IN THE SUPREME COURT OF ARKANSAS

The State of Arkansas, *et al.*,

APPELLANTS/ CROSS-APPELLEES,

vs. **NO. 10-00840**

Sheila Cole, *et al.*,

APPELLEES/ CROSS-APPELLANTS.

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

THE HONORABLE CHRISTOPHER C. PIAZZA, CIRCUIT JUDGE

BRIEF OF AMICUS CURIAE ARKANSAS LAW SCHOOL DEANS AND PROFESSORS

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I. The circuit court correctly held that Act 1 violates the fundamental right of privacy guaranteed by the Constitution of the State of Arkansas.

By restricting a person's eligibility to be considered as an adoptive or foster parent based on the status of his or her consensual intimate relationship, Act 1 infringes on the fundamental right to privacy recognized by this Court to include protection for all private, consensual, noncommercial acts of sexual intimacy. Thus, regulatory burdens on certain sexual conduct violate the Constitution of the State of Arkansas. *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W. 3d 332, 350 (2002). As this Court explained in *Jegley*, if a law burdens this fundamental right, strict scrutiny applies, requiring the Court to hold the law unconstitutional "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*. (quoting *Thompson v. Arkansas Soc. Servs.*, 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984)). Act 1 burdens the exercise of this right to privacy and, as the trial court correctly held, cannot survive strict scrutiny.

A. Act 1 burdens the fundamental right to privacy.

Act 1 burdens the fundamental right to privacy as recognized under Arkansas law. Arkansas has "a rich and compelling tradition" of protecting individual liberties guaranteed by its Constitution. *Jegley,* 349 Ark. at 631-62, 80 S.W.3d at 349-50. The Constitution's Declaration of Rights protects rights not

only made explicit therein, but also implicitly "inherent" and "inalienable" rights retained by the people. Ark. Const. art. II, § 2; *see also* Ark. Const. art. II, § 29 ("[t]his enumeration of rights shall not be construed to deny or disparage others retained by the people"); Walter Nunn, *The Constitutional Convention of 1874*, 27 Ark. Hist. Q. 177, 201 (1968) ("The tone and content of the entire constitution were devoted to what the state and local governments cannot do… [T]he citizens emerging from Reconstruction looked upon [the Constitution] as a means of protection from their own government.").

Among the rights explicitly guaranteed to all Arkansans under the State Constitution is the enjoyment of life and liberty and individual happiness. Section 2, titled "Freedom and Independence," provides:

> All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

Ark. Const. art. II, § 2. The rights guaranteed under Arkansas's Constitution are not coextensive with those provided under the Constitution of the United States; rather, this Court has recognized "protection of individual rights greater than the federal floor in a number of contexts." *Jegley*, 349 Ark. at 631, 80 S.W.3d at 349.

This Court has explained that the right to life, liberty, and property embraces "all of our liberties, civic, personal and political; in short all that makes life worth living," and that each of these rights "carries with it, as natural and necessary coincident, all that effectuates and renders complete and full, unrestrained enjoyment of that right." *Carroll v. Johnson*, 263 Ark. 280, 289, 565 S.W.2d 10, 15-16 (1978) (citation and quotation marks omitted). This Court has construed these rights broadly to encompass, among many personal freedoms, "the right to enjoy domestic relations and the privileges of family and home." *Id.* at 289, 565 S.W.2d at 16.

In *Jegley,* this Court continued its rich and compelling history of protecting individual liberty and struck down a statute that prohibited private, consensual, noncommercial acts of sexual intimacy between adults. *Jegley*, 349 Ark. 631-32, 80 S.W.3d at 349-50. In surveying Arkansas common and statutory law, this Court discussed the many contexts, both criminal and civil, where the Court upheld an individual's right to privacy against government intrusion. *Id*. at 627-32, 80 S.W.3d at 346-50. The Court noted that the right to privacy was particularly robust as to government interference in the home. *Id.* at 628, 80 S.W.3d at 347 (holding that the State Constitution recognizes "the right of persons to be secure in the privacy of their own homes"); *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."). The Court concluded that the statute at issue in *Jegley* impinged on the fundamental right to privacy of the plaintiffs, several of whom lived with partners in long-term committed relationships, and, thus, applied strict scrutiny review. *Id*. at 632, 80 S.W.3d at 350. Because in *Jegley*, the government could not prove that the statute advanced "a compelling state interest" and that the statute was "the least restrictive method available to carry out [the] state interest," the Court declared the law unconstitutional. *Id*.

