THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

Sheila Cole, on her own behalf, and by, for and on behalf of her granddaughter W.H.; Stephanie Huffman and Wendy Rickman; Frank Pennisi and Matt Harrison; Meredith Scroggin and Benny Scroggin, on their own behalves, and by, for and on behalf of their two children, N.S. and L.S.; Susan Duell-Mitchell and Chris Mitchell, on their own behalves, and by, for and on behalf of their two children, N.J.M. and N.C.M.; and Curtis Chatham and Shane Frazier, PLAINTIFFS, vs. The State of Arkansas; the Attorney General for the State of Arkansas, Dustin McDaniel, in his official capacity, and his successors in office; the Arkansas Department of Human Services and John M. Selig, Director, in his official capacity, and his successors in office; and the Child Welfare Agency Review Board and Charles Flynn, Chairman, in his official capacity, and his successors in office, DEFENDANTS.	NO. CV 2008-14284

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

The State agencies that Arkansas has charged with the welfare of and responsibility for children in State care are unanimous in their view: Act 1 serves *no* child welfare purpose whatsoever. Rather, Act 1 harms children in State care by categorically excluding applicants to serve as foster or adoptive parents who, all agree, may be good parents to the children who need them. Indeed, because of the State's comprehensive process to screen out unfit applicants, Act 1 serves only to exclude those the State professionals would otherwise approve. Act 1 therefore compounds the chronic and drastic shortage of adoptive and foster parents in this State, harming children in the State's child welfare system by, among other effects, denying children loving homes; causing children to be placed in emergency shelters, group homes, or sometimes even in DHS offices or juvenile detention while caseworkers desperately engage in the "hunt for placement"; bouncing children from placement to placement; separating brothers and sisters from one another; and forsaking some children to be orphans when they "age out" of the system.

The pernicious effects of Act 1 do not stop with children in State care. By forbidding the State from even considering the testamentary wishes of parents to designate for their children an adoptive parent who fits within the categorical exclusion of Act 1, the law improperly interferes both with fundamental parental rights to designate what is best for their children in the event of parental death or incapacity and with the role of the judiciary to determine what is best for these children in light of their parents' wishes.

These detrimental effects of Act 1 are not theoretical. For example, but for the luck of geography and a "creative" solution to Act 1 approved by DHS, Plaintiff W.H.—an infant child whose parents' rights were terminated for abuse—would be denied adoption by her grandmother, Plaintiff Sheila Cole, a woman in a long-term loving relationship with a partner

with whom she already is raising a child. There is no purpose served by depriving an abused child from adoption by her loving grandmother.

A second concrete example of the harm to children caused by Act 1 is the case of Plaintiffs Stephanie Huffman and Wendy Rickman, both professors at University of Central Arkansas. These Plaintiffs have been in a committed and loving relationship for a decade and are successfully raising two children, including a special-needs child adopted through DHS in 2003. When Ms. Huffman sought to adopt another child, even one of the special-needs children that the State finds exceedingly difficult to place, their home was scrutinized by the State and, once again, found fit to provide a home for a child in State care. Because of Act 1, however, a child who would have been raised in Plaintiffs' home may never be placed with a loving family and may instead be relegated to State care.

A third example: Plaintiffs Meredith and Benny Scroggin have decided that it is in the best interests of their young children to designate in their will Meredith's cousin to care for and adopt Plaintiffs' children in the event of parental death or incapacity. Because the designated caregivers fall within the categorical ban of Act 1, however, the State and the State's judiciary are precluded from even considering the testamentary wishes of the natural parents and whether those wishes are in the best interests of the children. Act 1 effectively guarantees that these children would be deprived of their own parents' judgment of what is best—an adoption—regardless of whether a court concurs that the parents' decision is in the children's best interests.

It is thus no surprise that Defendants, the State agencies charged with protecting the welfare of children, can identify neither a child welfare purpose for Act 1 nor a problem that Act 1 would solve. Indeed, these State witnesses and the Plaintiffs have no disagreement on the material facts demonstrating that Act 1 serves no child welfare purpose and does no more than

exacerbate chronic shortages of caring homes for vulnerable children. Instead, as shown below, Act 1 was proposed in 2008 by the Family Council's political action committee and Jerry Cox in order "to blunt the gay agenda," *i.e.,* to stop gay men and lesbians from serving as foster and adoptive parents to children in the State's child welfare system. But it is already the law of this State under *Dep't of Human Servs. and Child Welfare Agency Review Bd.* v. *Howard* that there is no child welfare purpose for barring same-sex couples from providing a loving home to those children.

Consequently, Plaintiffs respectfully move for summary judgment on the following constitutional claims:

- the due process rights of children in State care to be free from the harm caused by Act 1—law that is contradictory to professional judgment standards of child welfare;
- the equal protection rights of adult Plaintiffs to exercise their fundamental right to privacy without the burden of penalties from a law that is in no way narrowly tailored to advance a compelling government interest, given the lack of any connection between Act 1's categorical exclusions and children's well-being;
- the due process rights of parents to make fundamental decisions about their children's futures without the burden of a law which is in no way narrowly tailored to meet a compelling government interest; and
- the equal protection rights of children to be treated the same as other children regardless of the classification of their caregivers imposed by a law that does not serve an important government interest.

Above all, this case is about children who cannot speak for themselves being deprived of parents because of circumstances beyond their control, and who seek the protection of this Court from the damage Act 1 has caused and will cause. Act 1 causes serious harm to children for no child welfare purpose and must be struck down to protect the constitutional rights that the law impinges.

II. FACTUAL BACKGROUND

A. The Plaintiffs

On December 30, 2008, Plaintiffs—children and adults from many families—brought suit against the State of Arkansas and the agencies responsible for children in the State's foster care system. Plaintiffs include Sheila Cole, Stephanie Huffman, Wendy Rickman, Frank Pennisi, Matt Harrison, Curtis Chatham and Shane Frazier, all of whom wish to adopt children in Arkansas who need loving families but are automatically disqualified by Act 1 because they live with a same-sex partner and cannot be married under Arkansas law.

In the case of Plaintiffs Huffman and Rickman, who have been living together in a committed relationship for over ten years, Arkansas's Department of Human Services ("DHS") has already deemed their home to be a suitable placement for a child, having approved Huffman's adoption of a son in 2003. The couple is ready to open their family to another Arkansas child in need but Act 1 precludes them from being considered. Plaintiffs Curtis Chatham and Shane Frazier sought to adopt a twelve-year old child featured on DHS's website[1] as being in need of an adoptive family but were turned away because of Act 1. Plaintiff Cole

[1] Profiles of children in Arkansas awaiting adoption are available on DHS's "Heart Gallery" website (https://dhs.arkansas.gov/dcfs/heartgallery).

was barred by Act 1 from adopting her own infant granddaughter in Arkansas even though DHS concluded that the adoption would be in W.H.'s best interests.

To become eligible to adopt in Arkansas, all of these Plaintiffs would have to dissolve their homes and families. In the case of Ms. Cole, to adopt her granddaughter, she and her partner of ten years and the young child they are raising together could not live together under one roof in Arkansas. Similarly, to provide a home for a needy child, Ms. Rickman and Ms. Huffman would have to split up their family and raise their two children in separate households.

Plaintiffs Meredith and Benny Scroggin, and Susan Duell-Mitchell and Chris Mitchell are parents who have designated a relative or a close family friend to care for and adopt their children in the event they die or are otherwise unable to care for them themselves. The persons they have chosen are living in same-sex relationships and, thus, are barred by Act 1 from adopting in Arkansas. Plaintiffs N.S., L.S., N.J.M. and N.C.M., the children of the Scroggins and Mitchells, are also harmed by Act 1 because Act 1 denies them the security and benefits of adoption in the event of parental death or incapacity solely because of the sexual orientation of their designated caretakers.

Finally, Plaintiff Cole's granddaughter, Plaintiff W.H., and all children in state custody in Arkansas are harmed by Act 1 because it denies them the ability to be adopted or fostered by good parents who, after careful screening, are determined to be best suited to meet their needs, or in some cases, the only prospective parents available for them. Depriving children of willing and able adoptive and foster parents and, thus, unnecessarily extending children's stay in State custody, also harms the taxpayer Plaintiffs.

B. The State Defendants

The State Defendants responsible for the welfare of children include the Child Welfare Agency Review Board ("CWARB"), which is the board responsible for setting minimum standards for all residential and other institutions in which children may be placed, including foster and adoptive homes. Those minimum standards address a wide variety of matters, including the qualifications for foster and adoptive parents, what crimes disqualify applicants from serving as foster or adoptive parents, eligibility standards for employees of residential facilities, and physical and space requirements for all homes and facilities. Reflecting the overall obligations of the State to children in the child welfare system, in promulgating these standards, the Board's policies must be consistent with promoting the health, safety and welfare of children in the State's care. Ark. Code Ann. § 9-28-405(c)(1)(A) (West 2009); Separate Statement of Undisputed Material Facts ("Sep. Statement"), attached as Exhibit ("Ex.") 7, ¶ 1.[2]

The other State Defendants entrusted with the care of children are the Department of Human Services, DHS's Division of Children and Families Services ("DCFS"), and John Selig in his capacity as the Director of DHS (collectively with CWARB, the "State Defendants"). DHS, through DCFS, is responsible for, *inter alia*, investigating allegations of child abuse and neglect, removing children from their biological parents when necessary to protect the children's safety and welfare, and finding temporary and permanent placements for children who have

[2] All exhibits referenced hereinafter are attached to Plaintiffs' Motion for Summary Judgment. They include, in addition to record evidence, an Index of Exhibits (Ex. 1); an Index of 30(b)(6) Witness Topics (Ex. 2); Plaintiffs' Notices of Rule 30(b)(6) Deposition (Exs. 3-6); and a Separate Statement of Undisputed Material Facts In Support of Plaintiffs' Motion for Summary Judgment (Ex. 7). These documents are followed by excerpts from deposition transcripts presented in alphabetical order by deponent's last name (Exs. 8-44), Plaintiffs' Expert Reports (Exs. 45-49), one of Defendants' and Intervenors' Expert Reports (Exs. 50), and finally all other record evidence relied upon for this motion (Exs. 51-76).

entered the State's child welfare system. In addition to abiding by the CWARB minimum licensing standards, DHS may also create its own policies regarding the eligibility of applicants to be foster and adoptive parents, provided the policies are promulgated lawfully pursuant to the Administrative Procedures Act. Ark. Code Ann. §§ 25-15-203, 25-15-204 (West 2009); Deposition of Cindy Young ("Young Depo.") (Ex. 43) at 21:22-23:6; Deposition of John Selig ("Selig Depo.") (Ex. 34) at 44:2-12.

