10-00840

IN THE ARKANSAS SUPREME COURT

ARKANSAS DEPARTMENT OF HUMAN SERVICES, ET AL — APPELLANTS

and

FAMILY COUNCIL ACTION COMMITTEE, ET AL — INTERVENOR-APPELLANTS

vs. NO. 10-00840

SHEILA COLE, ET AL — APPELLEES

ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY

THE HONORABLE CHRIS PIAZZA, CIRCUIT JUDGE

ARKANSAS DEPARTMENT OF HUMAN SERVICES, ET AL'S APPELLANT'S BRIEF

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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 constitutionality of Initiated Act 1 of 2008, approved by a majority of Arkansas voters on November 4, 2008. Initiated 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?

(_X_) 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,
(___) appeal involves federal constitutional interpretation,
(_X_) appeal is of substantial public interest,
(_X_) appeal involves significant issue needing clarification or development of the law, or overruling of precedent,
(_X_) 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?

____ Yes __X_ No

(2) If the answer is "yes," then does this brief comply with Rule 4-1(d)?

____ Yes ____ No

JURISDICTIONAL STATEMENT

The Pulaski County Circuit Court determined that Arkansas Initiated Act 1 of 2008 violates the constitutionally-protected privacy rights of certain plaintiffs, under the Arkansas Constitution, and therefore declared the law to be unconstitutional. The Circuit Court determined that Act 1 does not violate any other rights under the Arkansas Constitution or the Constitution of the United States.

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

I express a belief, based on a reasoned and studied professional judgment, that this review raises no question(s) of legal significance for jurisdictional purposes.

Colin R. Jorgensen

POINTS ON APPEAL

I. **COUNT 10 SHOULD HAVE BEEN DISMISSED FOR FAILURE TO STATE A CLAIM BECAUSE THE PLAINTIFFS DO NOT HAVE A FUNDAMENTAL CONSTITUTIONAL RIGHT TO FOSTER OR ADOPT CHILDREN.**

Lindley v. Sullivan, 889 F.2d 124 (7th Cir. 1989)
Whalen v. County of Fulton, 126 F.3d 400 (2nd Cir. 1997)
McGautha v. California, 402 U.S. 183 (1971)

II. **COUNT 10 SHOULD HAVE BEEN DISMISSED FOR FAILURE TO STATE A CLAIM BECAUSE ACT 1 DOES NOT DIRECTLY AND SUBSTANTIALLY INFRINGE UPON THE PLAINTIFFS' RIGHT TO MAINTAIN INTIMATE RELATIONSHIPS OR ENGAGE IN PRIVATE INTIMATE CONDUCT.**

Lyng v. Castillo, 477 U.S. 635 (1986)
Washington v. Glucksberg, 521 U.S. 702 (1997)
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)

III. **IF THE PLAINTIFFS STATED A CLAIM IN COUNT 10, THE RATIONAL-BASIS TEST APPLIES TO COUNT 10, AND SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN FAVOR OF THE DEFENDANTS.**

Streight v. Ragland, 280 Ark. 206, 655 S.W.2d 459 (1983)
U.S. v. Carolene Products Co., 304 U.S. 144 (1938)
Weiss v. Geisbauer, 363 Ark. 508, 215 S.W.3d 628 (2005)

IV. THE *HOWARD* DECISION IS NOT CONTROLLING; TO THE EXTENT *HOWARD* IS INSTRUCTIVE, *HOWARD* INDICATES THAT THE RATIONAL-BASIS TEST APPLIES TO ACT 1 AND ACT 1 SATISFIES THE RATIONAL-BASIS TEST.

Ark. Dep't of Human Services v. Howard, 367 Ark. 55, 238 S.W.3d 1 (2006)

Howard v. Child Welfare Agency Review Bd., No. CV 1999-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004)

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ABSTRACT

[Abstractor's Note: The State Defendants appeal the trial court's ruling on Count 10 of the Plaintiffs' Complaint. As explained in the Statement of the Case and the Argument sections of the State Defendants' Appellants' Brief, the trial court's ruling on Count 10 presents only questions of law for this Court's consideration, as there were no disputed issues of fact at the trial court level that are material to Count 10. Accordingly, in accordance with the applicable rules, the State Defendants have abstracted those excerpts of the transcript in the record that are material to Count 10 of the Plaintiffs' Complaint. There are no other portions of the transcript or other testimony in the record of this case that are essential for the Court to confirm its jurisdiction, to understand the case, or to decide the issues presented by the State Defendants' appeal.]

PROCEEDINGS OF MARCH 17, 2009:

APPEARANCES:

Ms. Stacey Friedman, on behalf of Plaintiffs

Mr. Stephen Ehrenberg, on behalf of Plaintiffs

Mr. Daniel Beck, on behalf of Plaintiffs

Ms. Christine Sun, on behalf of Plaintiffs

Mr. Joe Cordi, on behalf of Defendants

Mr. Colin Jorgensen, on behalf of Defendants

Mr. Byron Babione, on behalf of Interveners

Ms. Martha Adcock, on behalf of Interveners

Mr. Cordi: When I first heard about this case, I did not expect to file a Motion to Dismiss. The Plaintiffs have alleged eleven counts, and I thought surely they managed to state at least one claim. After I researched each count, it became clear to me that the Plaintiffs have not stated a single claim in this case. **R. 10018.**

[Abstractor's Note: R. 10019-10025 not material to this appeal.]

Mr. Cordi: In counts nine and ten, Plaintiffs allege that Act 1 impinges on their substantive due process liberty interest in residing with their partners outside of marriage. But Act 1 does not directly and substantially infringe on any liberty interests they may have in living with an unmarried partner. The key case is *Lyng v. Castillo*, a 1986 Supreme Court case. In *Lyng*, the Supreme Court held that a law does not infringe on a liberty interest in family living arrangements unless the infringement is direct and substantial. **R. 10026.** So the question is whether the law on its face actually prohibits somebody from living with somebody else. Act 1 does not even come close to doing that on its face. Under Act 1, the Plaintiffs can reside with whoever they want to. There is no direct and substantial prohibition against living with anyone. The Plaintiffs may make a choice not to live with someone so that they can adopt a child, but that is indirect. The law is clear: it has to be a direct prohibition on the law's face, and we don't have that with Act 1. For

all of those reasons, counts one through ten should be dismissed, and the Court doesn't have to reach the rational basis test at all. **R. 10027.**

The Plaintiffs ask the Court to apply the strict scrutiny test, but before the Court can apply heightened scrutiny, the Plaintiffs must establish that they have a fundamental right at stake. The Plaintiffs have not established that. They've got nine attorneys from some of America's best law firms, who went to the best law schools. You would think that if there was a fundamental liberty interest deeply rooted in our nation's history and tradition, they could cite you one case. If there is such a case out there, these attorneys couldn't find it. They haven't even come close. Even if the Plaintiffs have a liberty interest, the Plaintiffs have not established that it is fundamental. So, strict scrutiny simply does not apply. Thus, if the Court decides to go through the analysis further and not dismiss counts one through ten for the reasons I've already stated, the Court should apply the rational basis test. **R. 10028.**

Act 1 is rationally related to a legitimate government interest as a matter of Arkansas law. It is well established in Arkansas, based upon a long line of cases from the appellate courts, that a biological parent can lose custody of their own child if they are cohabiting. This law is applied in divorce cases, where Arkansas law presumes that it is bad for a child to live with a biological parent who is cohabiting, and for that reason alone, the Judge can remove custody from one

biological parent and give custody to the other. When Arkansas' voters enacted Act 1, they essentially adopted this long line of Arkansas Court precedent. As a matter of law, Act 1 passes the rational basis test. As a matter of law, counts one through ten should be dismissed. **R. 10029.**

[Abstractor's Note: R. 10030 not material to this appeal.]

Mr. Cordi: This case will turn on the legal issues that we're discussing today. It's not going to turn on any disputed facts. The rational basis test applies if there is any conceivable reason for the Court to uphold the law. Reasonable minds may differ, but as long as it's rational, the law should be upheld. **R. 10031.** If the Court dismisses this case now without a trial, the Plaintiffs still have a remedy because they can go to the General Assembly and try to get a law passed to repeal Act 1. They could try to have Act 1 repealed through their own initiated act or a constitutional amendment. The Plaintiffs have remedies in the political arena. But as a matter of law, this case should be dismissed. **R. 10032.**

Mr. Babione: The starting point for this case is that statutes are presumed to be constitutional, so Act 1 should be presumed constitutional. A statute is constitutional and remains constitutional upon review by a court if it has a rational basis at law. The test to be applied is whether or not the law is rationally related to a legitimate government interest. That test only changes if the law infringes upon a fundamental right or a suspect classification. Act 1 does neither. **R. 10032.**

The test here is the rational basis standard, and Act 1 serves a legitimate government interest. Act 1 certainly promotes foster and adoption into homes where the child will have the benefit of having two legal parents, the benefit of having a legal mother and a legal father. It is a legitimate government interest to have foster children raised by both a male and a female. Act 1 serves those purposes. **R. 10033.**

Act 1 also serves the interest of protecting children's best interests because it prevents their placement into homes where there are people without a legal commitment, without rights or duties, with respect to the children. That's why it is the pervasive rule nationwide that children are not allowed to be placed into foster or adoptive homes where the adoptive or foster parent is cohabiting. We don't trust having a cohabiting adult in the home with a child they don't have a legal commitment to. And, they don't have a legal commitment to the person with whom they are cohabiting. The rational basis standard is if there is any conceivable basis for which the law would serve a legitimate government interest, then it's constitutional. Act 1 is constitutional on many counts. The Plaintiffs still have remedies in the legislature, but they don't have a remedy here. **R. 10034.**

[Abstractor's Note: R. 10035 not material to this appeal.]