In *Jegley*, this Court recognized that the "fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults." *Id*. at 632, 80 S.W.3d at 350. Act 1 impinges on that right by targeting for exclusion individuals who engage in a sexual relationship with an unmarried partner at home. Consistent with Arkansas's "rich and compelling tradition of protecting individual privacy," *id*., at 632, 80 S.W.3d 349-50, the right to engage in private, consensual, noncommercial acts of sexual intimacy between adults encompasses the right of individuals to engage in that form of intimacy with a partner cohabiting in the home.

Strict scrutiny applies here because Act 1 burdens the right to privacy of adults cohabiting in an intimate relationship with an unmarried partner. Indeed, Act 1 penalizes the exercise of this fundamental right. If the couples barred by Act

1 choose to exercise their fundamental right to privacy, the State can no longer consider them eligible to be foster or adoptive parents. This penalty is unavoidable for same-sex couples who cannot marry under Arkansas law. Like the cases involving the fundamental right to travel, penalizing the exercise of a fundamental right is itself unconstitutional. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 499 n.11 (1999).

Like the anti-sodomy law at issue in *Jegley*, Act 1 burdens the ability of these couples to engage in a significant expression of their sexual intimacy. Fundamental personal relationships include the intimate relationship an adult has with a romantic partner and that of parent and child. While not all couples choose to bring a child into their life, many cases have recognized the importance of the child-parent relationship. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000) (O'Connor, J., announcing judgment of the court) (characterizing as perhaps the oldest "fundamental liberty interest" recognized by Supreme Court of the United States "the interest of parents in the care, custody, and control of their children"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not a 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 his additional obligations.").

For many couples, parent-child relationships are created through fostering or adopting a child. Indeed, for couples who cannot conceive children on their own, adoption is the sole means by which they can establish parent-child relationships. Arkansas case law long has recognized that adopted children have the same legal status as natural children with respect to their adoptive parents. *See, e.g., Shaver v. Nash*, 181 Ark. 1112, 29 S.W.2d 298 (1930). Thus, while Arkansas may not have recognized a right to adopt or foster a child, it is clear that the inability to do so is not some trivial disability – parent-child relationships go to the very heart of how people define themselves and their relationships with others. Act 1 presents cohabiting couples in intimate relationships with the Hobbesian choice of breaking up their families or foregoing being a parent to (or having a legally recognized parent-child relationship with) a child. At the same time, children who are in need of families may be denied the opportunity to grow up in a loving and stable home with two parents.

While the State is correct that there is no recognized right to adopt or act as a foster parent, *see* Arkansas Dept. of Human Servs., et al.'s Appellant's Brief (hereinafter "ADHS Brief") at Arg. 8, this is irrelevant to the constitutional analysis in this case. Once the State grants citizens the opportunity to foster or adopt, it cannot dole out this opportunity in a manner that infringes on a fundamental constitutional right. *See, e.g.*, *Mem'l Hosp. v. Maricopa Cnty.*, 415

U.S. 250, 257-58 (1974) (refusal to provide free non-emergency medical care infringed right to travel); *see also Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (due process constitutional challenge to termination of welfare benefits cannot be answered by characterization of welfare as "right" or "privilege"; but once state offers such benefits, constitution is implicated in their denial).