On any given day, DHS and CWARB are responsible for approximately 3,800 children in the State's child welfare system. Arkansas DHS, 2009 Statistical Report ("2009 DHS Statistical Report")[3] (Ex. 53), at DCFS-19; Deposition of Janie Huddleston ("Huddleston Depo.") (Ex. 25) at 28:10-11. The foster care system includes children of all ages and ethnicities, and from all geographic areas in the State. 2009 DHS Statistical Report (Ex. 53) at DCFS-13 – DCFS-18. Many enter the system with siblings, or with medical, emotional, or other needs. *Id*. at DCFS-32. Some stay in the child welfare system for a relatively short period of time because they are reunified with their biological parents or find permanency with relatives or adoptive parents, while others stay in the system for years and still others (as discussed below) will never be placed in a foster home or with an adoptive family. *Id*. at DCFS-13 (length of foster stay), DCFS-28 (reasons children exited foster care).

Of these children in the State's care, approximately 2,200 are living in homes with foster or pre-adoptive parents. *Id*. at DCFS-19. The remaining 1,600 or so children who do not have a foster or adoptive parent-home live in State-run or contracted residential group homes, emergency shelters, or other institutional facilities. *Id*.; *see also* Huddleston Depo. (Ex.

[3] The 2009 DHS Statistical Report can be found at http://www.state.ar.us/dhs/AnnualStatRpts/ASR%202009.pdf.

25) at 31:6-15. Although DHS caseworkers endeavor to make placement decisions based on each child's individual needs, because of the shortage of foster families, it is undisputed that the system is not currently meeting the needs of all children in the State's care. *See* Deposition of Mona Davis ("Davis Depo.") (Ex. 19) at 128:17-129:5, 340:2-10 (the state cannot meet the individualized needs of the children in its care with the existing homes, and stressing the importance of recruiting additional families); Factual Background Section II.G, *infra*; *see also* Sep. Statement (Ex. 7) ¶ 9.

Presently, there are over 500 children in State custody awaiting adoption. 2009 DHS Statistical Report (Ex. 53) at DCFS-33. Even assuming that each adoptive home would be a fit and willing placement for a child currently awaiting adoption, there are more than twice as many children awaiting adoption as there are available adoptive homes. *Id*. (518 children awaiting adoption but only 228 adoptive homes available).

Moreover, these disturbing statistics under-report the shortage crisis faced by the State of Arkansas for appropriate child placements. The availability of one additional adoptive home does not mean that one additional child will be adopted because there is not a 1-1 match between applicants and candidates; for example, many applicants will only adopt infants, not the many older children waiting for placement or children with special needs. *See* Deposition of Marilyn Counts ("Counts Depo.") (Ex. 14) at 127:1-13; Sep. Statement (Ex. 7) ¶ 12. Many of these children will simply never be placed with a "forever family." Deposition of John Zalenski ("Zalenski Depo.") (Ex. 44) at 83:17-19; Sep. Statement (Ex. 7) ¶ 13. In 2009 alone, 248 teenagers "aged out" of the system, meaning that they reached the age of majority and left State care with no person to provide them with economic, emotional or other support. 2009 DHS Statistical Report (Ex. 53) at DCFS-28. Not surprisingly, children who age out of the system

face significant difficulties in establishing their independence and supporting themselves, and exhibit an increased likelihood of homelessness, dropping out of high school, mental health issues, substance abuse, and early pregnancy. Zalenski Depo. (Ex. 44) at 23:1-5, 27:9-17, and 25:19-23 (when kids age out of group care, "they're just really sadly lacking in the fundamental life skills that they need in order to make their way in the world. And then, you know, we turn them loose. It's not good.").

C. The Family Council Action Committee and Jerry Cox

After this action was filed, the Family Council Action Committee ("FCAC") and Jerry Cox, the president of FCAC, intervened as Defendants because they were sponsors of Act 1. FCAC is a political action committee whose purpose is to advance interests in a diverse range of subjects, including marriage, abortion, human cloning, physician-assisted suicide, and other issues.[4] Neither FCAC nor Defendant Cox has any role or experience in finding placements for children in the state system, matching those children's unique needs to available foster or adoptive parents, or screening applicants as to their suitability to be foster and adoptive parents. Deposition of Jerry Cox ("J. Cox Depo.") (Ex. 15) at 119:15-120:3 (Cox has never "spoken to any child in state care" before); *id*. at 124:3-20 (Cox has "no understanding at all" regarding what DHS does to evaluate the suitability of prospective applicants to be foster and adoptive parents, or if the individualized screening process in any way fails to properly serve the best interests of a child); Deposition of John Thomas (formerly vice president of the Arkansas Family Council and a 30(b)(6) witness designated by the FCAC) ("John Thomas Depo.") (Ex.

[4] *See* Family Council Action Committee, About Us, at http://familycouncil.org/?page_id=13.

37) at 45:13-46:2 (Thomas knows "very little" regarding the DHS process of individualized review); *id*. at 59:18-60:6 (Thomas does not work in "the area of children in state care").

All of the parties agree that the State has an obligation to further the best interests of children in its care and that the only legitimate purpose of Act 1 is to promote child welfare. Ark. Code Ann. § 9-28-1002(a) (West 2009); Ark. Code Ann. § 9-28-405(c)(1)(A) (West 2009); Thomas Depo. (Ex. 37) at 11:5-10 (agreeing that "the only issue in the case with respect to the basis of Act 1 is what's in the best interest of children"); Huddleston Depo. (Ex. 25) at 55:2-19 (the interests of children is the "paramount interest of DHS" and DHS has an obligation to change any policy that is inconsistent with the best interests of children); Deposition of Ed Appler ("Appler Depo.") (Ex. 9) at 146:5-18 (DCFS 30(b)(6) witness) (stating that the CWARB could not pass laws inconsistent with its duty to promote the health, safety and welfare of children); Selig Depo. (Ex. 34) at 22:5-23:15; Zalenski Depo. (Ex. 44) at 133:11-21 (DCFS 30(b)(6) witness); *see also* State Defendants' Answer to Plaintiffs' Third Amended Complaint, dated January 27, 2010 ("State Defendants' Third Answer") (Ex. 73) ¶ 1; Answer Filed in Intervention by Family Council Action Committee and Jerry Cox, dated March 31, 2009 ("FCAC Answer") (Ex. 51), ¶ 1.

D. The State's child welfare system is responsible for meeting the unique needs of the thousands of children in its custody and care

Arkansas children come into the custody of DHS and its subdivision DCFS in a variety of ways. Some enter the system because the child has been abused or neglected by his or her biological parents. Arkansas DHS, DCFS Family Services Policy and Procedure Manual ("DHS Manual")[5] (Ex. 54), last revised November 2009, at 15-41; Deposition of Kandi Tarpley

[5] The DHS Manual can be found at http://www.arkansas.gov/dhs/chilnfam/masterpolicy.pdf.

("Tarpley Depo.") (Ex. 36) at 10:7-12, 11:9-14, 22:25-23:9, 23:22-24:9; *see* Sep. Statement (Ex. 7) ¶ 18. Others come into State care because the child's parent claims to be unable to care for the child. DHS Manual (Ex. 54) at 183-85; Deposition of Frances Waddell ("Waddell Depo.") (Ex. 39) at 28:4-20. Still other children come into DHS custody because of their parents' death and the lack of any relatives or other individuals willing or able to take custody of the child. 2009 DHS Statistical Report (Ex. 53) at DCFS-27 (77 children entering foster care in 2009 due to death of parents); Davis Depo. (Ex. 19) at 167:25-168:2.

By express legislative mandate, once a child enters DHS custody, the State assumes an ethical and legal obligation to act in that child's individual best interests. *See* Ark. Code Ann. § 9-28-1002(a) (West 2009) ("The General Assembly acknowledges that society has a responsibility, along with foster parents and the Department of Human Services, for the well-being of children in foster care."); Huddleston Depo. (Ex. 25) at 55:2-19 (the interest of children is the "paramount interest of DHS" and DHS has an obligation to change any policy that is inconsistent with the best interests of children); Selig Depo. (Ex. 34) at 21:19-23:12; *see also* FCAC Answer (Ex. 51) ¶ 1. As the Legislature has recognized, each foster child in State care is entitled to certain basic rights including the right "[t]o be cherished by a family of his or her own," the right "[t]o be nurtured by foster parents who have been selected to meet his or her individual needs," the right "[t]o have individualized care and attention," and the right "[t]o have a stable, appropriate placement if he or she is placed in foster care." Ark. Code Ann. § 9-28-1002(b) (West 2009).