Mr. Babione: The people of Arkansas considered and debated this issue. **R. 10036.** The people decided that it was in the best interests of children in this State,

and that it furthered the public policy of this State, to allow fostering and adopting by either single persons who aren't cohabiting, or by married individuals. The Plaintiffs seek to bring this issue before the Court because they did not win in the legislative process, but the Court does not have the authority to second-guess the legislative process in a rational basis case. **R. 10037.** The Court should not weigh competing expert testimony when a statute is presumed to be constitutional. The rational basis test recognizes that there may be different viewpoints, and reasonable minds may disagree. **R. 10038.** When two sides are opposed to each other, but they are both articulating a rational basis for their position, the Court simply recognizes whether the side supporting the legislation has articulated any conceivable basis for which the legislation should stand. **R. 10039.** The rational basis test applies, and there are many rational bases upon which Act 1 stands. **R. 10040.**

Mr. Ehrenberg: The issue on this Motion is whether the Complaint has adequately pled one or more constitutional deprivations for which this Court can grant relief assuming the truth of the allegations and inferences that can be drawn therefrom. **R. 10040.** I will address three issues: the standing of the Plaintiffs to pursue these claims, sovereign immunity, and why the ballot title was constitutionally deficient, or count 11. Ms. Sun will then demonstrate in her

argument why the Plaintiffs all have well-recognized constitutional rights that are imperishably impinged by Act 1. **R. 10041.**

[Abstractor's Note: R. 10042-10050 not material to this appeal.]

Mr. Ehrenberg: For counts nine and ten, Stephanie Huffman and Wendy Rickman have lived together in a committed relationship for ten years. They are here in the courtroom today. They are both professors at the University of Central Arkansas in Conway, and they're raising Ms. Rickman's biological child, and a seven year old boy with special needs who Ms. Huffman adopted through DHS in 2003. Prior to the adoption, the State evaluated Ms. Huffman and Ms. Rickman under the rigorous individualized assessment mandated by Arkansas law, and Ms. Huffman was approved and found to be a fit adoptive parent. **R 10051.**

Ms. Huffman has begun the process to adopt another child, and she and Ms. Rickman were again subjected to a rigorous individualized assessment of their fitness, and Ms. Huffman was approved. But, no adoption has taken place yet and now, because of Act 1, no adoption can take place. Ms. Huffman and Ms. Rickman are both harmed because Act 1 automatically excludes them from adoption because they live together in a relationship outside of marriage, notwithstanding being thoroughly ivest[igat]ed twice and approved by DHS. **R. 10052.** Ms. Huffman and Ms. Rickman are suffering harm to their right to be

treated equally under the laws, and are undoubtedly within the class of persons affected by Act 1. **R. 10053.**

[Abstractor's Note: R. 10054-10055 not material to this appeal.]

Ms. Sun: As the Plaintiffs have alleged in their Complaint, and as they will show at trial, Act 1's mandatory exclusions impinge upon and penalize fundamental constitutional rights. **R. 10056.** The issue precisely before this Court is whether Act 1 impinges or penalizes upon the fundamental rights of the Plaintiffs, not whether there is some new fundamental right to adopt or be adopted. **R. 10057.** I'd like to go briefly through counts one through ten and as Mr. Ehrenberg and Mr. Cordi have noted, there are essentially five claims that the Plaintiffs have brought under both the State and Federal Constitutions. **R. 10058.**

[Abstractor's Note: R. 10059-10067 not material to this appeal.]

Ms. Sun: On counts nine and ten, these are the equal protection claims that we have brought on behalf of our Plaintiff couples who wish the opportunity to show that they would be fit parents through the State's rigorous screening process. For the purposes of this Motion, the Court need only decide that the Plaintiffs are entitled to show that there is no rational basis underlying Act 1. Determining which level of scrutiny applies is not necessary to decide this Motion. For a number of reasons, I believe there is no rational basis to underlie Act 1. It is the Plaintiffs' contention that the only legitimate state interest in the context of laws

that affect child state care or children generally is a purpose of promoting the interests of children. The entire premise of the child welfare system, as probate courts and family courts do every day, is to protect the interests of children. **R. 10068.**

The Plaintiffs submit that Act 1 directly penalizes a fundamental right to privacy which is the right to intimate association, including the right to live with a same sex or unmarried partner. Rather than addressing that argument, the Defendants argue that the right to live with a same sex or unmarried partner is novel and somehow not recognized under the fundamental right to privacy. Just as the right at issue in *Jegley*, and *Lawrence v. Texas*, and *Bowers v. Hardwick* was not the fundamental right to same sex sodomy, the right here is not properly limited to the right to live with the same sex or unmarried partner. Rather, the constitutional right alleged by the Plaintiffs is precisely the right recognized by the Supreme Court's decision in *Roberts v. Jaycees*. Under the Arkansas Supreme Court's decision in *Jegley v. Picado*, that is the right to be free from unjustified government interference in the formation and preservation of the intimate relationships that coupled Plaintiffs have formed. **R. 10069.** The State's position to the contrary means that the Constitution does not restrain the government from passing a law prohibiting anyone from living in the same home with a romantic

partner, an unmarried partner, or even with a spouse. The constitutional right to privacy does not permit such a law, and does not permit the intrusions here.

The cases demonstrate that a law that conditions a government benefit or privilege on the cessation of a fundamental right triggers scrutiny. Again, the Plaintiffs aren't arguing that there is a fundamental right to adopt. The Plaintiffs are arguing that the government cannot pass a law that penalizes the exercise of their fundamental right without passing the strict scrutiny test. Just as a statute that excludes Christians from adopting or fostering would burden the fundamental right to free exercise of religion, Act 1 directly penalizes the fundamental right of gay couples and unmarried heterosexual couples to associate with their loved ones in the manner they see fit. The Defendants themselves admit that Ms. Cole would be permitted to adopt her granddaughter if she simply agreed to break up the family and home that she's created with her partner of nine years. **R. 10070.** The burden imposed by Act 1 on Ms. Cole and the other couple Plaintiffs could not be clearer.

With respect to the State's rational basis argument, we believe that *Howard* casts serious doubts on whether there is any rational basis for this categorical exclusion. And, the argument that the Arkansas Judiciary has never condoned a parent's unmarried cohabitation in the presence of a child cannot be reconciled with the Supreme Court's decision in *Howard.*

With respect to the State's argument regarding custody and divorce proceedings, those cases involve fundamentally different considerations than those at issue here. The issue here is whether gay couples and unmarried heterosexual couples can provide a home to children in state care who need one. In a custody battle, the court might correctly presume for at least some period of time that the presence of a parent's new boyfriend or girlfriend would be detrimental to the child because of the animosity between the divorcing parents. **R. 10071.** Here, the couple-Plaintiffs would not be seeking to place children in between two parents; they would be seeking to adopt and foster the child together.

And, even in the cases where there has been some presumption that cohabitation would be detrimental to a child, the Court has still insisted on some sort of individualized inquiry as to whether or not that cohabitation is actually harmful to the child. For example, in *Alphin v. Alphin*, the Court noted that the new mother had six or seven different residences in the span of six years. That the mother had multiple live-in boyfriends, and that neither the mother nor her current boyfriend had a fixed schedule that allowed at least one of them to be present in the home every night to take care of their daughter. Based on the finding that the mother's cohabitation in fact led to an unstable life, relative to the stability of the father's life, the Court in *Alphin* transferred custody to the father. **R. 10072.**

In contrast, Act 1 creates a blanket exclusion of gay and unmarried heterosexual couples and denies them an individualized assessment of their suitability and fitness as a parent. Accordingly, even under the cases cited by the Defendants, the Court cannot decide without a full development of the record whether Act 1 is rationally related to a legitimate state interest. **R. 10073.**

Mr. Cordi: The Plaintiffs have still not cited a single case in their presentation today that establishes that they have a fundamental right to do any of the specific things they're asking to do. To establish that they have a fundamental right, they have to describe that fundamental right narrowly. They can't just say we have this broad fundamental right, and so, we should be allowed to go forward. The cases are clear. They have to describe their alleged fundamental right narrowly, and they haven't done that. **R. 10074.**

[Abstractor's Note: R. 10075-10076 not material to this appeal.]

