the Equal Protection rights of the child Plaintiffs to be free from disparate treatment as compared with similarly situated children, for reasons that are beyond their control and not tethered to their best interests. The child Plaintiffs – the children of the married couples referred to above – are denied by Act 1 the benefits of consideration of their parents' choice of designated adoptive parent merely because of the status of their parents' designees. Other children's parents' judgment and choices are fully considered, if such designated persons are not cohabiting in an intimate relationship. By requiring this

disparate treatment, Act 1 deprives the child Plaintiffs of their right to Equal Protection without even a rational justification, let alone the compelling justification required to support this discriminatory classification.

In any event, if this Court does not affirm the result below that Act 1 unconstitutionally burdens these well-recognized rights that require heightened scrutiny, the Court may nevertheless affirm the judgment of unconstitutionality. *See* State Add 677-90 (¶¶ 92-137, 141-59). For the reasons stated in the brief submitted by Plaintiffs as Appellees, Act 1 also is unconstitutional because it lacks any rational basis.

ARGUMENT

I. SHOULD THIS COURT AFFIRM THE JUDGMENT ON COUNT 10, THE CIRCUIT COURT'S ADVISORY OPINIONS ON OTHER GROUNDS SHOULD BE REVERSED.

Upon granting Plaintiffs' motion for summary judgment on Count 10, the Circuit Court's Order of April 16, 2010 correctly noted that it was "not necessary to address the remaining [state] claims." State Add 1008. Indeed, as this Court has previously found, once a law is pronounced unconstitutional, addressing further constitutional questions that are not necessary to the ruling amounts to issuing an improper "advisory opinion." *Dep't of Human Servs. and Child Welfare Agency Review Bd.* v. *Howard*, 367 Ark. 55, 66, 238, S.W.3d 1, 9 (2006). Nevertheless, in the Order, and later, in the judgment, the Court below did

precisely what it earlier correctly deemed unnecessary: the Court entered judgment on all other Constitutional issues in the case. State Add 1010. The Circuit Court's "advisory opinions" reached multiple State and Federal Constitutional issues that should not have been addressed by the Circuit Court's Judgment. Instead, those claims should have been dismissed as moot, or the Circuit Court could have entered a Rule 54(b) judgment. ARK. R. CIV. P. 54(b). Should this Court affirm the judgment entered on Count 10, the remainder of the judgment should be reversed because (i) the underlying dispute among the parties was resolved once the Court entered summary judgment on Count 10; (ii) the resolution of other Constitutional issues then had no bearing on the dispute between the parties; and (iii) the Circuit Court never addressed in its Opinion the State Constitutional claims resolved in its Judgment.

The dispute among the parties was fully resolved when the Circuit Court held that Act 1 was unconstitutional because it burdened the right to privacy and intimate association under the Arkansas State Constitution. The court was entirely correct in deciding the case on state law grounds. *See Siler* v. *Louisville & Nashville R.R.*, 213 U.S. 175, 193 (1909). Once the court reached this decision, it was unnecessary to resolve any other claims. Complete relief had been granted to Plaintiffs and resolving other constitutional claims served no purpose. Indeed, ruling on the other contested claims is reversible error.

As this Court has recognized, constitutional questions should be determined only if doing so is unavoidable. *See Smith* v. *Cole*, 187 Ark. 471, ---, 61 S.W.2d 55, 57 (1933) (holding that a statute violated the Arkansas Constitution and declining to address other constitutional arguments because those are "unnecessary to consider"). Accordingly, in *Howard*, when this Court held that a Department of Human Services regulation barring homosexual couples from fostering children violated the principle of separation of powers, this Court did not reach the other constitutional questions presented. 367 Ark. 55, 238 S.W.3d 1. Such notional constitutional rulings "amount to an advisory opinion" and "courts do not sit for the purpose of determining speculative and abstract questions of law or laying down rules for future conduct." *Id.* at 66, 238 S.W.3d at 9 (quoting *Dodson* v. *Allstate Ins. Co.*, 365 Ark. 458, 462, 231 S.W.3d 711, 715 (2006)); *accord Day* v. *Holahan*, 34 F.3d 1356, 1359 (8th Cir. 1994) ("Because we hold that [the statute] violates the First Amendment, we do not reach the other constitutional issues raised.").