Indeed, Arkansas' entire child welfare system is premised on the State acting in the best interests of each individual child that it takes into its custody.[6] *Clark* v. *Reiss*, 38 Ark. App. 150, 152, 831 S.W.2d 622, 624 (Ark. Ct. App. 1992) ("The prime concern and controlling factor is the best interest of the child, and the court in its sound discretion will look into the particular circumstances of each case and act as the welfare of the child appears to require."); *see also* Factual Background Section II.D, *supra*. Not only must the child welfare professionals within DHS act consistent with the best interests of children in their care, but so too must the courts in dependency and other proceedings where the rights of children in state care are at issue. *See Ark. Dep't of Human Servs.* v. *Couch*, 38 Ark. App. 165, 168, 832 S.W.2d 265, 267 (Ark. Ct. App. 1992) ("In any proceeding involving the welfare of young children, the court is in no way bound by DHS policy; rather, the paramount consideration is the best interests of the children.").

Upon entering the foster care system, the State makes an assessment of each child's chances of returning to his or her family, and develops a permanency plan for each individual child. Deposition of Connie Hickman Tanner ("C. Hickman Tanner Depo.") (Ex. 24) at 125:13-126:24; Kutz Depo. (Ex. 26) at 70:4-21. While reunification with the biological parents is often the initial goal for all foster children, for many children, that is impossible or not in their best interests. See Deposition of Cecile Blucker Depo. ("Blucker Depo.") (Ex. 11) 83:5-83:25; *see also* Ark. Code Ann. § 9-27-338 (West 2009); Sep. Statement (Ex. 7) ¶ 24. In most

[6] The primacy of the child's best interests and the State's obligation to find a permanent home for the child flow from the fact that the State has affirmatively acted to place the child, away from his or her home and parents, into its custody. *See Lloyd* v. *Butts*, 343 Ark. 620, 624, 37 S.W.3d 603, 606 (2001) ("When, however, the natural parents so far fail to discharge these obligations as to manifest an abandonment of the child and the renunciation of their duties to it, it then becomes the policy of the law to induce some good man or woman to take the waif into the bosom of their home.").

cases, the permanency goal for that child becomes adoption and DHS seeks to find an adoptive placement in the child's best interest. *See* Selig Depo. (Ex. 34) at 26:17-27:5; *see also* Young Depo. (Ex. 43) at 44:1-23 (DHS tries to find adoptive parents so children will not "languish in foster care"); Deposition of Monica Cauthen ("Cauthen Depo.") (Ex. 12) at 66:18-20 (purpose of finding adoptive parents is so that children "don't grow up orphans"). Adoption, in stark contrast to guardianship or foster care, creates a "forever family" that provides the child with legal, financial and emotional benefits unique to the parent-child relationship. Blucker Depo. (Ex. 11) at 83:19-84:7; Appler Depo. (Ex. 9) at 121:22-25 (adoption "gives greater strength of permanency, thus helping the child's mental health, making a child feel more loved, more secure"); Deposition of Shannon Kutz ("Kutz Depo.") (Ex. 26) at 19:25-21:1 (permanent placement in an adoptive family is especially important for younger children, to give the children greater stability).

For children who need foster placements, under DHS policy and federal law, DHS caseworkers must place children in the least restrictive, most family-like setting possible. DHS Manual at 62; *see also* Deposition of Anne Wells ("Wells Depo.") (Ex. 41) at 67:4-13 (discussing efforts to keep kids within the community as opposed to an institutional setting); Sep. Statement (Ex. 7) ¶ 27. The practical effect of DHS's policy, which is consistent with best practices in the child welfare field, is that whenever possible, caseworkers attempt to place children with families, as opposed to group homes, shelters, or other institutions. Young Depo. (Ex. 43) at 40:3-11, 41:19-22.

These policies and laws reflect longstanding professional judgment that children are best served by placements with families, and not institutions. Counts Depo. (Ex. 14) at 27:14-23; *see also* Appler Depo. (Ex. 9) at 115:20-116:5 (placement with family "creates greater

emotional stability" than group home where staff come and go); Sep. Statement (Ex. 7) ¶ 28. As Anne Wells, a DCFS mental health professional with over 20 years of experience working with children in Arkansas explained, placing a child in a family "assists that child in having a sense of identity," "security," and "safety," so that the child will feel that he is "in that cocoon of safety while someone—an adult, a caring adult cares for [him], is responsible for [him], and is not going to reject [him]." Wells Depo. (Ex. 41) at 91:9-24 (in contrast, a facility "disperses that sense of identity and psyche"); *see also* Zalenski Depo. (Ex. 44) at 37:3-5 (placing a child in a residential facility when the child needs a foster home is "detrimental" to the child). In addition to promoting healthy emotional attachments, placement with foster families, as opposed to residential institutions, facilitates permanency for those children eligible for adoption, because the child is more likely to be adopted by the foster parent. Blucker Depo. (Ex. 11) at 105:15-21.

Unless there is a specific circumstance of the child that would counsel otherwise, DHS also strives to keep sibling groups together, to place children with relatives, and to avoid "out-of-county" placements, meaning placements outside of the child's home town. Deposition of Sandi Doherty ("Doherty Depo.") (Ex. 21) at 56:9-57:6; Young Depo. (Ex. 43) at 78:1-20. The preferences for maintaining sibling groups and for placements with relatives reflect the understanding that children benefit from the "sense of responsibility and a bond and a feeling and love for that child" that are already established with family members. Wells Depo. (Ex. 41) at 75:10-12; *see also* Sep. Statement (Ex. 7) ¶ 30.

Similarly, avoiding out-of-county placements whenever possible helps the child maintain regular contact with his biological family when reunification is the goal, and maintain continuity with his school, his community, and any medical or psychological treatment that the child is receiving. Young Depo. (Ex. 43) at 48:15-49:20; Wells Depo. (Ex. 41) at 82:2-5 (out-of-

county placements make it almost impossible for DHS to arrange for family therapy); Deposition of Eldon Schulz ("Schulz Depo.") (Ex. 32) at 27:17-28:22 (out-of-county placements make continuity of medical treatment difficult or impossible to maintain); Sep. Statement (Ex. 7) ¶ 31.

E. The State Defendants agree that there is no "one-size-fits-all" family or ideal family structure that meets the needs of all children in the State's child welfare system

The cornerstone of the State's obligation to children in its care is to make placement decisions based on the individual emotional, medical and other needs of that child. *See* Zalenski Depo. (Ex. 44) at 38:1-21; *see also* Sep. Statement (Ex. 7) ¶ 32. Accordingly, because "each child is different," Counts Depo. (Ex. 14) at 26:6, there is no "one-size-fits-all family" for every child. Zalenski Depo. (Ex. 44) at 38:20-23, 39:11-12. That is, as DHS acknowledges, there is no one type of parent or home structure that is the best fit for every child because each child has individual needs and each parent and home offer different benefits. Davis Depo. (Ex. 19) at 35:18-20, 36:22-37:3, 63:7-12 (no one type of home is ideal for every child); Counts Depo. (Ex. 14) at 25:21-26:6; *see also* Deposition of Denise Thormann ("Thormann Depo.") (Ex. 38) at 54:5-13 ("there's not just a clear-cut ideal family circumstance for every child").

Because there is no such thing as a "one-size-fits-all-family," consistent with child welfare best practices, DHS strives to recruit a broad pool of potential applicants that may be matched with each child's individual needs. Only by doing so can the State increase the likelihood of finding placements for children in its care that meet children's individual needs. *See* Zalenski Depo. (Ex. 44) at 34:11-15 (DHS has a need for appropriate placements, not just any placement); *id.* at 42:14-43:11 (DHS will "never stop recruiting" because it is "impossible that there would be a one-to-one correspondence where you would have 100 foster families and 100 children and that would work out."); *see also* Sep. Statement (Ex. 7) ¶ 34.

Moreover, because each child has unique needs, DHS acknowledges that a married couple is not the ideal placement for every child.[7] Selig Depo. (Ex. 34) at 56:1-5, 62:1-12; *see also* Sep. Statement (Ex. 7) ¶ 35. Indeed, although there are policies reflecting preferences for relatives, location and other factors, neither DHS nor the CWARB have policies preferring placement of a child with a married couple. Young Depo. (Ex. 43) at 77:1-5 (which placement is best would "depend on the needs of the child"); Appler Depo. (Ex. 9) at 90:4-6 (no CWARB policy preferring married couple applicants over single applicants). Likewise, the State's experience is that some children are best placed precisely with those who cannot even be considered or evaluated because of Act 1. *See* Appler Depo. (Ex. 9) at 51:6-52:5 (has seen children "thriving" in families headed by same-sex couples and cohabiting heterosexual couples); Kutz Depo. (Ex. 26) at 86:20-23 (DHS believes that it is in Plaintiff W.H.'s best interests to be adopted by Plaintiff Cole, who is in a same-sex cohabiting relationship); Doherty Depo. (Ex. 21) at 26:17-29:1 (best interest of child to be placed with grandmother cohabiting with same-sex partner); Deposition of Cassandra Scott ("Scott Depo.") (Ex. 33) at 28:17-31:23, 33:13-20 (best interest of child to be placed with grandmother cohabiting with her boyfriend of 20 years); *id.* at 38:19-39:2 (admitting that placement with a cohabiting couple could be in the best interests of a child); Deposition of Debbie Roark ("Roark Depo.") (Ex. 31) at 42:3-9 (stating placement with cohabiting couple may be in child's best interest).

[7] John Thomas of the Arkansas Family Council, the entity responsible for getting Act 1 onto the ballot, agrees that for some children, the best placement may not be with a married mother and father. *See* Thomas Depo. (Ex. 37) at 36:21-37:11.