Mr. Babione: Towards the end of Ms. Sun's argument, she stated that the Plaintiffs are alleging that their right to intimate relationships is somehow infringed by Act 1. Act 1 is not a statute that criminalizes intimate relationships or intimate behavior. What Act 1 does is encourages children to be raised in homes where there is not a cohabiting adult; Act 1 does not prevent those adults from cohabiting or engaging in their intimate relationships. Act 1 is looking out for the rights of the children. It's not looking to protect intimate relationships of cohabitating adults,

nor does it target them precisely for that reason. What it's doing is it's looking to keep children out of home environments where they would be exposed to cohabitating adults that have no rights or duties or responsibilities with respect to those children. **R. 10077.**

I also heard Plaintiffs' counsel argue that Act 1 infringes on a right to individualized assessments to foster or adopt children. There is no text in the Federal or Arkansas Constitutions that articulates a fundamental right like that, and there are no cases that articulate a fundamental right like that, and in fact, all of the cases cut the opposite way and say that there really is no fundamental right to foster or adopt. **R. 10078.**

[Abstractor's Note: R. 10079-10080 not material to this appeal.]

The Court: I'm going to grant the Motion to Dismiss on sovereign immunity and on the ballot title (count 11). This law was not challenged before it went to the people, and fifty-seven percent of the people voted for it.

Quite frankly, also, I think that the constitutional issues are a really, really, heavy burden on the Plaintiffs in this case. **R. 10081.** I really believe that the Arkansas Supreme Court, in the *Jegley* case, left an opening, and it's not clear what that opening is or will be. **R. 10082.** I think that if I were to dismiss this case without letting that issue develop, that I would be remiss because I have a feeling that this case will turn on the State's constitutional right of due process to those

children. I'm going to deny the Motion to Dismiss on all the counts (one through ten). Once we have our hearing and once those facts are presented, I may revisit the constitutional issues, dealing with the United States Constitution. At this time, I don't think I should. I think I ought to go ahead and hear the evidence you present, and then I'll make a formal decision on that issue as well as the equal protection issue on the State level. **R. 10083.**

[Abstractor's Note: R. 10084-10086 not material to this appeal.]

The Court: If you'll prepare an order showing that I've deferred judgment on the Motion to Dismiss on the substantive issues until after we've had a hearing, and granted the Motion to Dismiss on the Attorney General and the State of Arkansas and the sovereignty issue and the ballot title. **R. 10087-10088.**

[Abstractor's Note: R. 10089-10120 not material to this appeal.]

PROCEEDINGS OF APRIL 8, 2010

Mr. Cordi: We are here this afternoon to ask you to uphold this law that protects children from neglect, physical abuse, sexual abuse, and I submit that it even protects the lives of children. **R. 10121.** In March of last year, we filed a Motion to Dismiss and argued that the Plaintiffs had not stated a claim upon which relief could be granted, and that Motion is still pending before the Court. **R. 10122.**

[Abstractor's Note: R. 10123-10134 not material to this appeal.]

The Court: Let me ask you this. Is it rational to do this when the Arkansas Supreme Court has ruled that there is a fundamental right of privacy between homosexuals and, and sexual acts, and by casting this net, haven't you made a statement against homosexuals because they can't marry in this State? Isn't that the thrust of this Act? **R. 10135.**

Mr. Cordi: Homosexuals cannot marry in this State under the Arkansas Constitution. The Plaintiffs have not challenged that. On its face, Act 1 applies to both heterosexual people and homosexual people. It applies to everyone. If the Plaintiffs wanted to challenge Arkansas's definition of marriage and the Constitution, they were free to do that. They filed four Amended Complaints, but they have never done that.

The Court: Right, but isn't there a fundamental right of privacy?

Mr. Cordi: I believe you're talking about *Jegley v. Picado*.

The Court: Yes.

Mr. Cordi: The criminal statute that was struck down in *Jegley v. Picado* penalized people for what they did in the privacy of their own bedrooms. It penalized them for having sex with someone of the same gender. Act 1 does not do that. Under Act 1, people can have sex with whoever they want to have sex with. They just can't cohabit with that person. It penalizes, for lack of a better word, the act of cohabitation. **R. 10136.** It doesn't penalize them for having sex

with any particular person or a person of a particular gender. It prohibits them from adopting or fostering for the act of cohabiting. It's the cohabiting that Act 1 speaks to, not sex. It does not speak to sex at all. It speaks to cohabiting just like the *Alphin* case does, it speaks to the act of living with an intimate partner outside of marriage. And so, *Jegley v. Picado* and Justice Brown's concurring opinion in the *Howard* decision are completely distinguishable from this. Act 1 prohibits people from doing something because of a choice they have made to move in with an intimate partner. It doesn't speak to who they're having sex with at all.

The Court: But, the *Howard* court did make certain findings of fact even though it was a separation of powers issue.

Mr. Cordi: Those findings of fact were with regard to issues that concerned whether someone was homosexual or whether they were heterosexual. **R. 10137.** The rule that was struck down in *Howard* was a regulation that prohibited homosexual people from fostering children just because they were homosexual, not because of any choice they had made. Act 1 prohibits people from adopting or fostering because of a choice they've made, the choice to move in with their partner. *Howard* is completely different.

The Court: But the Supreme Court made the finding as to whether certain couples could be decent foster parents, and they made a finding that there was not any harm. Judge Fox made several rulings that the Supreme Court accepted, that

there is no reason in which the safety and welfare of a foster child might be negatively impacted by being placed with a heterosexual foster parent who has any family member who is at home; that there's no evidence that gay people as a group would more likely engage in domestic violence, et cetera. **R. 10138.** These facts demonstrate there's no correlation between the health, safety, welfare of foster children and a blanket exclusion of any individual that is homosexual or resides in the house with a homosexual. It seems like a pretty conclusive finding.

Mr. Cordi: But, the heterosexual who is residing with the homosexual, they weren't intimate partners. They weren't cohabiting. Act 1 talks about cohabiting with a sexual partner outside of marriage.

Let's say a mother and a father had a sixteen year old son who was homosexual. That couple, the mother and father, could not adopt another child under the regulation that was struck down in *Howard.* But, the mother and father who had the sixteen year old homosexual son, they were not cohabiting with their son because they didn't have an intimate sexual relationship with their son. **R. 10139.** That's what *Howard* went to: someone could not foster a child just because they're homosexual and for no other reason, not for any choice they have made, not for anything they have done. In Justice Brown's concurrence in *Howard,* he said the regulation saddled gay and lesbian couples with infirmity due to sexual orientation. Not because of anything that those gay and lesbian couples had done.

Act 1 says if you make the choice to cohabit, to move in with that intimate partner, then you can't adopt or foster a child. That's completely different. The regulation in *Howard* would have been like saying if you're over six feet tall, you cannot foster a child. Well, a person can't help how tall they are. And so, I can understand Justice Brown's reasoning; why that would violate equal protection. But Act 1 is different. **R. 10140.** Act 1 burdens the choice to move in with an intimate partner. Just like the *Alphin* case. If a divorced parent chooses to move in with a boyfriend or girlfriend, that alone is enough to remove the biological child from that parent's home. **R. 10141.**

[Abstractor's Note: R. 10142-10148 not material to this appeal.]

Mr. Cordi: In counts nine and ten, the Plaintiffs tried to state a substantive due process equal protection claim that Act 1 impinges on their liberty interest in living with a same sex or unmarried partner. The reason that claim fails is *Lyng v. Castillo*, 477 U.S. 635, a 1986 case from the U.S. Supreme Court. **R. 10149.** The case makes clear that if a law does not substantially and directly infringe on the liberty interest, then there is no claim. Act 1 does not say that a person may not live with another person. There is no direct statement to that effect in Act 1.

An indirect side effect of Act 1 may be that a person has to make a choice, do I want to live with my partner or do I want to adopt or foster this child? But there is no direct prohibition against living with anyone they may choose to live

with. And, *Lyng v. Castillo* makes it perfectly clear that it must be a direct and substantial impingement on a liberty interest. They have an argument that it's indirect, but it's not direct. This law does not say they shall not live with person X. They can live with person X. But, if they live with person X, they can't adopt child Y. That is the indirect consequence of Act 1. So, count ten doesn't state a claim. **R. 10150.**

[Abstractor's Note: R. 10151-10153 not material to this appeal.]

Mr. Babione: The biggest red herring in this case is the fact that the Plaintiffs have continuously tried to characterize Act 1 as an act that discriminates on the basis of sexual orientation. Act 1 does not do that because not only by implication, but by its express terms, it says that this Act applies equally to homosexuals and heterosexuals. I assume the Plaintiffs think they have the most traction making that argument because they try to analogize it to the *Howard* case, but there really is no analogy there. These are totally different cases.

In *Howard*, the Court clearly said they looked at an administrative law that expressly discriminated based on homosexuality. The Court said that based on the record in that case, there is nothing that justifies a regulation that doesn't allow foster children to be placed in a household where a homosexual is living. **R. 10154.** The *Howard* regulation expressly targeted based on sexual orientation. Act 1 expressly states that it does not turn on sexual orientation. Also, in *Howard*, there

was no record with respect to whether homosexuals would or would not make foster parents. And of course, when DHS promulgates rules, it has a duty to affirmatively provide a record that supports that. Judge Brown said, if I look at this under an equal protection claim or a due process claim, never mind a separation of powers claim, you've got to justify this on a rational basis.