The United States Supreme Court has similarly stated that a court should not reach out to decide multiple constitutional questions when the underlying dispute can otherwise be resolved: "[W]hen a case presents two constitutional questions, one of which disposes of the entire case and the other of which does not, resolution of the case-dispositive question should suffice." *Am.*

Mfrs. Mut. Ins. Co. v. *Sullivan*, 526 U.S. 40, 62 (1999) (Ginsburg, concurring). *See also Kolender* v. *Lawson*, 461 U.S. 352, 362 n.10 (1983) ("[R]esolution of these other issues would decide constitutional questions in advance of the necessity of doing so."). As a result, the U.S. Supreme Court has repeatedly held that it will not address a constitutional question unless doing so is absolutely necessary. *See Three Affiliated Tribes of Fort Berthold Reservation* v. *World Engineering, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them."); *Burton* v. *United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). Indeed, the U.S. Supreme Court has explained that "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944).

Here, there is no dispute that the ruling on Count 10 disposed of the entire case before the Circuit Court. Once the entire case was fully decided as a result of the holding that Act 1 unconstitutionally burdened the rights to privacy and intimate association under the Arkansas State Constitution, the Circuit Court's ruling on the remaining claims was not necessary for resolving the case before it.

In its Order, the Circuit Court, without any analysis, granted the State's and Intervenors' motions "on all federal claims under the United States Constitution." State Add 1007. This amounted to an advisory opinion that should not stand. *See Howard*, 367 Ark. at 66, 238 S.W.3d at 9.

The Judgment, drafted by the Intervenors and entered by the Circuit Court, reflects two other errors that amount to advisory opinions. *First*, the judgment actually declares that Act 1 is "constitutional under the United States Constitution . . ." State Add 1010. Wholly apart from the fact that the federal claims should not have been reached at all, the judgment should not have declared Act 1 to be "constitutional" because, among other reasons, the Circuit Court's Order never reached any such conclusion.

Second, the Judgment granted relief on all State constitutional claims. Entering judgment on other State constitutional claims was not only advisory, but directly in conflict with the Court's Order (three weeks earlier) recognizing that the Circuit Court had not, in fact, reached those claims because it was "not necessary" to reach the State constitutional questions other than Count 10.

Should this Court affirm the judgment entered on Count 10, the advisory opinions in the Order and Judgment on other Counts (except Count 11) should be reversed without remand for further proceedings. *See* ARK. CODE ANN. § 16-67-325.

II. THE CIRCUIT COURT ERRED IN REJECTING PLAINTIFFS' CLAIMS UNDER COUNTS ONE THROUGH NINE, ANY ONE OF WHICH MAY FORM THE BASIS OF AFFIRMING THE RESULT BELOW THAT ACT 1 IS UNCONSTITUTIONAL.

A. Contrary to the Circuit Court's holding, the Federal Constitution requires heightened scrutiny for laws that burden intimate relationships.

The Circuit Court correctly held that Act 1 unconstitutionally penalizes the exercise of the fundamental right to privacy, recognized under the Arkansas Constitution, because it is not narrowly tailored to meet a compelling State interest. For example, Plaintiffs Stephanie Huffman and Wendy Rickman must either give up the home they have created or permanently cease their intimate relationship if they are to be allowed to apply to foster or adopt a child, even if a placement of a child with them is indisputably in the child's best interest. However, it is not just the Arkansas Constitution that recognizes that the right to intimate association is a right that requires heightened scrutiny—the U.S. Supreme Court recognizes that the Federal Constitution also calls for heightened review of such claims. The Circuit Court erred in concluding that Plaintiffs' federal claims under the right to intimate association were subject to only rational basis review.

The Federal Constitution's guarantee of due process includes the right to intimate association. *See Lawrence* v. *Texas,* 539 U.S. 558 (2003); *Roberts* v. *U.S. Jaycees,* 468 U.S. 609 (1984); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972). The Federal Due Process Clause protects "highly personal" relationships of "deep

attachment [ ] and commitment[ ]." *Jaycees,* 468 U.S. at 618-20. And, in *Lawrence,* the Supreme Court, overruling *Bowers* v. *Hardwick,* 478 U.S. 186 (1986), made it clear that unmarried couples and same-sex couples are not excluded from this protection. *See Lawrence,* 539 U.S. at 567 (recognizing that same-sex couples can have "enduring" "personal bonds"), *id.* at 578 (Due Process protection "extends to intimate choices by unmarried as well as married persons.").