F. The State Defendants agree that Arkansas's individualized assessment process and other safeguards screen out unsuitable applicants, regardless of the sexual orientation or marital status of the applicants

Prior to any child being placed with a foster or adoptive parent, the prospective applicant undergoes a lengthy and comprehensive screening process to determine the safety and stability of the home the applicant offers. The multiple-step screening process includes: (i) an initial inquiry meeting between the applicant(s) and DHS; (ii) an in-home consult with the applicant(s) and a social worker; (iii) background FBI and state criminal and child maltreatment central registry checks for all applicants and all adults and teenagers living in the household; (iv) thirty hours of training over ten weeks, and CPR and first aid classes for all applicants; (v) physical examinations for all applicants and all adults and teenagers living in the household; and (vi) a written home-study, which requires at least two visits, during which a caseworker inspects the physical premises, gathers information about the history of the applicant, and conducts separate interviews of the applicant and all other persons living in the home. *See generally* DHS Manual (Ex. 54) at 138-48; Counts Depo. (Ex. 14) at 35:6-40:23, 47:19-56:9, 111:18-116:5; *see also* Sep. Statement (Ex. 7) ¶ 40. Prior to the placement of any child, the home-study and other supporting materials are reviewed by a DHS supervisor, who can require that the caseworker obtain any additional evidence about the home that was not addressed in the case file. Counts Depo. (Ex. 14) at 88:4-88:22.

As part of the screening process outlined above, all applicants who apply to foster and adopt are screened to assess their fitness as parents, including their relationship stability (if the applicants are in a relationship), the risk of abuse, and their overall suitability to serve as foster parents for children. *See generally* DHS Manual (Ex. 54) at 145-46; *see also* Sep. Statement (Ex. 7) ¶ 42. Recognizing that individualized assessment and matching with an individual child's needs promote child welfare, the State screening process does not rely upon

presumptions about an applicant's ability to parent based on demographic characteristics. For example, under DHS policies and CWARB minimum licensing standards—and in order to maximize the ability of a caseworker to find a good fit for any given child—there is no specific income required to be a foster parent, *see* Young Depo. (Ex. 43) at 57:11-16; Appler Depo. (Ex. 9) at 59:25-60:3; no disease other than tuberculosis that automatically disqualifies an applicant, *see* Young Depo. (Ex. 43) at 50:23-51:19; Appler Depo. (Ex. 9) at 57:20-59:9; no physical disability that automatically disqualifies an applicant, *see* Young Depo. (Ex. 43) at 59:25-60:3; Appler Depo. (Ex. 9) at 56:10-57:19; no limits on the number of times that an applicant can have divorced or remarried, *see* Young Depo. (Ex. 43) at 69:13-70:5; Appler Depo. (Ex. 9) at 91:4-12; and no literacy requirement, *see* Counts Depo. (Ex. 14) at 62:19-21. Rather, other than the categorical exclusions created by Act 1 and standards regarding certain felony convictions, child welfare professionals in the State are entrusted to evaluate these and other demographic characteristics of the would-be foster and adoptive parent on an individualized basis to determine whether such characteristics play a positive, negative, or no role at all in their ability to meet the needs of a particular child. Young Depo. (Ex. 43) at 47:13-25; *see also* Blucker Depo. (Ex. 11) at 74:7-17 (need to look at the "whole picture" of an applicant, and not just their race, gender, sexual orientation or marital status, to determine whether he or she would be a suitable parent).

In assessing applicants in relationships, consistent with accepted professional social work standards, DHS does not make assumptions concerning parenting ability based on marital status. Selig Depo. (Ex. 34) at 56:1-5 (cannot determine if a placement is better or worse for a child just based on the marital status of the couple in the home); Appler Depo. (Ex. 9) at 60:25-62:13 (under good social work principles, you cannot assume that a married couple is stable or that an unmarried couple is unstable); *see also* Sep. Statement (Ex. 7) ¶ 49. Rather, the

stability of any particular relationship, married or unmarried, must be assessed by examining the individual applicant. Thormann Depo. (Ex. 38) at 55:19-56:24, 58:6-10; Scott Depo. (Ex. 33) at 36:19-24 (an individualized assessment, including of married couples, is critical to determine fitness and suitability to parent); *see also* Sep. Statement (Ex. 7) ¶ 50.

In addition to the initial screening process, there are a number of safeguards in place to ensure that the child is doing well in the home. Deposition of Beki Dunagan ("Dunagan Depo.") (Ex. 22) at 81:18-83:6. Under DHS policies, caseworker specialists are required to conduct follow-up in-person visits with the child in the foster home and to maintain regular communication with the child. DHS Manual (Ex. 54) at 146-47; *see also* Sep. Statement (Ex. 7) ¶ 51. As part of that follow-up evaluation, the child's experience is closely monitored to ensure that the placement is a good fit and that the foster or pre-adoptive parents are providing appropriate care for the child. Kutz Depo. (Ex. 26) at 32:9-14, 35:4-19. The child's experience also is monitored by a juvenile court, which conducts periodic review hearings, often every three to six months to evaluate the suitability of the placement. Ark. Code Ann. § 9-27-337 (West 2009); *see also* C. Hickman Tanner Depo. (Ex. 24) at 146:6-147:14; Counts Depo. (Ex. 14) at 100:11-22 (Pulaski County courts evaluate every three months). Similar safeguards ensure that adoptive placements are good and appropriate fits for children, and prior to any adoption the court must hold a hearing to assess the home-study and DHS's recommendations and to determine independently whether the adoption is in the child's best interest. *See* Counts Depo. (Ex. 14) at 91:3-96:12, 100:11-22; Deposition of the Honorable Stephen Choate ("Choate Depo.") (Ex. 13) at 45:1-8 (discussing the Permanency Planning Hearing).

Along with the child's caseworker, there are a number of other child welfare professionals involved in placement decisions regarding the child. Depending on the Arkansas

county in which the placement occurs, these professionals may include the child's attorney ad litem, the child's CASA advocate, and a DHS attorney from the Office of Chief Counsel and, in the case of adoptions, also a DHS adoption specialist, a DHS adoption supervisor, and ultimately a court that must decide whether to grant the adoption decree. Counts Depo. (Ex. 14) at 99:14-104:18; *see also* Wells Depo. (Ex. 41) at 43:9-15 (sometimes psychologist or psychiatrist also involved); Roark Depo. (Ex. 31) at 71:15-19 (therapists sometimes make placement recommendations).

The State Defendants agree that the initial screening process and the other safeguards in place effectively screen out unsuitable parents. Selig Depo. (Ex. 34) at 58:24-59:6 (screening process is "thorough" and "effective"); Appler Depo. (Ex. 9) at 96:23-97:2 (Arkansas's home-study evaluation requirements are "more comprehensive than most of the states I have ever seen"); Blucker Depo. (Ex. 11) at 24:22-23 (Arkansas's process is working, "[w]e are getting good homes"); Huddleston Depo. (Ex. 25) at 40:1-41:3 (screening process is "very thorough" and she would not make any changes to it). Moreover, the State has certified to the federal government that these processes are in accord with nationally recognized child welfare practices. Arkansas DCFS Statewide Outline Assessment (Ex. 57) at 157-58. In effect, the extensive screening process for prospective families allows caseworkers to "really learn [their] families." Counts Depo. (Ex. 14) at 50:4-50:11; 119:8-11; Choate Depo. (Ex. 13) at 87:6-7 (adoptive parents are thoroughly vetted). As one caseworker explains, "by the time a person has applied . . . to be a foster or adoptive parent, I feel like they pretty much have to be in this for the interests of the child, because there is a lot required of them. They're required to go through this training. They're required to get . . . physicals, and—and CPR training, and first aid training, and what have you. And it takes somebody, I think, that's fairly dedicated to a child

to—to go through that process." Deposition of Jeanette Adams ("Adams Depo.") (Ex. 8) at 72:5-14.

Notably, DHS admits that there is no reason to believe that the State screening process is not as effective for those categorically excluded by Act 1—cohabiting heterosexual and same-sex couples—as it is for married couples or single persons. Zalenski Depo. (Ex. 44) at 100:12-18, 109:4-12; *see also* Huddleston Depo. (Ex. 25) at 40:1-42:8 (no reason to believe screening would be less effective for cohabiting persons than for married couples); Sep. Statement (Ex. 7) ¶ 59. The CWARB likewise agrees there is no difference in assessing the stability, likelihood of committing physical or sexual abuse, or drug use of married versus unmarried or same-sex couples. *See* Appler Depo. (Ex. 9) at 66:9-25, 85:24-86:13, 93:17-95:16, 148:10-150:1. Said differently, it is undisputed that Arkansas's screening process can effectively assess the suitability of individuals in cohabiting heterosexual or same-sex relationships as prospective foster and adoptive parents in accordance with nationally recognized child welfare practices. The effect of Act 1 is, therefore, to exclude from consideration or evaluation any prospective foster and adoptive parents who but for Act 1 would have been deemed fit following Arkansas's screening process.

Indeed, based on their experiences within Arkansas's child welfare system, including investigating allegations of abuse and neglect, multiple State witnesses acknowledged that there is no reason to believe that those categorically barred by Act 1 from giving a child a home would be more likely to engage in harmful behavior than any individual married applicant, *e.g.*:

- not more likely to abuse or neglect children than a married couple applicant; *see, e.g.*, Appler Depo. (Ex. 9) at 83:5-13; Wells Depo. (Ex. 41)

at 74:3-9; Deposition of Teri Ward ("Ward Depo.") (Ex. 40) at 22:22-24:7; *id.* at 26:6-27:1; Deposition of Duretta Beall ("Beall Depo.") (Ex. 10) at 54:13-55:9; Deposition of Pam Davidson ("Davidson Depo.") (Ex. 18) at 26:6-11; Deposition of Phyllis Newton ("Newton Depo.") (Ex. 29) at 20:23-22:9; Deposition of Jeanette Adams ("Adams Depo.") (Ex. 8) at 67:6-9; *see also* Thormann Depo. (Ex. 38) at 55:19-56:5;[8]

- not more likely to abuse drugs than a married applicant; *see, e.g,* Appler Depo. (Ex. 9) at 84:7-15; Kutz Depo. (Ex. 26) at 122:9-12; Zalenski Depo. (Ex. 44) at 165:11-20; *see also* Thormann Depo. (Ex. 38) at 56:6-8;
- not more likely to engage in domestic violence than a married applicant, *see, e.g.*, Appler Depo. (Ex. 9) at 109:21-25; Wells Depo. (Ex. 41) at 72:19-24; Kutz Depo. (Ex. 26) at 122:13-21; *see also* Thormann Depo. (Ex. 38) at 55:22-56:5.