In this case, Act one does not target or focus on parenting capabilities with respect to sexual orientation, but it does focus on the effects that parenting has on children when that parenting takes place by a married mother and father, and when it takes place by unmarried individuals who are cohabiting. **R. 10155.**

[Abstractor's Note: R. 10156-10168 not material to this appeal.]

Mr. Babione: Your Honor, you said that Act 1 casts a broad net over a category of persons, but the net really isn't so broad. If you look at the percentages of people that cohabit in Arkansas, it makes up six percent of the number of persons not affected by Act 1. That's how it's put by the experts in this case, particularly Dr. Peplau, the Plaintiffs' expert. **R. 10169.** So, you have to ask yourself, will all six percent want to foster and adopt? It will only affect those who are out there living together, and they're not willing for one reason or another to make a legal commitment to each other, but they are interested in making a legal commitment to foster or adopt a child they don't know. So, the net is not actually that broad with respect to the number of people Act 1 actually affects. **R. 10170.**

The Court: There's another side to that six percent, there's some who can't make that legal commitment, and that's part of the net that gets thrown into this.

Mr. Babione: You're right, there are a lot of people who can't make legal commitments. For example, you could have two aunts that are raising their nephews and their nieces together, and they're heterosexual. But, they can't make a commitment to get married, and then get the benefits that come along with marriage. But, that doesn't turn on their sexual orientation. That just turns on the fact that they're same sex, and the State has various policies for why it allows opposite sex individuals to marry. And of course, those are different statutes that the Plaintiffs haven't claimed here. **R. 10171.** So, for this case, you have to assume the legitimacy of the marriage statutes because the Plaintiffs haven't stated a claim with respect to that. But, I want to point out that the marriage statutes don't just affect homosexuals. There are people out there that are raising children that are related or that are heterosexual that can't get married. **R. 10172.**

[Abstractor's Note: R. 10173-10177 not material to this appeal.]

Ms. Friedman: I think once you get through all the briefing, there's really not much of a dispute that there are fundamental legal constitutional rights at issue. The question is the scope of those rights or the scrutiny to be applied. **R. 10178.**

[Abstractor's Note: R. 10179-10185 not material to this appeal.]

Ms. Friedman: Same sex couples. I think you hit it spot on, that's the quote from *Howard*, and we've said numerous times in the briefs; the quote that's in my head is the one about if you're going to exclude same sex couples, that's not going to be rationally related to the health, welfare, or well-being of a child. **R. 10186.**

I heard a little bit about, Act 1 applies equally to same sex and opposite sex couples, and I have two reasons why it is fair for you to take your blinders off and ask this question as to the group of same sex couples. The first reason is the Plaintiffs. There are Plaintiffs in this case who are same sex couples who are challenging this law. **R. 10187.** And yes, sir, you can consider whether Act 1 is constitutional as to them. The second reason is the text of the statute itself. Section 1(a) is the ban. Section 1(b) says this ban applies equally to opposite sex couples and same sex couples. This statute applies to two categories of people, and the Defendants don't get to come in here and tell you you only get to look at one-half of the loaf. You get to look at the full loaf. Their answer about cohabiting couples doesn't answer the question for all of these reasons. And, I think at the end, we heard a suggestion that if it's a small number of people it doesn't matter. Your Honor, there's no small number of people exception to the rational basis test. This law isn't rational, you can find as a matter of law that's

true on the current record, on the undisputed fact[s], and for that reason, you can award summary judgment in Plaintiffs' favor today. **R. 10188.**

[Abstractor's Note: R. 10189-10194 not material to this appeal.]

Ms. Friedman: Counts nine and ten are the rights to intimate association. **R. 10195.** Your Honor, I think you hit it on the head, and I actually don't think that there's disagreement. There is a fundamental right to privacy. And, that right to privacy includes the right to intimate association. And, *Jegley* and *Lawrence* tell us that that's true for same sex individuals and for opposite sex individuals. I think there's no dispute that if we are burdening this fundamental right, you're in heightened scrutiny. And, I think there's no dispute that if you're in heightened scrutiny, Summary Judgment has to be awarded in the Plaintiffs' favor for all of the reasons I've said. It's going to apply even if that cohabiting couple would be the perfect placement for the child. That's not a narrowly tailored infringement on a right. But, the dispute is, what's the burden?

I think one of the arguments we heard today is, Act 1 is about cohabitation, it's not about sexual relations. It's about both, Your Honor. Both appear in the statute. If you're cohabiting with a sexual partner, you're banned from fostering and adopting. We gave you a litany of cases. **R. 10196.** It doesn't say in the text of the statute that you can't have sex. But, the Supreme Court and the Arkansas Supreme Court have both found a burden on a fundamental right doesn't have to

appear in the text of the statute so directly in order for it to be a burden. There's all of those cases about you can't say you have to give up a fundamental right to be a teacher, you can't say you have to give up some fundamental right to have welfare benefits, you can't say you have to give up a fundamental right to have emergency services. If the statute said that if you're a Baptist, you can't be a foster or adoptive parent, I don't think that any of us would have any question that would be an infringement on your fundamental right to exercise your religious views. Here, it says you can't foster or adopt if you're in a cohabiting relationship with a sexual partner. That is exactly the type of burden on a fundamental right that the Supreme Court and the Arkansas Supreme Court have recognized creates heightened scrutiny. Under heightened scrutiny, this Act fails. **R. 10197.**

It's worth making note of Justice Brown's concurring opinion in the *Howard* decision. Justice Brown makes this exact point: prohibiting foster parents status due to sexual activity in the bedroom is not categorically different from making the conduct a misdemeanor. It was the same sort of burden we're talking about here. **R. 10198.**

[Abstractor's Note: R. 10199-10207 not material to this appeal.]

Mr. Jorgensen: Under counts nine and ten, the right to intimate relationships, sexual intimacy, Ms. Friedman brought up Justice Brown's concurrence in the *Howard* case, and you brought that up a couple of times now.

It's true that Justice Brown stated in his concurrence that the regulation in *Howard* was prohibiting foster parent status due to conduct in the bedroom, but I don't see how Act 1 does that.

If you read the law in its entirety, like Ms. Friedman encouraged us to do with the provision that states that it explicitly applies equally to same sex and opposite sex individuals, then you see that it plainly excludes individuals who cohabit with a sexual partner outside of marriage recognized by the State of Arkansas. All of that is taken into account. If you cohabit but you're not in a sexual relationship, you're not excluded. If there is a sexual relationship but you're not cohabiting, you're not excluded. **R. 10208.**

[Abstractor's Note: R. 10209-10214 not material to this appeal.]

The Court: [Directed to Mr. Babione] If the right exercised by the majority affects the fundamental right of the minority, then, don't you think that there's some scrutiny by the Court that needs to. . . **R. 10215.**

Mr. Babione: Absolutely, Your Honor, absolutely. And, that's a good thing. That is where our courts do step in, and that is where they check the legislature. I think that we have made the strongest case that there are no fundamental rights here that are being affected. Certainly, there are interests and there are policy agreements, but there are no fundamental rights that are being infringed by Act 1. **R. 10216.**

[Abstractor's Note: R. 10217-10228 not material to this appeal.]

Ms. Friedman: On counts nine and ten, I think the State was saying again, that it's about cohabitation and not about sexual relations, but there was one sentence in there I think that answers this question. The State said, of course, if they don't have sex, they can cohabit and they can foster and adopt, that's it, if they don't have sex, they can cohabit and they can foster and adopt. That is a burden on the right to intimate association. **R. 10229.**

The Court: Well, what I'm going to do is I'm going to go back in there and decide this. I don't know what I'm going to decide on this issue on Summary Judgment. If I do decide, I'll let you know by letter or call you. **R. 10230.**

[Abstractor's Note: R. 10231-10233 not material to this appeal.]

STATEMENT OF THE CASE

The Plaintiffs (Appellees and Cross-Appellants on appeal) challenged the constitutionality of an initiated act approved by approximately 57% of Arkansas voters on November 4, 2008, titled "An Act Providing That an Individual Who is Cohabiting Outside of a Valid Marriage May Not Adopt or Be a Foster Parent of a Child Less Than Eighteen Years Old" ("Initiated Act 1" or "Act 1," codified at Ark. Code Ann. § 9-8-301 et seq.). *See* State Addendum ("State Add.") 1-40 (Complaint); State Add. 79-117 (First Amended Complaint); State Add. 240-276 (Second Amended Complaint); State Add. 312-349 (Third Amended Complaint); State Add. 654-693 (Fourth Amended Complaint). Initiated 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 challenged Act 1 on six grounds in 12 separate Counts under both the United States Constitution and the Constitution of the State of Arkansas. *See* State Add. 27-38; 104-115; 263-274; 334-347; 677-690. In Counts 1 and 2, the Plaintiffs argued that Act 1 violates the due process rights of children in State custody. *See* State Add. 27-30; 104-107; 263-266; 334-337; 677-680. In Counts 3

and 4, the Plaintiffs argued that Act 1 burdens the due process right to family integrity of certain children in State custody and family members of those children. *See* State Add. 30-31; 107-108; 266-267; 337-338; 680-681. In Counts 5 and 6, the Plaintiffs argued that Act 1 burdens the due process right to parental autonomy of certain biological parents in Arkansas. *See* State Add. 31-33; 108-110; 267-269; 338-340; 681-683. In Counts 7 and 8, the Plaintiffs argued that Act 1 burdens the equal protection rights of the biological children of the parents bringing Counts 5 and 6. *See* State Add. 33-34; 110-111; 269-270; 340-341; 683-684. In Count 9, the Plaintiffs argued that Act 1 violates the due process and equal protection rights of certain individuals who cohabit with sexual partners outside of marriage under the United States Constitution. *See* State Add. 34-36; 111-113; 270-272; 341-343; 684-686. In Count 10, the Plaintiffs argued that Act 1 violates the due process, equal protection, and privacy rights of cohabiting individuals under the Arkansas Constitution. *See* State Add. 36; 113; 272; 343; 686-687. In Counts 12 and 13, added in their Third Amended Complaint, the Plaintiffs argued that Act 1 is unconstitutionally vague. *See* State Add. 345-347; 688-690. The Plaintiffs also challenged the ballot title of Act 1 under only the Arkansas Constitution (Count 11). *See* State Add. 37-38; 114-115; 272-274; 344-345; 687-688.