Moreover, in *Lawrence*, the U.S. Supreme Court acknowledged that when the right of intimate association is burdened, heightened scrutiny applies to claims by same-sex couples, just as it has long held that heightened scrutiny applies to claims by heterosexual couples. The Court held, relying on an established long line of heightened scrutiny cases, that the Texas anti-sodomy law could not stand because the state could not "*justify its intrusion* into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578 (emphasis added). Whatever disagreement there may be among some lower courts as to the meaning of this holding—and there is no disagreement among the most recent and persuasive cases—this holding by the U.S. Supreme Court is not rational basis language, but rather a heightened form of scrutiny that should not have been ignored by the court below. *See, e.g., Witt* v. *Dep't of Air Force*, 527 F.3d 806, 816-18 (9th Cir. 2008) (holding that *Lawrence* applied heightened scrutiny review); *Cook* v. *Gates*, 528 F.3d 42, 52-56 (1st Cir. 2008) (holding that lower

court erred by reading *Lawrence* as applying rational basis review to plaintiffs' due process claim and that *Lawrence* recognized a "protected liberty interest" requiring heightened scrutiny); *Reliable Consultants, Inc.* v. *Earle*, 517 F.3d 738 (5th Cir. 2008) (rejecting argument that *Lawrence* applied rational basis as standard for sexual privacy claims).

As the *Witt* court explained, in accordance with *Lawrence*, for a government act that implicates the right to intimate association to stand, "the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Witt*, 527 F.3d at 819. Plaintiffs prevail under this standard for the same reason that they prevail under traditional strict scrutiny. If this Court does not affirm on Count 10 under the Arkansas Constitution, the Circuit Court's judgment may nevertheless be affirmed on the basis that Act 1 unconstitutionally burdens the U.S. Constitution's protection of the right to intimate association.

B. Act 1 deprives children in State care of their constitutional right to due process.

Counts 1 and 2 are the Due Process claims, under the Arkansas and Federal Constitutions, brought by children in State care. Once the State takes children into custody, the Due Process Clauses of the Arkansas and Federal Constitutions impose an obligation on DHS and the State to promote and care for the well-being of children in their custody for whom they have assumed the responsibility of

caring as a parent. And, while the parties differ on the exact due process standard to be applied, under either the professional judgment standard that is applicable to laws affecting children in State care, or the penal "deliberate indifference" standard for which the State and Intervenors advocate, it is clear that Act 1 is unconstitutional and that the Circuit Court's application of a rational basis standard was in error.

The Due Process Clause imposes on the State an affirmative duty of care towards foster children in State custody. *See DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200-01 & n.9 (1989); *Youngberg* v. *Romeo*, 457 U.S. 307, 317 (1982). Because "[f]oster children . . . are 'placed . . . in a custodial environment . . . [and are] unable to seek alternative living arrangements,'" *Nicini* v. *Morra*, 212 F.3d 798, 808 (3d Cir. 2000), courts have consistently held that "[t]he relationship between state officials charged with carrying out a foster child care program and the children in the program is an important one involving substantial duties and, therefore, substantial rights." *Taylor* v. *Ledbetter*, 818 F.2d 791, 798 (11th Cir. 1987) (en banc) (finding substantive due process right for children in foster care); *see also Norfleet* v. *Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (denying qualified immunity and holding that "it was clearly established in 1991 that the state had an obligation to provide adequate medical care, protection and supervision" to children in foster care); *Clark* v. *Reiss*,

38 Ark. App. 150, 152, 831 S.W.2d 622, 624 ("Minors are wards of the chancery court, and it is the duty of those courts to make all orders that will properly safeguard their rights.").

This due process obligation requires the State to act consistent with "accepted professional judgment, practice, or standards" towards Plaintiff-foster children because any deliberate departure from those standards that harms children in State care plainly "shocks the conscience." *See Youngberg*, 457 U.S. at 314-15 (setting forth the minimum applicable substantive due process standard for individuals who are in state custody, but not in prison); *Yvonne L. ex rel. Lewis* v. *N.M. Dep't of Human Servs.*, 959 F.2d 883, 893-94 (10th Cir. 1992) (holding that an action alleging injuries sustained in a foster care setting must be evaluated by whether child welfare workers "failed to exercise professional judgment" when making foster care placements); *K.H. through Murphy* v. *Morgan*, 914 F.2d 846, 854 (7th Cir. 1990) (finding child welfare workers protected from liability only when exercising "a bona fide professional judgment" regarding placement of children in state custody). Conduct violates this standard when they are "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." *Jordan* v. *City of Philadelphia*, 66 F. Supp. 2d 638, 646 (E.D. Pa. 1999) (quoting *Youngberg*, 457 U.S. at 323). Here, Act 1 clearly departs from the