G. There is no dispute that the State needs more foster and adoptive parents to meet the individual needs of the children entrusted to its care; shortages cause poor placements that harm children and deny some children any family at all

It is undisputed that there are insufficient foster and adoptive homes to meet the needs of children entrusted to the State's care. 2009 DHS Statistical Report (Ex. 53) at DCFS-33 (518 children currently awaiting adoption but only 228 adoptive homes available); State

[8] This testimony is consistent with the opinion of Karen Worley, the Director of the Family Treatment Program at the University of Arkansas Medical Sciences ("UAMS") Department of Pediatrics and one of plaintiffs' experts. Dr. Worley explains that in her 25 plus years of experience treating victims and offenders of sex abuse in Arkansas, the risk of child sex abuse is not related to the sexual orientation or marital status of the child's parents. *See* Rebuttal Expert Report of Dr. Karen Worley ("Worley Rebuttal Report") (Ex. 49) ¶ 15.

Defendants' Third Answer (Ex. 73) ¶ 84; *see also* Huddleston Depo. (Ex. 25) at 28:3-12, 30:3-12, 33:10-13; Sep. Statement (Ex. 7) ¶ 66.

The shortage is heightened by the fact that not every potential foster home or adoptive home is suitable for every child in DHS care. *See, e.g.*, Doherty Depo. (Ex. 21) at 34:7-10 ("you have to match the needs of that child with the home that you're providing"). Not all potential foster and adoptive parents will accept every child in need of a home. Counts Depo. (Ex. 14) at 108:16-109:3; *see also* Sep. Statement (Ex. 7) ¶ 68. For example, some applicants will not accept teenagers, children with serious medical needs, or sibling groups. Counts Depo. (Ex. 14) at 127:16-128:22; *see also* Sep. Statement (Ex. 7) ¶ 69. Other applicants may be willing to accept children with some behavioral problems, but not necessarily those with significant problems. Huddleston Depo. (Ex. 25) at 76:17-77:5; *see also* Sep. Statement (Ex. 7) ¶ 70.

Moreover, given the preference not to sever a child's roots to his or her community, the shortage of applicant homes is exacerbated. *See* Factual Background Section II.D, *supra*. Thus, even if there were the same number of available foster or approved adoptive parents as there were children in need of placements—and clearly there is not—there would still not necessarily be a suitable home for every child. Huddleston Depo. (Ex. 25) at 72:23-73:5; Blucker Depo. (Ex. 11) at 63:25-65:14; *see also* Sep. Statement (Ex. 7) ¶ 71.

The shortage of suitable foster and adoptive parents—and any policy or law such as Act 1 that arbitrarily increases that shortage—harms children in a variety of ways. Because there is a shortage of adoptive families, some children eligible for adoption will experience long delays for adoption, or never be placed with a permanent family at all. Selig Depo. (Ex. 34) at 40:20-43:18 (discussing reasons children age out of foster care, including the lack of a suitable foster or adoptive home); *see also* Sep. Statement (Ex. 7) ¶ 72. Similarly, the shortage of foster

parents means that some children get placed in a residential group home or in emergency shelters, instead of with a foster family. Davis Depo. (Ex. 19) at 126:7-12; Tarpley Depo. (Ex. 36) at 27:8-14 ("When [DHS is] unable to find a foster home, we turn to emergency shelters"); *id*. at 32:3-11(children are harmed "because there's a shortage of foster care. Children are moved often, have to spend time in hospitals, residential facilities"); *see also* Sep. Statement (Ex. 7) ¶ 73. Although group homes strive to replicate a family home setting, many remain very institutional in feel with "cement block walls" and "painted concrete floors." Deposition of Gary Gilliland ("Gilliland Depo.") (Ex. 23) at 48:17-18. And, although many group homes have "house parents" as opposed to "shift staff," it remains a challenge in a group home to provide a child with the parental and interpersonal connections needed to succeed in life. Dunagan Depo. (Ex. 22) at 14:5-19:4.

In some instances, shortages of appropriate homes cause children to spend the night at DHS offices. Selig Depo. (Ex. 34) at 19:22-20:1; Roark Depo. (Ex. 31) at 13:14-17; Tarpley Depo. (Ex. 36) at 27:15-28:6. The shortage of foster homes also contributes to out-of-county foster placements, which hurts the child's chances of family reunification and makes it difficult for the child to remain connected to his community, school, and medical providers. Selig Depo. (Ex. 34) at 23:13-25:24 (shortages in available placements make it more difficult for children to be placed in reasonable geographic proximity to their original parents, which makes visitation and reunification harder to achieve); *see also* Shulz Depo. (Ex. 32) at 30:10-31:21 (medical harm to children caused by multiple placements and out-of-county placements); Sep. Statement (Ex. 7) ¶¶ 31, 77. Shortages also cause children to be separated from their siblings because there are not enough foster families willing to take in groups of children. Huddleston Depo. (Ex. 25) at 34:17-22; *see also* Sep. Statement (Ex. 7) ¶ 78. While it is DHS policy to keep

siblings together, the shortage of appropriate homes sometimes makes this impossible. Davis Depo. (Ex. 19) at 99:16-100:8; *see also* Sep. Statement (Ex. 7) ¶ 78.

Yet another consequence of the shortage of available homes is that children may be placed with a parent who is less well-equipped to deal with the child's emotional or medical needs or in homes that may already house the maximum number of children permitted by DHS policies, thereby increasing the risk that the placement will not be successful. Roark Depo. (Ex. 31) at 10:20-13:13; Davis Depo. (Ex. 19) at 211:23-212:17; *see also* Sep. Statement (Ex. 7) ¶¶ 79, 80. Poor matches caused by the shortage of appropriate homes increase the risk of disruption and multiple placements, which are harmful and make future foster placements more likely to fail. Huddleston Depo. (Ex. 25) at 62:11-25; *see also* Sep. Statement (Ex. 7) ¶ 81. Multiple placements lead to failed emotional bonds because children who are moved repeatedly become unable to trust and depend on their foster parent. Doherty Depo. (Ex. 21) at 43:3-18; *see also* Zalenski Depo. (Ex. 44) at 29:9-24 (multiple placements are "a pretty devastating experience" for most children and can cause them to "become seriously disturbed"); *see also* Sep. Statement (Ex. 7) ¶ 82. Multiple placements are one of the consequences of the shortage of available foster homes exacerbated by laws or policies such as Act 1, which reduce the available number of applicants. Huddleston Depo. (Ex. 25) at 62:11-25; *see also* Sep. Statement (Ex. 7) ¶ 83.

Perhaps most damaging, due to the shortage of foster parents, is that some foster children in the juvenile detention system are kept in juvenile detention longer than their sentence requires. Choate Depo. (Ex. 13) at 118:3-18; *see also* Deposition of Scott Tanner ("S. Tanner Depo.") at 24:16-25:1, 30:2-31:16 (majority of kids who need foster placements after release from DYS facilities stay past their release date due to lack of available foster placement); *id.* at

30:2-33:20 (describing specific case where child spent three extra months in DYS custody waiting for foster placement until court threatened to hold DCFS in contempt). For these children, the inability of DHS to find them foster placements can have disastrous consequences to their efforts to rehabilitate. *See id.* at 22:19-24:1; 26:8-29:3.

III. INITIATED ACT 1 CATEGORICALLY EXCLUDES SAME-SEX AND COHABITING HETEROSEXUAL COUPLES FROM CONSIDERATION AS FOSTER OR ADOPTIVE PARENTS REGARDLESS OF WHETHER SUCH PERSONS MAY PROVIDE A SUITABLE LOVING HOME TO A CHILD IN NEED

Act 1 excludes two classes of persons from adopting or fostering: (i) persons living in a gay or lesbian relationship, who are permanently excluded from consideration because they cannot get married in the state of Arkansas; and (ii) persons in an unmarried heterosexual relationship.[9] The complete text of Act 1 is set forth as Exhibit 51 hereto.

The history of categorical exclusions of gay and lesbian couples did not begin with Act 1. In fact, Act 1 was proposed only after a successful challenge in the courts of this State of an administrative ban against gay persons, and those living with gay persons, from serving as foster parents. *Dep't of Human Servs. and Child Welfare Agency Review Bd.* v. *Howard*, 367 Ark. 55, 65, 238 S.W.3d 1, 7 (Ark. 2006). As part of that proceeding, the same State Defendants in this case stipulated, among other things, that: (i) "[t]he defendants are aware of 'homosexuals,' as defined, who have served as foster parents in Arkansas"; and (ii) "The defendants are not aware of any child whose health, safety, and/or welfare has been endangered

[9] Because Act 1 has the effect of barring both partners in a same-sex or cohabiting heterosexual relationship from adopting or fostering and for the sake of brevity, this Motion sometimes refers to those banned by Act 1 as "same-sex couples" or "cohabiting heterosexual couples."

by the fact that such child's foster parent, or other household member, was 'homosexual,' as defined [by section 200.3.2 of the Minimum Licensing Standards]." *Id.* at 65, S.W.3d at 7.