Judge Piazza, correctly held that Act 1 posed a "significant burden" on the exercise of the plaintiff's privacy rights. *See Cole, et al. v. Dept. of Human Servs.*, Case No. 60CV-08-14284, Order at 2 (April 16, 2010). In response, the State argues that there must be a "direct and substantial burden" on the exercise of a fundamental right in order for strict scrutiny to apply. ADHS Brief at Arg. 12. Although, as discussed above, Act 1 meets that standard by explicitly penalizing individuals who exercise their fundamental right to privacy, this Court in *Jegley* did not create such a high standard. Instead, it explained that the Act involved in that case simply posed a "burden" on the exercise of the right to privacy. *Jegley*, 349 Ark. at 632, 80 S.W. 3d at 350. While the Supreme Court of the United States has used a "direct and substantial burden" test for certain substantive due process cases, *see e.g.*, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), the Arkansas Supreme Court has not set such a high standard for cases involving the particular fundamental right to privacy recognized in *Jegley*. Indeed, imposing a higher standard would be inconsistent with Arkansas's "recognized protection of

individual rights greater than the federal floor." *Jegley*, 349 Ark. at 631, 80 S.W. 3d at 349. Thus, federal case law on this subject cited by the State is inapplicable.

To the extent that this case might be seen as requiring an extension of the application of the fundament right established in *Jegley*, this Court has acknowledged that "it is important to point out that we have recognized due process as a living principle." *Id*. Indeed, this Court has quoted with approval Justice Frankfurter's opinion in *Wolf v. Colorado*, 338 U.S. 25,27 (1949), in which he explained:

> It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

Jegley, 349 Ark. at 632, 80 S.W. 3d at 350 (quoting *Carroll v. Johnson*, 263 Ark. 280, 288, 565 S.W. 2d 10, 15 (1978) (quoting *Wolf*, 338 U.S. at 27)). Because cohabitation is a means by which couples engage in their consensual intimate relationships, the right recognized in *Jegley* is infringed on in this case. Indeed, for cohabiting same-sex couples, this is the only manner in which they can form a stable, permanent household, as marriage is not an option for these couples under Arkansas law. Ark. Const. amend. 83, § 2, Ark. Code Ann. § 9-11-107(b) (Arkansas law does not recognize same sex marriages from other states); Ark. Code Ann. § 9-11-109 (same sex marriages are void under Arkansas law).

B. Act 1 cannot withstand strict scrutiny because it does not use narrowly tailored means to further any compelling state interest.

Having established that Act 1 burdens the fundamental right to privacy, the circuit court was correct to conclude that the law does not satisfy the requirements of strict scrutiny. As noted above, strict scrutiny requires the State to prove that Act 1 furthers a compelling state interest using narrowly tailored means. *Jegley*, 349 Ark. at 632, 80 S.W. 3d at 350. The record contains many reasons establishing that Act 1 cannot withstand strict scrutiny. There is no need to look any further than the following undisputed facts to conclude that Act 1 is not narrowly tailored to serve the Government's asserted interest in protecting child welfare: The Arkansas Department of Human Services (ADHS) already has in place a detailed approval process to determine whether applicants are suitable to be foster or adoptive parents.[1] *See* ADHS Brief at Ab. 7. This process is just as effective for

[1] While the Intervenor-Appellants Family Council Action Committee, et al., (Intervenor) argue that the appellees are asking for a "public stamp of approval" on, or "official recognition" of, their relationship, *see* Intervenor's Brief (hereinafter "Intervenor's Brief"); the plaintiffs are, in fact, asking the State to treat them like everyone else. They, too, want the individualized assessment that other adoptive or foster candidates receive.

cohabiting couples as it is for married couples and single individuals and provides a narrowly tailored means of accomplishing the State's goal – finding suitable homes for children without parents – as opposed to the blunt instrument of Act 1, which unconstitutionally and unnecessarily categorically excludes many good parents simply because of their cohabiting status. The circuit court properly held that the law fails to satisfy strict scrutiny because it unreasonably casts a broader net than necessary to further the Government's interest.

The State Appellant's main argument appears to rely on custody decisions in domestic relations cases that place children with a non-cohabiting parent instead of a cohabiting parent. ADHS Brief at Arg. 2-3. These cases are inapplicable for several reasons. First, unlike Act 1, these cases do not involve categorical exclusion of unmarried couples from acting as the custodial parent. Indeed, in the principal case cited by the State -- *Alphin v. Alphin*, 364 Ark. 332, 219 S.W. 3d 160 (2005) -- this Court actually did not affirm the trial court's decision on that basis, even though the biological mother cohabited with her new spouse for a

period of time in the child's presence. *See id*. (affirming trial court on the basis of instability in mother's home unrelated to cohabiting).[2]

Second, these cases arise in an entirely different context. The choice in many child custody cases is between two biological parents. The issue presented

[2] Interestingly, one court of appeals judge who considered this case in the lower court questioned directly the importance of cohabiting on the issues that arose in that case. As Judge Baker explained:

> Societal mores change. When our courts first used language regarding morality and cohabitation without the benefit of marriage in relation to custody, engaging in sexual acts outside of marriage was a criminal act. In consideration of this fact, we should not blindly follow such cases. . . . Our law should not be an unspoken code that bases custody decisions upon the courts monitoring a woman's sexual activities, a premise which directly contradicts our holdings in alimony cases.