The Plaintiffs named as Defendants the Arkansas Department of Human Services and its Director, and the Arkansas Child Welfare Agency Review Board

and its Chairman ("State Defendants"). *See* State Add. 1; 79; 240; 312; 654. The trial court allowed a sponsor of Act 1, Family Council Action Committee, and its President ("Intervenor Defendants"), to intervene as an additional party in defense of the Act. *See* State Add. 199.

The State Defendants and the Intervenor Defendants (both Appellants and Cross-Appellees on appeal) moved to dismiss the Complaint for failure to state a claim for which relief can be granted. *See* State Add. 42-78 (State Defendants' Motion to Dismiss and Brief); 178-180 (Intervenor Defendants' Motion to Dismiss). On March 17, 2009, a hearing was held on the Motions to Dismiss. Abstract ("Ab.") 1-14; R. 010016-010093. On April 16, 2009, the trial court entered an order dismissing Count 11 and deferring judgment on the remainder of the Motions to Dismiss the Complaint. State Add. 237-239.

After extensive discovery, the State Defendants, the Intervener Defendants, and the Plaintiffs each moved for summary judgment. *See* State Add. 387-479 (State Defendants); State Add. 480-568 (Intervenor Defendants); State Add. 569-653 (Plaintiffs). On April 8, 2010, a hearing was held on the Motions for Summary Judgment. *See* Ab. 14-26; R. 010121-010233. On April 16, 2010, the trial court entered an order granting the Defendants' Motions to Dismiss and Motions for Summary Judgment on all federal claims under the United States Constitution (Counts 1, 3, 5, 7, 9 and 12). *See* State Add. 1007-1008. Specifically,

the trial court determined that under federal law, Act 1 implicates no fundamental right and no suspect class, and Act 1 withstands rational basis review because the law is rationally related to a legitimate governmental purpose. *Id.* The trial court also determined that Act 1 infringes upon the right to privacy guaranteed to citizens of Arkansas by the Arkansas Constitution (Count 10). *Id.*

On May 10, 2010, the trial court entered a Final Order and Judgment in which the trial court granted the Plaintiffs' Motion for Summary Judgment on Count 10 under the Arkansas Constitution, granted the Defendants' Motions to Dismiss and Motions for Summary Judgment on all claims under the United States Constitution (Counts 1, 3, 5, 7, 9, and 12), and dismissed the remainder of the claims under the Arkansas Constitution with prejudice (Counts 2, 4, 6, 8, and 13). *See* State Add. 1009-1010. The trial court also stayed enforcement of its judgment pending appeal in accordance with Rule 62 of the Arkansas Rules of Civil Procedure. *Id.* The State Defendants and the Intervenor Defendants each filed a Notice of Appeal on May 14, 2010. *See* State Add. 1011-1016. The Plaintiffs filed a Notice of Cross-Appeal on May 21, 2010. *See* State Add. 1017-1020. The State Defendants appeal the trial court's judgment in favor of the Plaintiffs on Count 10 of their Complaint, under the Arkansas Constitution.

ARGUMENT

The State Defendants appeal the trial court's ruling on Count 10 of the Plaintiffs' Complaint, in which the Plaintiffs argued that Act 1 violates the due process, equal protection, and privacy rights of cohabiting individuals under the Arkansas Constitution. *See* State Add. 36; 113; 272; 343; 686-687. The trial court granted summary judgment to the State Defendants and the Intervenor Defendants on all federal claims under the United States Constitution (Counts 1, 3, 5, 7, 9 and 12), determining that Act 1 implicates no fundamental right and no suspect class, and Act 1 withstands rational-basis review because the law is rationally related to a legitimate governmental purpose. *See* State Add. 1007-1008. Summary judgment was granted to the Defendants on all federal claims. *Id.* The trial court dismissed all of the Plaintiffs' claims under the Arkansas Constitution (Counts 2, 4, 6, 8, and 13), with the exception of Count 10. *See* State Add. 1009-1010.

The trial court determined that Act 1 is unconstitutional for a single reason: because according to the Plaintiffs and the trial court, Act 1 infringes upon the right to privacy guaranteed to all citizens of Arkansas by the Arkansas Constitution. *See* State Add. 1008. Specifically, the trial court reasoned that the Arkansas Constitution protects individual privacy rights to a greater degree than the United States Constitution, and although Act 1 is constitutional under federal law, Act 1 violates the Arkansas Constitution because 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 intimate relationship outside of marriage," which "infringes on the fundamental right to privacy guaranteed to all citizens of Arkansas." *Id.* Because the trial court determined that Act 1 infringes upon a fundamental right under the Arkansas Constitution, the trial court reasoned that Act 1 is constitutional only if it is the least restrictive method available to carry out a compelling state interest. *Id.* Applying heightened scrutiny, the trial court determined that Act 1 is invalid under Arkansas law because it is not narrowly tailored in the least restrictive manner to carry out the State's compelling interest in protecting children. *Id.*

This Court has consistently stated that non-marital cohabitation is not in the best interests of children. Specifically, this Court has repeatedly held that a parent who has been awarded custody of his or her biological child after divorcing the child's other biological parent may lose custody of that child for cohabiting with a sexual partner outside of marriage. *See, e.g., Alphin v. Alphin*, 364 Ark. 332, 341, 219 S.W.3d 160, 165 (2005)("[T]his court and the court of appeals have held that extramarital cohabitation in the presence of children 'has never been condoned in Arkansas, is contrary to the public policy of promoting a stable environment for children, and may of itself constitute a material change of circumstances warranting a change of custody.'")(citing *Word v. Remick*, 75 Ark. App. 390, 396,

58 S.W.3d 422, 427 (2001); *Hamilton v. Barrett*, 337 Ark. 460, 989 S.W.2d 520 (1999); *Taylor v. Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003); *Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001)). The trial court's ruling, *regarding the alleged rights of prospective adoptive and foster parents as opposed to biological parents*, is in direct conflict with this long line of the Court's jurisprudence concerning the best interests of Arkansas children.

In its dispositive order, the trial court referenced *Ark. Dep't of Human Services v. Howard*, 367 Ark. 55, 238 S.W.3d 1 (2006), a case cited tirelessly by the Plaintiffs in their complaints, briefs, and arguments below. *See* State Add. 1008. In *Howard*, this Court held that an administrative regulation prohibiting any person from serving as a foster parent if any adult member of that person's household was a homosexual violated the separation-of-powers doctrine set forth in the Arkansas Constitution. 367 Ark. at 58, 66. This Court's holding in *Howard* is inapposite to the issues presented by the instant case because Act 1 is a law passed by the citizens of Arkansas by ballot initiative, not an administrative regulation.

Count 10 of the Plaintiffs' Complaint fails to state a claim for which relief can be granted because Act 1 does not require cohabiting adults to abandon their non-marital intimate relationships. Act 1 merely provides that an adult who wishes to foster or adopt a child in Arkansas may not do so while engaging in non-marital

cohabitation with a sexual partner. Non-marital cohabitation is not a fundamental constitutionally protected right under the Arkansas Constitution. The trial court should have dismissed Count 10 accordingly. Additionally, summary judgment should have been granted to the Defendants on Count 10 because there is no fundamental liberty interest at stake, Act 1 does not discriminate against any suspect class, and the rational-basis test therefore applies. As the trial court determined properly, Act 1 is rationally related to conceivable government interests. The trial court should have granted summary judgment to the Defendants on Count 10 accordingly.