In its comprehensive Findings of Fact and Conclusions of Law issued after a trial on the merits, the Circuit Court in *Howard* specifically rejected each of the purported rationales behind the ban on gay and lesbian couples, including finding that: (i) "Being raised by gay parents does not increase the risk of problems in the adjustment of children"; (ii) "There is no evidence that gay people, as a group, are more likely to engage in domestic violence than heterosexuals"; and (iii) "There is no evidence that gay people, as a group, are more likely to sexually abuse children than heterosexuals." *Howard* v. *CWARB*, No. CV 1999-9881, 2004 WL 3200916 (Ark. Cir. Ct. December 29, 2004) (Findings of Fact and Conclusions of Law). Having assessed the testimony of the State's and the Plaintiffs' experts, the court concluded that the blanket exclusion of gay persons, including those living as couples, from serving as foster parents was not "rationally related" to the legitimate state interest of promoting the health, welfare and safety of foster children. *Howard*, 2004 WL 3200916, Conclusions of Law ¶¶ 4-6. The Arkansas Supreme Court affirmed the trial court's decision. Relying on the factual findings of the circuit court, the Supreme Court held that "there is no correlation between the health, welfare, and safety of foster children and the blanket exclusion of any individual who is a homosexual or who resides in a household with a homosexual." *Howard*, 367 Ark. at 65, 238 S.W.3d at 7. Following *Howard*, the State legislature rejected efforts to enact a ban on gay men and lesbians and unmarried couples fostering children. *See* S.B. 959, 86th Gen. Assem., Reg. Sess., 2007.

Act 1 bars DHS and other child welfare agencies in the State from even evaluating gay couples and unmarried heterosexual couples as potential foster or adoptive

parents, regardless of their ability to parent. Act 1 prevents placement of a child with such categorically "banned" persons even if the State and the courts would have concluded that such placement is in the best interests of a child. Unlike other regulations, the categorical exclusions cannot be waived by the State even if doing so would be in the best interests of a child. Appler Depo. (Ex. 9) at 91:19-93:16; *see also* Sep. Statement (Ex. 7) ¶¶ 91, 92. Moreover, Act 1 provides no exception for relatives of a child who—but for Act 1—would provide a home, *e.g.*, for their niece, nephew or grandchild. Zalenski Depo. (Ex. 44) at 145:21-146:11. The State also says that Act 1 *requires* automatic removal of a foster child from a cohabiting household without any consideration of the child's well-being in that home even if the placement has proven to be "perfect" for those involved. Zalenski Depo. (Ex. 44) at 145:21-146:11; *see also* Sep. Statement (Ex. 7) ¶ 94. Act 1 further interferes with child welfare by prohibiting the State "from recommending or otherwise taking the position that a placement of any kind, including guardianship or custody, with a person disqualified from adoption or fostering under Act 1 would be in the 'best interests of the child.'" Joint Stipulation and Order Re: Plaintiffs' Motion For Preliminary Injunction and Temporary Restraining Order, dated January 12, 2009 (Ex. 66) at 2.

Aside from Arkansas, only one other state in America bans individuals in cohabiting relationships from adopting or fostering.[10] Arkansas uses no absolute bans on placing

[10] Utah is the only state other than Arkansas with such a categorical ban on adoption. Utah Code Ann. § 78B-6-117 (West 2009) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state."). Florida bans gay and lesbian individuals (and couples) from adopting, but not fostering, and Mississippi prevents same-sex couples, but not gay and lesbian individuals, from adopting. *See* F.S.A. § 63.042 (West 2009) ("No person eligible to adopt under this statute may adopt if that person is a homosexual"); Miss. Code Ann. § 93-17-3 (West 2009) ("Adoption by couples of the same gender is prohibited.").

a child with an applicant for foster care or adoption after individualized review, except for bans of individuals who are convicted of felonies involving violence, sex, and other serious crimes and, due to Act 1, those in cohabiting heterosexual and same-sex relationships. Young Depo. (Ex. 43) at 53:2-5 (some criminal convictions cannot be waived); *id.* at 54:25-56:2 (all DHS policies subject to waiver); Appler Depo. (Ex. 9) at 70:1-72:14; *see also* Zalenski Depo. (Ex. 44) at 92:7-94:24; Ark. Code Ann. §§ 9-28-409(e)(1), 9-28-409(h)(1) (West 2009).

IV. AS THE STATE DEFENDANTS ACKNOWLEDGE, ACT 1 DOES NOT PROMOTE CHILDREN'S WELFARE, IS INCONSISTENT WITH CHILD-WELFARE BEST PRACTICES, AND EXACERBATES THE STATE'S SHORTAGE OF FOSTER AND ADOPTIVE HOMES

A. DHS and CWARB concede that there is no child welfare purpose furthered by Act 1, consistent with the professional consensus in the child welfare field

Neither DHS nor CWARB—the agencies charged by state law with protecting children's well-being—can identify a single child welfare interest that is furthered by Act 1. Blucker Depo. (Ex. 11) at 68:7-70:19, 73:24-76:10 (DHS 30(b)(6)[11] witness on any interests furthered by Act 1); Appler Depo. (Ex. 9) at 104:1-21 (CWARB 30(b)(6) witness on any interests furthered by Act 1); *see also id.* at 89:10-19 (prior to Act 1, CWARB did not believe that ban on fostering or adoption by cohabiting couples was necessary to protect the health or welfare of children). Indeed, the many caseworkers, child abuse investigators, policymakers, and other child welfare professionals at DHS, CWARB, and other state agencies identified as witnesses in this case[12] overwhelmingly oppose the categorical bans created by Act 1 as being contrary to children's interests:

---

[11] An index of the 30(b)(6) witnesses from DHS, CWARB and the FCAC, and their topics is attached as Exhibit 2.

[12] During discovery, the parties took the depositions of twenty-seven witnesses from the CWARB, DHS, DCFS, and the Crimes Against Children Division ("CACD") of the

(Footnote Continued)

- Cecile Blucker, Director of DCFS (DHS 30(b)(6) witness on any child welfare or other interest furthered by Act 1). *See* Blucker Depo. (Ex. 11) at 68:7-70:19 (no DHS interest furthered by Act 1); *id.* at 74:1-6 ("regardless of race, gender, sexual preference, married or non, I want the people who take care of the children to be good people who put the children's best interest at heart—who have the children's best interest at heart")

- Ed Appler, CWARB Board Member and President of Grace Adoptions Services (CWARB 30(b)(6) witness on *inter alia* any child welfare or other interest furthered by Act 1). *See* Appler Depo. (Ex. 9) at 104:1-21 (no CWARB interest furthered by Act 1); *id.* at 93:3-7 (Act 1 inconsistent with best practices in the social work field)

- John Selig, Director of DHS. *See* Selig Depo. (Ex. 34) at 56:15-58:1 (not in the best interests of children to have a categorical ban on cohabiting couples from fostering or adopting)

- Janie Huddleston, Assistant Director of DHS overseeing DCFS. *See* Huddleston Depo. (Ex. 25) at 65:15-25 (Act 1 requires DHS to reject families that could care for children, thereby exacerbating the shortage of placements)

- Anne Wells, Mental Health Professional on the DCFS Executive Staff. *See* Wells Depo. (Ex. 41) at 88:15-89:1 (cohabitation ban is contrary to best practices and the state "need(s) all the foster parents that we possibly can")

- John Zalenski, Assistant Director of Program Excellence on the DCFS Executive Staff (DHS 30(b)(6) witness). *See* Zalenski Depo. (Ex. 44) at 146:19-23 (Act 1 is contrary to best practices in the social work field)

- Marilyn Counts, DCFS Administrator of Adoptions (DHS 30(b)(6) witness). *See* Counts Depo. (Ex. 14) at 117:3-118:5 (based on social work experience, no child-welfare purpose served by categorically excluding cohabiting individuals from fostering or adopting), *id.* at 72:2-20 (does not support a cohabitation ban, and instead believes that applicants should be individually assessed)

- Debbie Roark, DCFS Program Manager, Child Protective Services. *See* Roark Depo. (Ex. 31) at 81:22-82:16, 83:23-24 (does not support

---

(*Footnote Continued*)

Arkansas State Police. With few exceptions, these witnesses were identified by the State Defendants as 30(b)(6) witnesses or witnesses with relevant information regarding Act 1.

automatic ban on cohabiting persons because the State has "different children with different needs and we need foster homes")

- Cherylon Reid, Assistant Director of Community Services on the DCFS Executive Staff. *See* Deposition of Cherylon Reid ("Reid Depo.") (Ex. 30) at 29:2-34:14 (discussing situation where DCFS Executive Staff would have recommended adoption of child by grandmother in same-sex relationship but for Act 1 and noting that inability to recommend adoption could cause harm to that child)

- Sandi Doherty, DCFS Program Administrator and former DCFS Area Director and County Supervisor. *See* Doherty Depo. (Ex. 21) at 48:1-49:10, 53:15-23 (categorical ban of cohabiting persons contrary to best practices)

- Libby Cox, DCFS Area Supervisor for Drew County and former Arkansas State Police child abuse investigator. *See* Deposition of Libby Cox ("L. Cox Depo.") (Ex. 16) at 52:8-15 (automatically barring cohabiting couple does not serve the best interests of children)

- Kandi Tarpley, DCFS Family Service Worker. *See* Tarpley Depo. (Ex. 36) at 29:24-31:22; 31:18-22 (does not support Act 1's categorical exclusion of unmarried couples adopting: "I think each person needs to be assessed by the rules and the procedures that there are in place, and we are in need of people who are qualified to take care of kids.")

- Shannon Kutz, DCFS Family Service Worker and ICPC Coordinator. *See* Kutz Depo. (Ex. 26) at 139:18-140:13 (bad social work practice to automatically assume that an applicant couple would be unsuitable parents solely because they are unmarried)

- Jeanette Adams, who conducts adoptive home studies for DCFS. *See* Adams Depo. (Ex. 8) at 62:18-63:17 (in her professional opinion, individualized review is preferable to a categorical ban on cohabiting applicants)

- Scott Tanner, Coordinator of the Ombudsman Division of the Public Defender, who works with DHS regarding children who need foster placement after their release from the custody of the Department of Youth Services. *See* S. Tanner Depo. (Ex. 35) at 94:16-95:8 (based on 21 years of experience with children in the state's child welfare system, does not believe that gay couples or cohabiting heterosexual couples should be categorically barred from serving as foster or adoptive parents)

- The Honorable Stephen Choate, 16th Judicial District, retired. Choate Depo. (Ex. 13) at 25:1-13 (Act 1 does not serve the best interests of children in Arkansas because it categorically "eliminated a whole category

. . . rather than looking at each individual case to see if . . . they would be good parents. I don't . . . think that it reflects the general makeup of the population.")