Alphin v. Alphin, 90 Ark. App. 71, 80, 204 S.W. 3d 103, 109 (2005) (Baker, J., dissenting) (footnotes omitted). In a telling footnote, Judge Baker quoted from Justice Brown's concurrence in *Jegley*, which explained, "[t]he unmistakable trend, both nationally and in Arkansas, is to curb government intrusions at the threshold of one's door and most definitely at the threshold of one's bedroom." *Id.* (quoting *Jegley v. Picado*, 349 Ark. 600, 641, 80 S.W. 3d at 356 (2002) (Brown, J., concurring)).

here is whether it is better to leave children without a permanent family than to place them with an available, loving, stable, cohabiting couple who have together chosen to form a family and who go through a thorough vetting and approval process with the ADHS. The calculus of what is in the best interests of the child in this context thus is quite different. Indeed, while courts have acknowledged that a biological parent's cohabitation is a factor a court should consider in awarding custody, cohabitation itself is not determinative. S*ee Word v. Remick*, 75 Ark. App. 390, 396-97, 58 S.W. 3d 422, 426-27 (2001), *Hamilton v. Barrett*, 337 Ark. 460, 468, 989 S.W. 2d 520, 524 (1999) (custody change affirmed, based on cohabitation that violated agreed order between the parties). S*ee, e.g., Powell v. Marshall*, 88 Ark. App. 257, 267, 197 S.W. 3d 24, 29-30 (2004) (reversing change of custody decision by trial court where mother cohabited, but it did not adversely affect child).

Third, no case involving child custody directly has addressed the implications of *Jegley v. Picado* on the preference against custody by a cohabiting parent. The Intervenor-Appellants argue that cases involving cohabiting parents have been decided since *Jegley*, and the courts have not mentioned the impact of *Jegley*. *See* Intervenors' Brief at Arg. 10. In neither of these cases did the parties raise their right to privacy as set out in *Jegley*. *See Alphin v. Alphin*, 364 Ark. 332, 219 S.W. 3d 160 (2005), *Holmes v. Holmes*, 98 Ark. App. 341, 235 S.W. 3d 482

(2007). The right to privacy, like other individual rights, can be waived. *See generally Cooper Standard Auto., Inc. v. Kelley*, 2009 Ark. App. 552, 2009 WL 2778042 (2009) (failure to raise constitutionality issue resulted in waiver).

This Court need not abandon consideration of cohabitation as a factor in child custody cases in order to uphold the trial court's ruling here. This Court may choose to hold that the concerns that arise when the choice is between two biological parents in a custody case are different from those that come into play when the choice is between, for example, a child continuing to reside in a group home or joining a permanent, stable, loving and unmarried family with cohabiting parents. The approval process that the ADHS already uses to determine whether persons are fit to be foster or adoptive parents provides a narrowly tailored means to make these determinations instead of the blunderbuss categorical exclusion imposed by Act 1.

The State also argues that it is "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." ADHS Brief at Arg. 11. This is an incorrect statement of the law. If this were the case, this Court could consider the race of a custodial parent's spouse in determining custody. Case law clearly establishes that this – like unconstitutional restrictions on the exercise of fundamental rights – is itself

unconstitutional. *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984) (overturning best interest of the child determination where the lower court considered that the mother had entered into an interracial marriage in awarding custody); *Tipton v. Aaron*, 87 Ark. App. 1, 14, 85 S.W. 3d 142, 151 (2004) (Griffen, J., concurring) (concurring in reversal of trial court award of custody to father where court considered that white mother had remarried African American man in custody decision).[3] Thus, in many cases, the State is not permitted to consider factors that implicate some other constitutional principle or limitation on the ability of the State to act.