Standard of Review

The constitutionality of an initiated act is to be determined just as though it were an act if the legislature, because in adopting an initiated act the people become their own legislature. *Jeffery v. Trevathan*, 215 Ark. 311, 319, 220 S.W.2d 412, 416 (1949). When the constitutionality of a statute is challenged, all doubts must be resolved in favor of finding the statute to be constitutional. *See Streight v. Ragland*, 280 Ark. 206, 213-15, 655 S.W.2d 459, 463-64 (1983). This Court recognizes the existence of a strong presumption that every statute is constitutional. *See Barclay v. First Paris Holding Co.*, 344 Ark. 711, 722, 42 S.W.3d 496, 502 (2001)(citing *City of Cave Springs v. City of Rogers*, 343 Ark. 652, 37 S.W.3d 607 (2001)). The burden of proof is on the party challenging the legislation to prove its

unconstitutionality, and all doubts should be resolved in favor of the statute's constitutionality, if it is possible to do so. *Id.* An act should be struck down only when there is a clear incompatibility between the act and the constitution. *Id.* It is the duty of the courts to sustain a statute unless it appears to be clearly outside the scope of reasonable and legitimate regulation. *See City of Little Rock v. Smith*, 204 Ark. 692, 693, 163 S.W.2d 705, 706 (1942).

If a plaintiff fails to allege a cause of action upon which relief could be granted, then the defendant's motion to dismiss should be granted without regard to whether there might be any disputed issues of material fact relevant to a summary judgment motion. *Brandt v. St. Vincent Infirmary*, 287 Ark. 431, 433, 701 S.W.2d 103, 104 (1985). This Court determines if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of its motion leave a material question of fact unanswered. *Sykes v. Williams*, 373 Ark. 236, 240, 283 S.W.3d 209, 213 (2008)(citations omitted). The Court views the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

In a substantive-due-process challenge, if a fundamental liberty interest is at issue, then the "strict-scrutiny test" applies and the government may infringe upon the liberty interest if the infringement is narrowly tailored to serve a compelling state interest. *See Ark. Dep't of Corr. v. Bailey*, 368 Ark. 518, 532, 247 S.W.3d

851, 861 (2007). If a liberty interest, but not a fundamental one, is at issue, then the "rational-basis test" applies and the government may infringe upon the liberty interest if the statute is rationally related to a legitimate government interest. *Bailey*, 368 Ark. at 533, 247 S.W.3d at 862 ("Under the rational-basis test, the party challenging the constitutionality of the statute must prove that the statute is not rationally related to achieving any legitimate governmental objective under any reasonably conceivable fact situation.")(citing *Whorton v. Dixon*, 363 Ark. 330, 214 S.W.3d 225 (2005); *Rose v. Ark. State Plant Bd.*, 363 Ark. 281, 213 S.W.3d 607 (2005)).

In order to state a claim for violation of equal protection under Arkansas law, a plaintiff must first show that there is state action which differentiates among individuals. *Bosworth v. Pledger*, 305 Ark. 598, 604, 810 S.W.2d 918, 920 (1991). If a statute impinges on a fundamental right or is based on a suspect criterion, then the State must prove that the statute is reasonable and promotes a compelling state interest. *Id.* If a statute does not impinge on a fundamental right and does not target a suspect class, then the State must demonstrate that there is some rational basis for the classification. *Id.* Thus, under Arkansas law, for both substantive due process and equal protection challenges to legislation, if there is no fundamental liberty interest at issue and the law does not target a suspect class, then the proper standard of analysis for a constitutional challenge is the rational-basis test.

I. COUNT 10 SHOULD HAVE BEEN DISMISSED FOR FAILURE TO STATE A CLAIM BECAUSE THE PLAINTIFFS DO NOT HAVE A FUNDAMENTAL CONSTITUTIONAL RIGHT TO FOSTER OR ADOPT CHILDREN.

In Count 10, the Plaintiffs allege that Act 1 violates their rights to engage in private, consensual, non-commercial acts of sexual intimacy and maintain intimate relationships under the due process and equal protection clauses of the Arkansas Constitution. *See* State Add. 36; 113; 272; 343; 686-687. The State Defendants do not dispute the Plaintiffs' assertion that because the Plaintiffs cohabit with intimate partners to whom they are not married, they are ineligible to adopt or foster children under the terms of Act 1. *See* State Add. 34-35 (¶ 149); 111 (¶ 144); 270 (¶ 132); 341 (¶ 128); 685 (¶ 132). The State Defendants do not dispute the Plaintiffs' assertion that "Act 1 will disqualify from adopting and fostering both heterosexual and gay individuals who have made a personal decision to cohabit with intimate partners to whom they are not married." State Add. 35 (¶ 151); 112 (¶ 146); 271 (¶ 134); 342 (¶ 130); 685 (¶ 134). Likewise, the State Defendants do not dispute the Plaintiffs' assertion that if they wish to adopt or provide foster homes for children under the terms of Act 1, they must either marry their intimate partners, or "cease living together . . . with their partners." *Id.*

The Plaintiffs who bring Count 10 argue that Act 1 infringes on a fundamental constitutional right to maintain intimate relationships outside of

marriage because they are ineligible to foster or adopt children if they choose to cohabit with their sexual partners outside of marriage, and they must choose to either marry or cease living with their intimate partners in order to become eligible to foster or adopt children under the terms of Act 1. Although the Plaintiffs interpret Act 1 correctly, they misinterpret the constitutionality of Act 1 and the effect of the law upon their right to maintain intimate relationships. Simply put, Act 1 does not require the Plaintiffs to abandon their intimate relationships. Act 1 does not require the Plaintiffs to cease cohabiting with their sexual partners, or to refrain from any conduct that comprises their intimate relationships. Act 1 imposes no penalty, hardship, or limit on the Plaintiffs' maintenance of their intimate relationships.

Act 1 merely provides that if the Plaintiffs wish to adopt or foster a child in Arkansas, *a privilege that is not constitutionally protected to any degree*, they cannot cohabit with a sexual partner outside of marriage. Even assuming that the Plaintiffs have a fundamental constitutionally protected right to unmarried cohabitation (which the State Defendants do not concede, *infra*), Act 1 does not require the Plaintiffs to choose between their exercise of two fundamental rights because serving as an adoptive or foster parent is a privilege, not a constitutionally protected right. *See, e.g.*, *Whalen v. County of Fulton*, 126 F.3d 400, 404 (2nd Cir. 1997)(adoptive parents have no liberty interest in adopting biological sibling of

their adoptive child); *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989)("[W]e can find neither a fundamental right nor a privacy interest in adopting a child"); *State Dep't of Health v. Cox*, 627 So.2d 1210, 1216 (Fla.Dist.Ct.App. 1993)("[A]doption is not a right; it is a statutory privilege[.]"), *affirmed in part and quashed in part on other grounds*, 656 So.2d 902, 903 (Fla. 1995); *Sherrard v. Owens*, 644 F.2d 542, 543 (6th Cir. 1981)(per curiam), *cert. denied*, 454 U.S. 828 (1981)(holding that foster parents do not possess a constitutionally protected liberty interest in the maintenance of the foster family relationship); *Kyees v. County Dep't of Pub. Welfare*, 600 F.2d 693, 699 (7th Cir. 1979)(holding that foster parents do not possess a constitutionally protected liberty interest in the maintenance of the foster family relationship); *Drummond v. Fulton County Dep't of Family and Children Services*, 563 F.2d 1200, 1207 (5th Cir. 1977)(en banc), *cert. denied*, 437 U.S. 910 (1978)(denying foster parents' constitutional claims and noting that "[t]he very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adoptive family by any court, demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it."). Accordingly, Act 1 does not violate the Arkansas Constitution because Act 1 does not force the Plaintiffs to choose between exercising two constitutional rights. *See, e.g.*, *McGautha v. California*, 402 U.S. 183, 213 (1971)("Although a defendant

may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.").

Arkansas circuit courts have the discretion to approve or deny adoption petitions on numerous grounds, including many grounds that could also be characterized as the exercise of a constitutional right by a prospective parent. For example, if a person petitions for adoption and cannot meet the relevant residence requirements, the adoption petition will be denied despite the fact that United States citizens enjoy a constitutional right to interstate travel and residence in any state. *See, e.g.*, Ark. Code Ann. § 9-9-205 (providing that Arkansas courts have jurisdiction over the adoption of a minor only if the person seeking to adopt the child, or the child, is a resident of Arkansas). As another example, many states, including Arkansas, allow biological parents to express a religious preference for placing their child into an adoptive home, despite the fact that prospective adoptive parents enjoy constitutionally-protected freedom of religion. *See* Ark. Code Ann. § 9-9-102(c)(allowing child's genetic parent or parents to express a religious preference and stating that if the parent does so, "the court shall place the child with a family that meets the genetic parent's religious preference, or if a family is not available, to a family of a different religious background that is knowledgeable and appreciative of the child's religious background."). Pursuant to the Plaintiffs'

logic, the statutory residence requirements and religious preference provision, and a myriad of other statutory provisions relating to foster care and adoption, are unconstitutional because they implicate the exercise of constitutionally protected rights of individuals who may wish to foster or adopt children. There is simply no authority in support of the Plaintiffs' strained logic.

The Department of Human Services ("DHS") and the courts are constitutionally permitted to take into account a variety of factors in determining whether to approve adoption petitions, including factors that may relate to the prospective adoptive parents' exercise of constitutional rights. If the factor is relevant to the best interests of the child to be adopted in the analysis of DHS and the courts, or as determined in policy expressed in validly enacted legislation such as Act 1, then the factor may be considered, whether it relates to the prospective parent's exercise of a constitutional right or not. Count 10 should have been dismissed for failure to state a claim because the Plaintiffs have no constitutionally protected right to foster or adopt children.