Similarly, all of the professionals at the CACD of the Arkansas State Police[13] who were identified by the State Defendants as witnesses in this case testified that Act 1's categorical exclusion of gay couples and cohabiting heterosexual couples is unnecessary to prevent child abuse. These professionals further uniformly agreed that based on their experience investigating complaints of child abuse in Arkansas, there is no reason to believe that parents pose a greater risk of harm to children simply because they are cohabiting:

- Pam Davidson, CACD Chief Administrator. *See* Davidson Depo. (Ex. 18) at 30:7-15 (based on 30 years experience, no basis to exclude cohabiting heterosexual and gay couples); *id.* at 25:12-26:18 (in her experience, marital status and sexual orientation irrelevant to whether someone was likely to be a perpetrator of child abuse)

- Duretta "Kaye" Beall, recently retired CACD Investigations Administrator. *See* Beall Depo. (Ex. 10) at 40:21-41:20 (cannot identify any basis for categorical bans created by Act 1); *id.* at 54:6-55:5 (would have to assess a gay or cohabiting heterosexual couple specifically before determining whether they would pose a risk of abuse)

- Phyllis Newton, CACD investigations supervisor for Arkansas, Ashley, Bradley, Calhoun, Chicot, Cleveland, Dallas, Desha, Drew, Jefferson, Lincoln, Ouachita, and Union counties and former DCFS supervisor on child maltreatment investigations. *See* Newton Depo. (Ex. 29) at 21:14-22:9, 22:22-23:7, 28:6-15 ("I just don't think that marital status has anything to do with whether or not someone could be a good parent"); *id.* at 20:23-21:17 (in her experience at CACD and DHS, no correlation between marital status or sexual orientation and abuse)

- Teri Ward, CACD investigations supervisor for Crawford, Franklin, Johnson, Logan, Pope, Sebastian, and Yell counties. *See* Ward Depo. (Ex. 40) at 19:19-20:7 (in her professional opinion, no basis upon which to categorically exclude cohabitors from adopting or fostering); *id.* at 23:3-

[13] The CACD investigates all allegations of child abuse or neglect against foster or adoptive parents in the State and all serious allegations of abuse by biological parents. Beall Depo. (Ex. 10), at 7:22-9:25.

24:7 (no basis to believe that cohabiting couples pose a greater risk of physical or sexual abuse or poor child outcomes than married couples or single persons)

- Denise Thormann, CACD investigations supervisor. *See* Thormann Depo. (Ex. 38) at 54:17-56:20 (professional judgment that there is no basis for excluding all gay couples and cohabiting heterosexual couples from adopting); *id.* at 54:21-55:15 (nothing inherently bad about cohabitors that makes them bad parents)

The testimony of the State Defendants and of all of these State officials that the categorical bans on gay couples and cohabiting heterosexual couples mandated by Act 1 harm children is consistent with the professional consensus in the field of child welfare. *See* Expert Report of Dr. Judith Faust ("Faust Report") (Ex. 45) ¶¶ 25-28. Defendants and Intervenor-Defendants, and their experts, offer no evidence to the contrary. Every major professional organization dedicated to child welfare opposes bans such as those created by Act 1 as contrary to the interests of children, including:

- The Child Welfare League of America ("CWLA"), a coalition of child-welfare agencies and organizations around the country, of which Arkansas DHS is a member, develops standards for child welfare policy and practice. CWLA standards require individualized assessment of prospective foster parents, and state that applicants for foster parenting should not be denied solely on the basis of marital status or sexual orientation, among other characteristics. *Id.* ¶ 25.
- The National Association of Social Workers, the leading professional association of social workers, has a policy statement concluding that any barriers to foster and adoptive parenting unsupported by evidence should be removed, including barriers to single parents, gay and lesbian parents, and other non-traditional families. *Id.* ¶ 26.

- The North American Council on Adoptable Children, whose mission is to promote permanent homes for those children who cannot be with their biological families, advocates for the elimination of categorical restrictions in foster care and adoption, including "rules, legislation, and practices, that prevent the consideration of current or prospective foster or adoptive parents based on any of the following characteristics: . . . gender, . . . marital status, . . . [or] sexual orientation." *Id.* ¶ 27.[14]

B. Because it recognizes that cohabitation bans such as Act 1 do not serve children's interests, the State acted to remove its internal policy similar to Act 1 barring cohabiting individuals from serving as foster parents

In 2008, DHS policy manager Cindy Young identified a number of DHS executive directives that had been improperly promulgated, including a 2005 Executive Directive purporting to ban foster placements with cohabiting persons. *See* Young Depo. (Ex. 43) at 105:21-106:17; 108:19-109:19. She determined that the law requires that this policy go through the public notice and comment process set forth under Ark. Code Ann. § 25-15-201 (West 2009), and subsequently, in October 2008, DHS held a public hearing to allow comment on whether a cohabitation ban[15] was consistent with the best interests of children. *See* Young Depo (Ex. 43) at

---

[14] The National Association of Black Social Workers similarly warns against narrow definitions of acceptable families because of the devastating impact on communities of color. Faust Report (Ex. 45) ¶ 28 ("Family and kinship should be defined by the family systems, cultures and experiences. Systems need to be inclusive of the diverse cultural structures accepted in the African American community.") (quoting position paper).

[15] Importantly, even this policy would not have been an absolute ban, as is imposed by Act 1. The policy ban did not prohibit adoptions by individuals cohabiting with their partner. The policy ban also allowed DHS to seek a policy waiver if a foster placement with a person in a cohabiting heterosexual or same-sex relationship was in the best interests of a child. *See* Young Depo. (Ex. 43) at 54:24-56:2 (all DHS policies are subject to waiver). In fact, the evidence shows that while the 2005 policy ban was in place, the State did

(Footnote Continued)

102:2-103:5; State Defendants' Answer (Ex. 74) ¶ 69; DCFS Public Hearing on Exclusion of Cohabitating Adults Serving as Foster Parents, October 2, 2009 (Ex. 58).

At the hearing, virtually every witness testified *against* the ban. Among other proponents of eliminating the ban were the Foster Care Youth Advisory Board, which allows foster children a voice in the child welfare system.[16] Following the hearing, DHS concluded that it was in the best interests of children to rescind the Executive Directive, particularly in light of the State's need for more foster and adoptive parents. Young Depo. (Ex. 43) at 116:14-117:12, 134:18-135:13; *see also* Sep. Statement (Ex. 7) ¶¶ 108, 109. As DHS Director John Selig explained in the press release announcing DHS's intent to discontinue its internal policy ban on cohabiting heterosexual couples and gay couples from serving as foster parents:

> Throughout this process we listened to many people including those with whom we do casework and the public regarding the needs of foster children. Recognizing that this is a sensitive societal issue, it's important to expand our recruitment base so that we can to [sic] find a family that best meets the needs of every child.

Arkansas DHS Media Release, October 9, 2008 ("DHS Media Release") (Ex. 56). But, because Act 1 passed shortly after that decision, DHS was unable to implement its rescission of its internal cohabitation ban. Young Depo. (Ex. 43) at 134:18-136:18. But for Act 1, the ban would have been reversed. Selig Depo. (Ex. 34) at 73:21-76:19.

(*Footnote Continued*)

determine that it was in the best interest of many children to be placed with same-sex couples and cohabiting heterosexual couples. *See* Argument Section II.B, *infra*.

[16] The Youth Advisory Board also opposed Act 1, because it would restrict the number and range of potential homes available to foster children and thus be "detrimental to the welfare of foster youth in Arkansas." E-mail from Rosa Adams to Toma Whitlock, dated October 22, 2008 (Ex. 62).

V. UNDISPUTED EXPERT TESTIMONY CONFIRMS THAT ACT 1'S CATEGORICAL EXCLUSION OF SAME-SEX COUPLES AND COHABITING HETEROSEXUAL COUPLES AS FOSTER AND ADOPTIVE PARENTS DOES NOT PROMOTE CHILDREN'S WELFARE

Faced with the unanimous testimony of virtually all of its own witnesses that Act 1 serves no child welfare purpose and uncontested evidence that Act 1 actually harms children in State care, Intervenors and counsel for the State are forced to rely on three "experts," two of whom have virtually no relevant experience. These three proposed witnesses, Dr. Paul Deyoub, a psychologist who specializes in forensic psychology, Bradford Wilcox, a sociologist, and Jennifer Roback Morse, an economist,[17] do not in any way create a material issue of fact on whether Act 1 harms children for at least the following reasons:

First, with respect to gay couples, Defendants' experts do not dispute that research shows that average outcomes for children of same-sex couples are no different than those raised by married couples. As explained by Plaintiffs' experts, decades of scholarship show that

[17] Morse, an economist with no experience in child-welfare, is unqualified to opine on whether Act 1 harms or benefits children. The entirety of her expert opinion rests on the unfounded assumption that the State can always recruit additional families with no difficulty to replace those Act 1 excludes and, therefore, excluding cohabiting couples poses no significant cost to the children of Arkansas. *See* Deposition of Dr. Jennifer Morse ("Morse Depo.") (Ex. 27) at 199:13-17 ("The recruitment problem is not as insurmountable as it may seem. And that's the basis of my opinion that the number of people being excluded is not so large that it can't be addressed in some other way."). These claims about the ease of recruiting other families and her assumption that parents are interchangeable to make up for the loss resulting from Act 1 are contradicted by every fact-witness in this case, and further betray her lack of experience relevant to this case. *See* Factual Background Section II.B, *supra*. But perhaps most incredible is Morse's opinion that if cohabiting couples who want to foster or adopt move out of Arkansas to do so because of Act 1, it should be considered a *benefit* to children in other states who then gain parents. *See* Expert Report of Jennifer Roback Morse, Ph.D. ("Morse Report") (Ex. 50) at 5 ("This loss would be a gain to the children in states in which these individuals eventually adopt children."). Plaintiffs are at a loss to understand why, if adoption by a cohabiting couple benefits children in *other* states, Defendants believe that children in Arkansas should be subjected to the "cost" of increased stays in foster care or less suitable placements because cohabitors are excluded in Arkansas.