The State's two specific examples of limits that purportedly implicate constitutional rights are distinguishable. The State argues that requiring adoptive parents to be state residents, Ark. Code Ann. § 9-9-205, and allowing biological parents to express a religious preference for the adoptive family, Ark. Code Ann. § 9-9-102(c), both implicate constitutional rights, but the State may still consider them for purposes of adoption. The Supreme Court of the United States has long upheld bona fide residency requirements. Durational residency requirements are the main source of unconstitutional burdens on the right to travel. *See Shapiro v.*

[3] Arkansas law specifically prohibits consideration of race in adoption and foster care placements. Ark. Code Ann. §9-9-102(b).

Thompson, 394 U.S. 618, 622 (1969), *overturned on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974) (striking durational residency requirement as a prerequisite to receiving welfare benefits as violating right to travel); *Martinez v. Bynum*, 461 U.S. 321, 328 (1983) ("a bona fide residence requirement, appropriately defined and uniformly applied furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents.").

That Arkansas requires adoptive parents to be residents, just as Arkansas requires someone to be a resident before he or she can vote in a state election, does not implicate the State's authority to unduly burden constitutional rights in other cases.[4] *See Martinez*, 461 U.S. at 328 (a bona fide residence requirement "does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there"). The expression of a religious

[4] Bona fide residency requirements have been upheld because a state can reserve benefits for its own citizens. *Martinez*, 461 U.S. at 328. It is only when a state, for example, requires a person to live in that state for a year before they can receive state benefits that the right to travel is implicated. If Arkansas required state residents to live in the state for a year before they could receive welfare benefits, this would implicate the right to travel. *See Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

preference by a biological parent is simply a preference, not a categorical bar to placement, as seen in Act 1.[5] The ADHS is free to place the child with someone else if parents of the preferred religious background are unavailable or if following the parent's stated preferences would not be in the child's best interests.

At the end of the day, the State has not provided a compelling state interest that would justify the wholesale elimination of same sex and heterosexual unmarried couples from the limited pool of possible foster and adoptive parents that should be available to Arkansas children who are in need of parents and families. Indeed, the States has not even argued that it has a compelling interest or has used narrowly tailored means in this case, but instead merely argues that rational basis applies. ADHS Brief at Arg. 16-20; *see also Howard*, 367 Ark. 55, 70, 238 S.W. 3d 1, 11 (""Nothing that the Child Welfare Agency Review Board

[5] One Arkansas Court of Appeals case has held that requiring a non-custodial parent to bring a child to church and Sunday school during visitation did not violate the Establishment Clause. *See Johns v. Johns*, 53 Ark. App. 90, 94, 918 S.W. 2d 728, 731 (1996). The Supreme Court of Arkansas has never addressed this issue, and, given the many jurisdictions that hold otherwise, the outcome of this case can reasonably be questioned. S*ee id.* at 96, 918 S.W. 2d at 732 (Cooper, J., dissenting) (citing and describing numerous cases from other jurisdictions).

presented to the trial court shows that it had a compelling state interest for [banning a person from acting as foster parents because he or she was homosexual or a homosexual resided in the home]"). This is not surprising given that the narrowly tailored individual assessment is readily available to, and used by the State.

II. Act 1 also violates the Appellees' Right to Equal Protection under the State Constitution of Arkansas.

Act 1 is unconstitutional for the additional reason that the statute violates the right to equal protection. This Court's decision in *Jegley* along with Justice Robert Brown's concurrence in *Dep't of Human Services and Child Welfare Agency Review Bd. v. Howard*, 367 Ark. 55, 66, 238 S.W. 3d 1, 8 (2006) (Brown, J. , concurring), provides the analysis applicable to this case.[6]

Application of Act 1 to just two of the plaintiffs in this case demonstrates how it violates equal protection. Appellees Stephanie Huffman (Professor Huffman) and Wendy Rickman ("Rickman") have been in a committed

[6] Although the Court found an alternative ground to affirm the trial court's decision to invalidate a ban on being a foster parent if an adult member of the household was homosexual, Justice Brown's analysis is instructive of how equal protection principles apply in this context.