"professional judgment" standard for at least three independent reasons:

First, the State has already exercised its professional judgment on this issue, concluding that categorically banning cohabitors from serving as foster or adoptive parents not only fails to meet professional judgment standards, it harms children in State care. In 2008, just weeks before Act 1 was voted on, the State concluded a thorough evaluation and public hearing of a categorical agency-level ban on cohabiting couples serving as foster parents. During this process, the State recognized that as a practice, DHS has virtually no categorical bans—even of those convicted of most crimes[1]—because of the importance of not excluding potentially qualified foster or adoptive parents and the effectiveness of the individual review process that all applicants must pass. The State then concluded that the categorical ban on cohabitors should be eliminated because it was harmful to children in State

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[1] The only criminal convictions that cannot be waived are those involving violence, sex crimes and other serious crimes. ARK. CODE ANN. §§ 9-28-409(e)(1), 9-28-409(h)(1) (West 2010). Individuals convicted of diverse crimes including driving under the influence, burglary, battery and gun charges have been approved by the State Defendants as foster or adoptive placements following individual review through the state's alternative compliance and waiver process. *See, e.g.*, Supp Abs 502-534.

care. In the words of then-DHS Director John Selig, the removal of any such ban was "important" to the child welfare purpose of DHS because such a ban is a direct and unacceptable impediment to "find[ing] a family that best meets the needs of every child" in State care. FCAC Add 130B (Arkansas DHS Media Release, October 9, 2008). Act 1, because it overrides this considered "professional judgment" of DHS, cannot stand.

Second, Act 1 fails for lack of "professional judgment" because a categorical ban on same-sex couples and cohabiting heterosexual couples from serving as foster and adoptive parents directly contradicts the professional judgment of not only professionals in Arkansas, but also the professional judgment of the leading child welfare associations, as well as the practice of forty-eight other states. FCAC Add 223-24 (¶¶ 25-28); *cf. Schall* v. *Martin*, 467 U.S. 253, 268 (1984) ("The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering . . . .") (*quoting Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934), *overruled on other grounds by Malloy* v. *Hogan*, 378 U.S. 1, 5 (1964)). Indeed, every major professional organization dedicated to child welfare opposes bans such as those created by Act 1 as contrary to the interests of children. FCAC Add 223-24 (¶¶ 25-28).

Third, with regard to the specific application of Act 1 in Arkansas, the

State's 30(b)(6) witnesses—both from DHS and the Child Welfare Agency Review Board—have all conceded that Act 1 serves no child welfare purpose. Prior to Act 1, Arkansas's individualized assessment process appropriately determined which individuals were suitable foster and adoptive parents. The State admits that placing a child with a particular cohabiting foster or adoptive couple may be in that child's best interest, Supp Add 21, 22 (¶¶ 37, 39); *see also* State Add 598-99, and agrees that it has successfully placed children with cohabiting adults prior to Act 1, *see* Supp Add 138-45; Supp Abs 258-68 (DCFS 30(b)(6) witness); *see also* Supp Add 47-49 (¶¶ 124-26).

By removing qualified cohabiting heterosexual and gay persons from the pool of qualified prospective parents, Act 1 directly harms children in State care, especially given the critical shortage of available foster and adoptive homes in Arkansas, particularly of families willing to take in sibling groups, older children, or those with serious special needs. Supp Abs 162-63, 172-73, 466; Supp Add 11 (¶ 9). Of the 3,800 children in the State's care, approximately 2,200 are presently living in homes with foster or pre-adoptive placements, while the remaining 1,600 live in State-run or contracted group homes, emergency shelters, or other institutional facilities. Supp Add 97; Supp Abs 242-43. There is no dispute that children are better served by placements with families than in institutional settings, in part because those placements are more likely to lead to a

"forever family." Supp Abs, 31, 65, 91, 434, 463. And, there is no credible dispute that Act 1 serves to keep children from being placed with approved cohabiting, loving families. As this Court has recognized, "any delay in affording [foster] children protection or in providing them with a permanency plan works against those children's welfare and best interests." *Hathcock* v. *Ark. DHS*, 347 Ark. 819, 826, 69 S.W.3d 6, 10 (2002); *accord Mayo* v. *Ark. DHS*, No. CA 07-854, 2008 Ark. App. LEXIS 11, at *10 (Ark. Ct. App. Jan. 9, 2008) ("To hold the child in limbo is contrary to the overriding legislative directive to provide permanency for children where return to the home cannot be accomplished within a reasonable time."). As the State's own witnesses have testified, Act 1's categorical ban cannot be reconciled with their *own* professional judgment of what is in the best interests of children in State care. *See, e.g.*, Supp Abs 481 (Act 1 is contrary to best practices in the social work field), 24-25 (same); State Add 612-17.