II. COUNT 10 SHOULD HAVE BEEN DISMISSED FOR FAILURE TO STATE A CLAIM BECAUSE ACT 1 DOES NOT DIRECTLY AND SUBSTANTIALLY INFRINGE UPON THE PLAINTIFFS' RIGHT TO MAINTAIN INTIMATE RELATIONSHIPS OR ENGAGE IN PRIVATE INTIMATE CONDUCT.

The United States Supreme Court has held that a law does not infringe on a fundamental liberty interest in family living arrangements to a constitutionally

significant degree unless the infringement is direct and substantial. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)(holding that statute governing allocation of food stamps that distinguished relatives who resided together over other individuals who resided together did not ""directly and substantially' interfere with family living arrangements and thereby burden a fundamental right.")(citing *Zablocki v. Redhail*, 434 U.S. 374, 386-387 & n. 12 (1978); *id.* at 403-404 (Stevens, J., concurring); *Califano v. Jobst*, 434 U.S. 47, 58 (1977)). On its face, the law challenged in *Lyng* did not prohibit family members from residing together, thus it did not directly and substantially interfere with their constitutionally protected family living arrangements, even though some family members could conceivably have chosen to move in order to receive government benefits as individuals. *Id.*

If a statute's indirect and insubstantial infringement upon a fundamental liberty interest in family living arrangements is not constitutionally significant, then Act 1's infringement upon a lesser liberty interest, cohabitation with an *unrelated* individual, is not constitutionally significant. Act 1 does not prohibit the Plaintiffs from residing with whomever they may choose. Act 1 does not directly and substantially infringe upon any liberty interest the Plaintiffs may have in residing with an unrelated person of their own choosing. Thus, even if the Plaintiffs had a fundamental liberty interest in residing with an intimate partner

(and they do not), as a matter of law, any infringement by Act 1 upon the Plaintiffs' interest is, at most, indirect and insubstantial.

The State Defendants agree that the Plaintiffs enjoy a constitutionally protected right to engage in certain consensual intimate conduct in the privacy of their homes. *See Lawrence v. Texas*, 539 U.S. 558 (2003)(holding that state law criminalizing certain sexual conduct between persons of the same sex is unconstitutional); *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002)(holding that Arkansas law criminalizing certain sexual conduct between persons of the same sex is unconstitutional). However, Act 1 does not infringe on anyone's right to engage in private intimate conduct or enter into intimate relationships, either directly or indirectly. Under the plain terms of Act 1, the Plaintiffs can maintain an intimate relationship, and engage in acts of intimacy in their own homes or elsewhere, and remain eligible to foster or adopt. Act 1 merely states that if the Plaintiffs wish to be eligible to foster or adopt, they cannot *cohabit* with a sexual partner outside of marriage. *See* Ark. Code Ann. § 9-8-304 ("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.")(emphasis added). Count 10 should have been dismissed accordingly. To the extent the Plaintiffs have any liberty interest that is infringed by Act 1, Count 10 must be analyzed

under the rational-basis standard of review, and the trial court correctly determined that Act 1 satisfies the rational-basis test. *See* State Add. 1007-1008.

Further, the Plaintiffs do not have a fundamental liberty interest in cohabiting with an unmarried partner. A liberty interest is not fundamental, and thus does not trigger strict-scrutiny analysis, unless it is so deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed. *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997). Neither this Court nor the United States Supreme Court has held, or even suggested, that either the United States or Arkansas Constitutions include a fundamental right to cohabit with a sexual partner. *Jegley v. Picado* actually holds "that the fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults." *Id.*, 349 Ark. at 632, 80 S.W.3d at 350. Thus, this Court struck down a statute that criminalized sodomy between same-sex persons. *Id.* Similarly, in *Lawrence v. Texas*, the United States Supreme Court noted that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" in striking down a Texas statute that criminalized sodomy between same-sex persons. *Id.*, 539 U.S. at 572. Contrary to the private acts of sexual intimacy discussed in *Jegley* and *Lawrence*, several

judicial decisions plainly hold that there is no fundamental liberty interest in cohabiting with a person or persons to whom you are not related.

In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), a zoning ordinance restricted land-use to one-family dwellings, defining the word "family" to mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons. 416 U.S. at 2. Although the ordinance allowed two unrelated persons to cohabit but no more than two, the plaintiffs argued that if two unmarried people can constitute a "family," there is no reason why three or four may not. 416 U.S. at 8. In response to this argument, the Court noted that "every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." *Id.* Notably, the Court made no mention of any fundamental right of unmarried individuals to cohabit, and the ordinance was upheld under rational-basis review. 416 U.S. at 7-8.

In *Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Court considered a challenge to a provision of the Food Stamp Act of 1964, which excluded from participation in the program any household containing an individual who is unrelated to any other member of the household. 413 U.S. at 529. Two of the plaintiffs lived together as a couple but were not married or related, and they were denied assistance solely because they lived together and were unrelated. *Id.* at 531-532. The Court began its analysis by noting that "[u]nder traditional equal

protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest." *Id.* at 533 (citations omitted). Notably, the Court made no mention of any fundamental liberty interest the unmarried couple might have in cohabitation, and the Court therefore applied the rational-basis test to the Food Stamp Act.

Act 1 is clearly not designed to prevent the Plaintiffs from residing together in an intimate relationship outside of marriage, and Act 1 does not prohibit anyone from cohabiting with an intimate partner. Rather, the purpose of Act 1 is explicitly stated in the language of the law. Act 1 states that "[t]he people of Arkansas find and declare that it is in the best interest of children in need of adoption or foster care to be reared in homes in which adoptive or foster parents are not cohabiting outside of marriage." Ark. Code Ann. § 9-8-301. Nothing about Act 1 directly *or* substantially interferes with the Plaintiffs' exercise of their choice to cohabit outside of marriage. Act 1 is not designed to deter the Plaintiffs from exercising that choice, and Act 1 does not prevent the Plaintiffs from exercising that choice. Count 10 must be analyzed under the rational-basis standard of review, and the trial court properly determined that Act 1 satisfies the rational-basis test. *See* State Add. 1007-1008.

The trial court determined that Act 1 infringes on the Plaintiffs' right to privacy under the Arkansas Constitution (State Add. 1008) despite the fact that

"[t]he Arkansas Constitution, like the U.S. Constitution, does not contain an explicit guarantee of the right to privacy." *Jegley*, 349 Ark. at 624, 80 S.W.3d at 344. The Eighth Circuit Court of Appeals has recently considered a case involving constitutional claims related to sexual conduct that may be instructive. In *Sylvester v. Fogley*, 465 F.3d 851 (8th Cir. 2006), an Arkansas State Police officer brought suit under state and federal law alleging that members of the State Police violated his constitutional right to privacy by investigating an allegation that he had sexual relations with a crime victim during the course of the underlying criminal investigation. 465 F.3d at 852. The Eighth Circuit began its analysis with a discussion of *Lawrence*, indicating the Eighth Circuit's belief that in *Lawrence*, the Supreme Court applied the rational-basis test:

> Even if "certain intimate conduct" is protected as a liberty/privacy right, the exact contours of that right are unknown and identifying the precise standard of review to be applied to the government's interference with that right can be formidable. For example, in *Lawrence* the Supreme Court struck down a Texas statute criminalizing homosexual sodomy because the "statute further[ed] no *legitimate state interest* which can justify its intrusion into the personal and private life of the individual." 539 U.S. at 578, 123 S.Ct. 2472 (emphasis added). This language implies that the Court applied a rational-basis standard of review instead of a strict-scrutiny standard, inferring that the right to engage in homosexual sodomy is not a fundamental right.

465 F.3d at 857 (emphasis in original).

The Eighth Circuit then noted the plaintiff's argument that he has a fundamental right to engage in the sexual conduct in which he engaged. *Id.* at 858. However, the Eighth Circuit declined to hold that there was such a fundamental right: "In our view, however, we need not determine whether Sylvester's sexual conduct is protected as a fundamental privacy right because we would reach the same result applying either the strict-scrutiny standard of review or the rational-basis standard of review." *Id.* Thus, the Eighth Circuit, in which Arkansas sits, believes that the Supreme Court applied rational-basis review in *Lawrence* and has refused to explicitly recognize a fundamental privacy right in certain forms of sexual conduct. The Eighth Circuit has not held that individuals have a fundamental privacy right in cohabiting, and the *Fogley* decision indicates that the Eighth Circuit would analyze any claim of a right to cohabit with an unrelated person under the rational-basis test.

As a matter of law, Initiated Act 1 does not burden the Plaintiffs' liberty interests in engaging in private, consensual, non-commercial acts of sexual intimacy, or to maintain intimate relationships, under the Arkansas Constitution. As a matter of law, Count 10 should have been dismissed by the trial court for failure to state a claim. *See* Ark. R. Civ. P. 8(a) & 12(b)(6).

III. IF THE PLAINTIFFS STATED A CLAIM IN COUNT 10, THE RATIONAL-BASIS TEST APPLIES TO COUNT 10, AND SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN FAVOR OF THE DEFENDANTS.