relationship for ten years. FCAC Abs. 115. Professor Huffman adopted her son, T, during 2003. Prior to T's adoption, the ADHS completed a home study of their household and conducted a background check on Professor Huffman. R. 4282. Rickman and Professor Huffman were living together at the time. R. 4274. The ADHS deemed the adoption of T by Professor Huffman to be in the child's best interest and, thus permitted Professor Huffman to adopt him. FCAC Abs. 108. Professor Huffman attempted to adopt a second special needs child several years later. Once again, the ADHS conducted a home study. R. 4278-4279. Yet, solely due to Act 1, the Department could not seek to approve Professor Huffman to adopt a second child despite her previous successful application, adoption and parenting.

Instead of being rationally related to a legitimate state interest, much less narrowly tailored to a compelling state interest, Act 1 is an arbitrary classification aimed at a particular politically unpopular group and at the practices of members of that group with which some Arkansans disapprove. As this Court explained in *Jegley*, "[w]ith respect to regulation of morals, the police power should properly be exercise to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others." 349 Ark. at 637, 80 S.W. 3d at 353. As Justice Brown noted in his concurrence in *Howard*, "the fact that the governing

majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Howard*, 367 Ark. at 70, 238 S.W. 3d at 11 (Brown, J., concurring).

That certain people might find cohabiting or engaging in same-sex relationships morally objectionable is insufficient to justify it as a legitimate state interest. Indeed, such moral objections are constitutionally impermissible. As this Court explained in *Jegley*, "'[I]f the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest.'" 394 Ark. at 635, 80 S.W. 3d at 352 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)). That Act 1 is an initiated act does not change this analysis. Indeed, in *Romer*, the Colorado Constitutional Amendment at issue was likewise a voter-initiated amendment; yet, the Supreme Court of the United States still struck it. 517 U.S. at 635-636.

Act 1 should also not be saved by reliance on it's over inclusive language. As this Court has said:

> [I]t was settled by the decision in *Yick Wo v. Hopkins*, 118 U.S. 356 [(1886)] . . . that purposeful discrimination in the enforcement of an ostensibly fair law may violate the constitution. If the unlawful application of the statute results 'in its unequal application to those who are entitled to be treated alike,' there is a denial of equal protection."

Taylor v. City of Pine Bluff, 226 Ark. 309, 310-11, 289 S.W. 2d 679, 680 (1956) (quoting *Snowden v. Hughes*, 321 U.S. 1(1944). Even if the State were trying to justify this Act as encouraging marriage, same-sex couples are impacted by the Act and cannot marry or have their out of state marriages recognized under Arkansas law, which renders the Act unconstitutional as applied to them.

The absence of logic of the exclusion of cohabiting adults that results from Act 1 strongly suggests that constitutionally impermissible motivations were at work in its enactment. In the Intervenor's own words, they proposed the voter initiative in order to "blunt the gay agenda", *see State Add. 40.* This Court has already concluded in a prior case concerning the exclusion of gay persons, including couples, from serving as foster parents, that "there [is] no rational relationship between the regulation's blanket exclusion and the health, safety, and welfare of the foster children." *See Dep't of Human Servs. and Child Welfare Agency Review Bd.* v. *Howard*, 367 Ark. 55, 65, 238 S.W.3d 1, 8 (2006). For all these reasons, Act 1 violates unmarried adults' right to equal protection of the laws.

Conclusion

The plaintiffs in this case are asking the State of Arkansas to treat them like everyone else and permit them to be considered under the same thorough screening process the State already uses to qualify non-cohabiting persons to foster or adopt children. The circuit court correctly decided that Act 1 penalizes unmarried Arkansans for exercising their fundamental right to privacy. Because the State has presented no compelling interest furthered by this Act, and the Department of Human Services' existing individualized analysis of all unmarried single adults and married couples who seek to foster or adopt children provides a narrowly tailored means to accomplish the goal of providing for the best interests of children without parents, this Act cannot withstand strict scrutiny. Additionally, Act 1 is unconstitutional because it violates the equal protection rights of Arkansans who are prohibited from even being considered as permanent, loving families for children in need.

Respectfully submitted,

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