In the court below, Defendants nonetheless argued that no due process claim should arise unless Act 1 constituted "deliberate indifference" to the needs of children in State care. To begin, this argument recognizes that the Circuit Court's application of a rational basis standard to the children's due process claims was clear error. Equally important, although Defendants' call for application of a "deliberate indifference" standard—a standard that is reserved for dissimilar cases when children are in penal custody or seeking money damages—is wrong, it does

not alter the conclusion that Act 1 is unconstitutional. *See Braam* v. *Washington,* 81 P.3d 851, 859 (Wash. 2003) (rejecting "deliberate indifference" standard for claims by foster children challenging state policy and holding that "[s]omething more than refraining from indifferent action is required to protect these innocents"). Act 1 cannot even meet the deliberate indifference standard—enforcing Act 1 after rescinding a similar ban in 2008 and admitting that Act 1 harms children plainly constitutes "deliberate indifference" to the best interests of children in State care.

And, when considered in this context, the lack of Due Process could not be more clear. At six months old— in an emergency room with broken ribs—Plaintiff W.H. was in need of a loving family and there was one (and only one) family member ready, willing and able to care for her—her grandmother, Plaintiff Sheila Cole. The State and all its child welfare representatives agreed that placing W.H. with her grandmother and, specifically, that adoption by Ms. Cole, was in W.H.'s best interests. Supp Abs 261; *see also* FCAC Add 130E-F. However, simply because Ms. Cole lives with her same-sex partner of ten years (and their child), Act 1 categorically barred her as a foster or adoptive parent for her own granddaughter. But for the ability to use the Interstate Compact on Placement of Children (essentially, the ability to use another state's laws) to attempt to effectuate an adoption by Ms. Cole, who resides in Oklahoma, this family would have been

separated, even though all the child welfare professionals involved agree that an adoptive placement with Ms. Cole is in W.H.'s best interests. A statute that commands such a result without any regard for the best interest of the child, that is demonstrably harmful to Arkansas children in State care, that ties the hands of child welfare professionals at DHS and the courts in making appropriate permanent-placement decisions—including whether a child would benefit from the stability of a "forever family" through an adoptive placement with a relative—is the very antithesis of the professional judgment of DHS and child welfare professionals more generally, constitutes deliberate indifference and violates the child plaintiffs' right to due process.[2]

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[2] For the same reasons, Act 1 is an unconstitutional burden on Plaintiffs' Cole and W.H.'s right to familial integrity (Counts 3 and 4), a fundamental right that is also subject to heightened scrutiny. Plaintiffs Cole, W.H. and all families have a "right to be free from governmental interference in an already existing familial relationship." *Mullins* v. *Oregon*, 57 F.3d 789, 794 (9th Cir. 1995). Act 1's categorical ban on foster and adoptive placements—including placements that are in the best interest of a child and protective of an existing familial relationship—cannot stand as a burden on this right because it is not narrowly tailored to achieve any compelling government interest.

Because the undisputed facts show that Act 1 not only fails to protect children in State care but actually causes harm, Plaintiffs were entitled to summary judgment on Counts 1 and 2. In the event this Court reaches these claims, Plaintiffs respectfully ask this Court to vacate and reverse the decision of the Circuit Court entering judgment against them on these claims.

C. Act 1 burdens fundamental rights of parental decision-making.

Act 1 also violates the parent-Plaintiffs' (Meredith and Benny Scroggin, and Susan Duell-Mitchell and Chris Mitchell) rights, as guaranteed by the Arkansas and Federal Constitutions. In the event of their death or incapacity, the parent-Plaintiffs have exercised their judgment as to what is best for their children and have designated cohabiting individuals to be adoptive parents for their children. Act 1 eviscerates the effect of this parental designation, requires instead that DHS and the courts utterly disregard the parents' wishes, and denies Plaintiffs their right to parental autonomy without any inquiry into the best interests of the Plaintiffs' children.