The only issues presented by this appeal are two questions of law: (1) whether the Plaintiffs stated a claim in Count 10 of their Complaints, and (2) if so, whether the rational-basis test applies to the Plaintiffs' claim in Count 10. As explained above, the State Defendants contend that Count 10 fails to state a claim and to the extent that the Plaintiffs stated a claim in Count 10, the proper constitutional analysis for Act 1 is the rational-basis test. The trial court properly concluded that Act 1 satisfies the rational-basis test. *See* State Add. 1007 ("The State has argued several legitimate governmental purposes including the theory that cohabiting environments, on average, facilitate poorer child performance outcomes and expose children to higher risks of abuse than do home environments where the parents are married or single. I find that this constitutes a legitimate government purpose."). Because the trial court ruled that Act 1 satisfies the rational basis test and the State Defendants are not appealing that determination by the trial court, the question whether Act 1 satisfies the rational-basis test is not an issue in this appeal.

If the Court is inclined to consider the question whether Act 1 satisfies the rational-basis test, the Court can do so without reference to the record below or any other evidence. The rational-basis test is satisfied if "any state of facts either

known or which could reasonably be assumed affords support for" the challenged legislation. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). The issue is not the actual basis of the legislation. *Streight v. Ragland*, 280 Ark. at 215, 655 S.W.2d at 464. Rather, the issue is whether "any rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose." *Id.* A statute passes the test if the Court can "reasonably conceive" of a lawful purpose for the law. *Id.* The Court is "not limited to the rational bases suggested by the parties, rather [the Court has] the power to hypothesize a rational basis for the legislation." *Weiss v. Geisbauer*, 363 Ark. 508, 514, 215 S.W.3d 628, 632 (2005). To the extent that the Plaintiffs stated a claim in Count 10, the rational-basis test applies to that claim, and summary judgment should have been granted in favor of the Defendants on Count 10.

IV. THE *HOWARD* DECISION IS NOT CONTROLLING; TO THE EXTENT *HOWARD* IS INSTRUCTIVE, *HOWARD* INDICATES THAT THE RATIONAL-BASIS TEST APPLIES TO ACT 1 AND ACT 1 SATISFIES THE RATIONAL-BASIS TEST.

The trial court improperly relied upon the *Howard* decision and Justice Brown's concurring opinion in *Howard* when the trial court granted summary judgment to the Plaintiffs on Count 10. In Howard, this Court determined that an

administrative regulation providing that no person may serve as a foster parent if any adult member of that person's household is a homosexual violated the separation-of-powers doctrine. *Howard*, 367 Ark. at 58, 66, 238 S.W.3d at 3, 8. In a concurring opinion, Justice Brown agreed that the administrative regulation at issue in *Howard* violated the separation-of-powers doctrine. 367 Ark. at 66-70, 238 S.W.3d at 9-11 (Brown, J., concurring). Justice Brown, however, added that the regulation was also unconstitutional because it violated the plaintiffs' rights to equal protection and privacy. *Id.* He determined that the regulation violated the plaintiffs' equal-protection rights because it "saddled [gays and lesbians] with an infirmity due to sexual orientation." 367 Ark. at 68, 238 S.W.3d at 10. Unlike the regulation at issue in *Howard*, Act 1 explicitly "applies equally to cohabiting opposite-sex and same-sex individuals." Ark. Code Ann. § 9-8-304(b). Thus, Justice Brown's concurring opinion with respect to the equal-protection issue in *Howard* has no application in this case.

Justice Brown also determined that the *Howard* regulation "overtly and significantly burden[ed] the privacy rights of couples engaged in sexual conduct in the bedroom[.]" *Id.*, 367 Ark. at 68, 238 S.W.3d at 10. Like the sodomy statute held unconstitutional in *Jegley*, *supra*, the *Howard* regulation penalized homosexuals for having sex. *Id.*, 367 Ark. at 68, 238 S.W.3d at 10. In stark contrast to the sodomy statute and the *Howard* regulation, Act 1 clearly does not

penalize anyone for having sex. Not a single word in Act 1 even remotely suggests that individuals who have sex, whether with persons of the same or opposite gender, may not adopt or foster children in Arkansas. Act 1 merely prohibits individuals who cohabit with a sexual partner out of wedlock from adopting or fostering children. In that way, Act 1 is very much like the long line of Arkansas cases holding that a parent who has been awarded custody of his or her biological child after divorcing the child's other parent may lose custody of that child for cohabiting with a sexual partner outside of marriage. *See, e.g., Alphin v. Alphin*, 364 Ark. at 341, 219 S.W.3d at 165 ("[T]his court and the court of appeals have held that extramarital cohabitation in the presence of children 'has never been condoned in Arkansas, is contrary to the public policy of promoting a stable environment for children, and may of itself constitute a material change of circumstances warranting a change of custody.'")(citing *Word v. Remick, supra*; *Hamilton v. Barrett, supra*; *Taylor v. Taylor, supra*; *Taylor v. Taylor, supra*). Act 1 no more invades bedroom privacy than do these well-settled cases. Accordingly, absolutely nothing in the *Howard* decision comes close to suggesting that Act 1 is somehow unconstitutional.

The Plaintiffs in this case attempted to have this case assigned to the same Circuit Judge who presided in *Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004), but that Circuit

Judge ruled that this case is not related to *Howard*, and ordered the case transferred to the Circuit Judge to whom the case was first randomly assigned by the clerk. *See* State Add. 41. As explicitly recognized by the *Howard* trial court, the *Howard* decision is readily distinguishable and does not control in the instant case. *Id.* However, the trial court's analysis in *Howard* is instructive for its indication that Count 10 and indeed all of the Plaintiffs' equal protection and due process claims are subject to rational-basis review, and Act 1 easily satisfies the rational-basis test.

Although this Court in *Howard* ruled only based upon the separation-of-powers doctrine, which is not an issue in this case, the *Howard* plaintiffs brought both equal protection claims and substantive due process claims, and the trial court evaluated all of the plaintiffs' constitutional claims. The trial court applied the rational-basis test to the plaintiffs' equal protection claims regarding their rights of privacy and intimate association and found that the rational-basis test applied, and there was no constitutional violation:

> Unless a challenged classification burdens a fundamental right or targets a suspect class, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest, *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 1627 (1996). At this point the law is well settled that in cases involving homosexuals or "gay rights," a suspect class does not exist. Nor is there any precedent for "heightened scrutiny." The plaintiffs argue violation of their fundamental rights of privacy and intimate association, such causes of action addressed below. This case involves the grant of a statutory privilege in a situation in

> which the state acts in *loco parentis* for minor children. Like adoption, foster parenting is a privilege created by statute and not by common law. There is no fundamental right to apply to be a foster parent.
>
> ***
>
> The base level "rational basis" standard is the appropriate standard for resolution of this matter.
>
> ***
>
> The ruling of this court is that, in an equal protection challenge in which the State stands *in loco parentis* to minor children, where there is no suspect class, no heightened scrutiny, and no fundamental right involved, that for purposes of a rational basis review, "public morality" is a stand alone legitimate state interest and that rules, regulations, and/or statutes rationally related to furthering the legislatively determined "public morality" are constitutional.

Howard v. Child Welfare Agency Review Bd., 2004 WL 3154530 at *10 - *12.

The *Howard* trial court also applied the rational-basis test to the plaintiffs' due process claims regarding their rights to privacy and intimate association and found that there was no constitutional violation:

> The plaintiffs also claim that Regulation 200.3.2 violates their rights to privacy and intimate association under both the U.S. and Arkansas Constitutions. In support of such a claim they cite *Lawrence v. Texas*, 123 S.Ct. 2472 (2003). The legal principles addressed by *Lawrence* are different than those presented by this case. [FN3] The balance of the legal argument on these two issues is the same legal argument made to the Eleventh Circuit and rejected by such court in *Lofton v. Gilmore*, 358 F.3d 804 (2004). The *Lofton* court's analysis on the issues of

> privacy and intimate association is adopted by this court. The plaintiffs' claims for relief under Counts VI and VII are accordingly denied.

Howard v. Child Welfare Agency Review Bd., 2004 WL 3154530 at *12.

To the extent the Plaintiffs stated a claim in the instant case, the rational-basis test also applies to all of the Plaintiffs' constitutional claims, including Count 10. Act 1 is constitutional as a matter of Arkansas law.

CONCLUSION

For the reasons discussed above, the Court should reverse the trial court's grant of summary judgment to the Plaintiffs on Count 10, affirm the trial court's grant of dismissal and summary judgment to the Defendants on the remaining Counts brought by the Plaintiffs, and hold that Initiated Act 1 of 2008 is constitutional.

Respectfully submitted,
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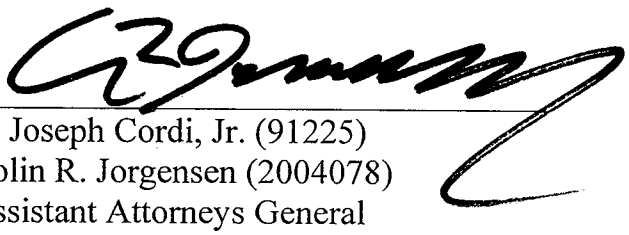
By: 

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