The fundamental right of a parent to make decisions concerning the care, custody, and control of his or her children at issue in Counts 5 and 6 is one of the oldest liberty interests recognized under the United States Constitution. *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972) (right to custody and care of one's children has found protection in the due process

and equal protection clauses of the Fourteenth Amendment and the Ninth Amendment); *see also Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982). Nearly a century ago, the United States Supreme Court explained that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510, 535 (1925).

Before the Circuit Court, there was no meaningful dispute that this fundamental right exists and that laws that burden this right are subject to heightened scrutiny. The limited issue was whether Act 1 itself burdened the right of the parent-Plaintiffs to make decisions concerning the care, custody, and control of their children, which clearly it does. Making plans for the care of children in the event of parental death or incapacity is one of the "high duties" a parent has and, indeed, is one of the most important decisions parents can make about their children's well-being and future. *See Bristol* v. *Brundage*, 589 A.2d 1, 2 n.2 (Conn. App. Ct. 1991) (finding that the sole surviving parent's testamentary appointment must be given rebuttable presumption that it is in the best interests of his or her child). "A judge treads on sacred ground when he overrides the directions of the deceased with reference to the custody of his children." *Comerford* v. *Cherry*, 100 So. 2d 385, 390 (Fla. 1958). Parents' liberty interest in

the care, custody and control of their children applies to parents' testamentary selection of caregivers for their children. *See Landis* v. *DeLaRosa*, 49 P.3d 410 (Id. 2002).

Here, while the parent-Plaintiffs do not suggest they have an absolute right to dictate the adoptive placement of their children through their testamentary wishes, they do have a protected right to have their caregiver designation at least considered by the State in determining the best interests of their children. *See Linder* v. *Linder*, 348 Ark. 322, 350-51, 72 S.W.3d 841, 856-57 (2002); *Troxel*, 530 U.S. at 70. Act 1 not only fails to give any weight to the parent-Plaintiffs' judgment, but it requires the State, and the judges overseeing probate decisions, to categorically disregard the parent-Plaintiffs' determination that adoption by these individuals is in their children's best interests, without any regard to the children or caregivers at issue.[3] These parents, who know their children better than anyone,

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[3] The availability of guardianship, an inferior substitute that places the child with the same caregiver, but fails to provide the requisite permanency and legal safeguards that parent-Plaintiffs directed for their children in the event of parental death or incapacity, does not make Act 1's interference with parental judgment any less impermissible. Guardianships fall far short of adoptions in

(Footnote Continued)

have determined that their children would be best cared for if they were *adopted* by specific cohabiting individuals, including, in one instance, the children's uncle. State Add 587-88. Act 1 renders that determination meaningless, and ties the hands of judges in this State to act in children's best interests. This is done without any reason to believe that all 40,000 cohabitors in the State of Arkansas are unfit to serve as adoptive parents for the children of their friends and kin and without any inquiry into the best interest of those children. FCAC Add 235. When Section Eight of Article II of the Constitution of Arkansas states that no person shall be "deprived of life [or] liberty. . . .without due process," it means, among other things, that no person shall be deprived of a fundamental liberty interest in directing the care, custody and control of his or her children without due process, which is exactly what Act 1 does.

Because the enforcement of Act 1 intrudes on a fit parent's decisions about his or her child, the burden is on the State to establish that the intrusion is narrowly tailored to meet a compelling interest. *Linder*, 348 Ark. at 347-48, 72 S.W.3d at 855 (applying strict scrutiny to grandparent visitation law). As there is no dispute that Act 1 cannot withstand strict scrutiny, the complete disregard for

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(*Footnote Continued*)
protecting the legal rights of children and securing emotional stability through permanency. *See, e.g.,* Supp Abs 31-32, 57-58.

parent-Plaintiffs' determinations is unconstitutional. Accordingly, if the Court reaches Counts 5 and 6, Plaintiffs respectfully ask this Court to vacate and reverse the decision of the Circuit Court entering judgment against them on these claims.

D. Act 1 deprives children with cohabiting designated caregivers of their right to equal protection of the laws.

Just as Act 1 violates the rights of the parent-Plaintiffs to parental autonomy, the undisputed facts demonstrate that Act 1 constitutes a violation of the rights of Plaintiff-children to equal protection of the laws because the statute results in disparate treatment of similarly-situated children, based solely on factors beyond the children's control: the intimate relationship of their designated caregivers.

The Arkansas and Federal Constitutions limit when the State can treat similarly situated individuals differently, and those limits are offended by Act 1. As this Court held in *Jegley*, a statute violates the Equal Protection Clause of the United States Constitution when it "provides dissimilar treatment for [persons] who are similarly situated," and cannot withstand the requisite constitutional scrutiny. *Jegley* v. *Picado*, 349 Ark. 600, 633, 80 S.W.3d 332, 350 (2002) (citing *Reed* v. *Reed*, 404 U.S. 71, 92 (1971)). The Arkansas Equal Rights Amendment similarly prohibits any law that "grant[s] to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." ARK. CONST. art. 2 § 18.

With regard to children, the level of constitutional review is settled: unless a law meets the requirements of strict scrutiny, laws that disadvantage a class of children based on factors beyond their control are unconstitutional. Consistent with this constitutional principle, the United States Supreme Court, in *Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972), held that Louisiana's workmen's compensation law, which relegated "unacknowledged illegitimate children" to a lower priority status in the distribution of benefits than "legitimate children," violated the equal protection rights of children born out of wedlock. *Weber*, 406 U.S. at 175-76. The Court explained that:

> imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

Id. In the wake of *Weber*, the Supreme Court has repeatedly held that laws that disadvantage children who are born to unmarried parents are subject to heightened scrutiny. *See, e.g.*, *Mills* v. *Habluetzel,* 456 U.S. 91, 99 (1982) (restrictions on support suits by children born out of wedlock "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest"); *United States* v. *Clark*, 445 U.S. 23, 27 (1980); *Lalli* v. *Lalli*, 439 U.S. 259, 264-65 (1978) (plurality opinion); *see also Clark* v. *Jeter*, 486 U.S. 456, 461 (1988)

("[W]e have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.'") (quoting *Weber*, 406 U.S. at 175); *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973) ("[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.").

In *Plyler* v. *Doe*, 457 U.S. 202 (1982), the Supreme Court again recognized that the rationale of *Weber* extends to other children disadvantaged by the state because of factors beyond their control. In that case, the challenged state law withheld state funds for the education of children who were not "legally admitted" into the United States, and permitted local school districts to deny enrollment to such children. *Plyler,* 457 U.S. at 205. The Court applied a heightened level of scrutiny, examining whether the classification was narrowly tailored to serve a compelling governmental interest. Because the law imposed a "lifetime hardship on a discrete class of children not accountable for" their parents' decisions, *id.* at 223, the Court held that a substantial state interest had not been shown, *id.* at 230.

Here, Act 1's disparate treatment of children significantly disadvantages the child-Plaintiffs based solely on factors beyond the children's control: the intimate relationship of their designated caregivers outside of

marriage. The child-Plaintiffs and other similarly situated children are no more able to control the marital status or sexual orientation of their designated caregivers than the class of children who were paid less in *Weber* or excluded from public education in *Plyler*. Act 1 divides similarly situated children into two categories: those for whom the State may consider a parent's testamentary wishes that a designated caregiver adopt the child, and those whose parents' wishes concerning the adoption of their children must be automatically excluded from consideration, regardless of the best interests of the child. The effect of this unlawful classification is to deprive children of the possibility of obtaining a permanent adoptive relationship with the adult deemed by their parents as in their best interests, even if a court and DHS agree that adoptive placement is in the best interest of the child. There is no governmental interest served by imposing this hardship on a discrete class of children not accountable for their parents' testamentary decisions. There is likewise no governmental interest served by denying the children in this case the opportunity to be adopted by their parent-designated caregiver and instead offering them the lesser protections afforded by guardianship. *See* Arg 23-34, *supra*. Accordingly, Judgment should not have been entered against Plaintiffs on Counts 7 and 8, and these Counts provide an alternative basis for upholding the judgment below.

E. The judgment of unconstitutionality may be affirmed on other grounds asserted by Plaintiffs.

This Court may also affirm the result on the basis that if Act 1 is subject to a rational basis review, rather than a heightened scrutiny test, Act 1 nevertheless fails. For the reasons set forth in the brief submitted by Plaintiffs as Appellees, Act 1 is *not* rationally related to furthering any child welfare purpose or any other legitimate governmental interest. *See* Arg 20-29, *supra.*

RESPECTFULLY SUBMITTED,

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