"children raised by same-sex couples are no more likely to have adjustment problems than children of married heterosexual couples." Expert Report of Dr. Michael Lamb (Ex. 46) ("Lamb Report") ¶ 29; *see also* Deposition of Dr. William Bradford Wilcox ("Wilcox Depo.") (Ex. 42) at 200:18-21 ("Most studies that have been done of same-sex parents indicate that kids do about as well as kids in heterosexual households."); *Howard*, 367 Ark. at 65, 238 S.W.3d at 7. Defendants' experts have pointed to no studies showing the contrary. Indeed, Wilcox admits to having no opinion as to whether "a blanket exclusion of same-sex couples would be appropriate for foster and adoptive [parents]." Wilcox Depo. (Ex. 42) at 201:8-13. Similarly, Dr. Deyoub admits that his opinions about outcomes for children raised by same-sex couples are based on studies involving heterosexual cohabitors, and thus his testimony cannot create an issue of material fact as to outcomes for children of same-sex couples. Deposition of Dr. Paul Deyoub ("Deyoub Depo.") (Ex. 20) at 18:20-21:20; *see also id.* at 32:13-33:7 (unable to identify any study showing that outcomes of children raised by same-sex couples are poorer than average outcomes for children of married couples). Finally, none of Defendants' expert witnesses claim any expertise on the well-being of children raised by gay and lesbian parents. *See* Deyoub Depo. (Ex. 20) at 74:21-75:4 (conceding that he does not consider himself to be an expert on the development of children of gay parents); Wilcox Depo. (Ex. 42) at 206:12-21 (admitting that he is not an expert on outcomes for children of gay couples); Morse Depo. (Ex. 27) at 224:4-18 (testifying that she is "not prepared to stake [her] professional reputation on the outcomes of those studies one way or the other"). Accordingly, there is no dispute that children raised by same-sex couples have average outcomes similar to those of married couples.

The undisputed record also demonstrates that there is no triable issue of fact on whether excluding cohabiting heterosexual couples from the individualized review process

serves any child welfare purpose. Both sides' experts agree that cohabiting heterosexual couples can and do make good parents. *Compare* Lamb Report (Ex. 46) ¶¶ 23-31; Faust Report (Ex. 45) ¶¶ 29-31; *with* Deyoub Depo. (Ex. 20) at 91:6-22, 144:8-15 (admitting that some cohabiting couples are good parents); Morse Depo. (Ex. 27) at 187:22-188:8 (admitting that some cohabiting couples make suitable parents); Wilcox Depo. (Ex. 42) at 79:23-80:7, 178:23-179:7 (acknowledging that cohabiting couples can raise well-adjusted children). The experts also agree that, as a result of Act 1, some children may be prevented from being placed with the family that is in their best interests, and that for some children, the best set of parents could be a same-sex or cohabiting heterosexual couple. *See* Wilcox Depo. (Ex. 42) at 185:24-186:6, 206:22-207:4; Morse Depo. (Ex. 27) at 61:3-62:5; Deyoub Depo. (Ex. 20) at 91:6-22; Faust Report (Ex. 45) ¶¶ 41, 44. Moreover, there is undisputed expert testimony that the majority of children raised by cohabiting parents, like the majority of children raised by married couples and single parents, have positive outcomes. *Compare* Expert Report of Dr. Cynthia Osborne ("Osborne Report") (Ex. 48) at 10 ("the studies show that the majority of children in cohabiting parent families do just as well as their peers in married parent families"); Lamb Report (Ex. 46) ¶ 24 ("Most children raised in nontraditional families, including families headed by heterosexual cohabiting couples, adjust perfectly well.") *with* Wilcox Depo. (Ex. 42) at 92:9-93:7 (unable to provide any evidence that the majority of children in cohabiting homes experience negative outcomes); *see also* Morse Depo. (Ex. 27) at 78:13-16, 250:3-251:12 (unable to provide the base rate of studies cited).

Despite these acknowledgments, the Defendants' experts attempt to justify Act 1 by relying on studies showing disparities between average outcomes for cohabiting heterosexual couples as a group and married heterosexual couples as a group. But these experts also concede,

as do the Intervenor-Defendants, that these statistical averages cannot tell us anything about any particular applicant, and all applicants, regardless of their relationship status, must be screened to assess whether they will be suitable foster or adoptive parents.[18] As Defendants' expert Morse opines, "[t]hose studies would not be the way you would determine whether a particular individual had any of those conditions." Morse Depo. at 261:19-21. Instead, "you would have to investigate each individual on each of those dimensions." *Id.* at 267:6-7; *see also id.* at 38:24-39:12, 54:8-14 (admitting that the only way to determine which cohabiting couples in Arkansas have poor relationship quality would be to "interview them all" and that averages "tell you nothing about any individual couple"); *see also* Wilcox Depo. (Ex. 42) at 19:10-24:14, 66:20-23, 109:3-6 (stating that to determine whether a couple had a stable relationship, he would have to assess them individually); Deyoub Depo. (Ex. 20) at 35:24-36:16 (agreeing that "social science research couldn't tell you anything about the particular child . . . and the particular parents").

Simply put, Defendants' experts cannot defeat summary judgment simply by offering theoretical disagreement with the State's own evidence about the actual and substantial detriment of Act 1 on this State's child welfare system.

---

[18] Even if this were disputed, none of Defendants' experts have expertise in child-welfare systems to qualify them to contradict the professional opinions of DHS, DCFS, CWARB and Professor Faust. *See, e.g.*, Morse Depo. (Ex. 27) at 210:16-22 (admitting lack of familiarity with child welfare practice and screening process); Deyoub Depo. (Ex. 20) at 104:9-107:13 (betraying lack of familiarity with screening process by stating—contrary to the testimony of all DHS witnesses—that DHS caseworkers do not look at "the qualities in an adoptive or foster parent" and that married couples are not screened for relationship stability); Wilcox Depo. (Ex. 42) at 131:8-14, 132:3-5 (admitting, "I'm not familiar with all of the intricacies of the Arkansas [individualized review] process" and, regarding whether the individualized review process works, "I don't know where Arkansas is. I just don't know enough about the DHS and the other agencies that are working in that state to make a firm answer.").

VI. ACT 1'S EXCLUSION OF QUALIFIED FOSTER AND ADOPTIVE APPLICANTS INCREASES THE COSTS TO DHS AND ARKANSAS TAXPAYERS

It is undisputed that placing a child in a permanent home reduces the cost to DHS of caring for that child. As DHS director John Selig noted, when children remain in foster care, DHS incurs additional salary costs associated with visits by DCFS caseworkers, as well as transportation costs. *See* Selig Depo. (Ex. 34) at 30:22-31:6; *see also* Davis Depo. (Ex. 19) at 129:23-130:10 (stating that out-of-county placements have higher costs associated with transportation expenses for family visits, medical visits and caseworker visits); Deposition of Greg Crawford ("Crawford Depo.") (Ex. 17) at 27:13-20 (stating that one of DCFS's big expenses is the transportation expenses associated with bringing foster children to appointments); Wells Depo. (Ex. 41) at 65:25-66:14 (residential treatment facilities are very expensive); Blucker Depo. (Ex. 11) at 110:2-17 (residential treatment facilities are more expensive than foster care). Thus, excluding individuals who would otherwise be approved to adopt or foster children increases the expense of the child welfare system to DHS and State taxpayers.

VII. PROCEEDINGS TO DATE

Plaintiffs filed their Complaint on December 30, 2008. On April 16, 2009, the Court issued its Order regarding the State and Intervenor-Defendants' Motion to Dismiss. The Court held that the Plaintiffs had standing to pursue their claims, but deferred judgment on the merits of Counts 1-10 of the Complaint upon a full hearing of the facts and evidence. Order on Defendants' and Intervenor-Defendants' Motion to Dismiss Plaintiffs' First Amended

Complaint, dated April 16, 2009 (Ex. 57) ¶¶ 3, 4.[19] At the hearing on the Motion, the Court indicated that the parties should develop, in particular, the record regarding how Act 1 will affect children entrusted to the State's care. Transcript of Proceedings of March 6, 2009 (Ex. 74) at 65:21-66:10. Subsequently, throughout the summer and fall of 2009, the parties engaged in extensive fact and expert discovery on the issue of whether Act 1 serves the best interests of children in the State's child welfare system. On February 9, 2010, Plaintiffs filed this Motion for Summary Judgment.

ARGUMENT

I. STANDARD FOR GRANTING SUMMARY JUDGMENT

"The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried." *Kelley* v. *USAA Cas. Ins. Co*., 371 Ark. 344, 346, 266 S.W.3d 734, 737 (2007) (quoting *Nash* v. *Hendricks*, 369 Ark. 60, 68, 250 S.W.3d 541, 546-47 (2007)). Summary judgment is not a drastic remedy; rather, it is simply one of the tools in a trial court's efficiency arsenal. *Foreman Sch. Dist. No. 25* v. *Steele*, 347 Ark. 193, 198, 61 S.W.3d 801, 804 (2001). Under Rule 56(c) of the Arkansas Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions of file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ark. R. Civ. P. 56(c)(2); *see also Jackson* v. *Sparks Reg'l Med. Ctr.*, 375 Ark. 533, 539, 294 S.W.3d 1, 4 (2009). Where, as here, Plaintiffs have established a prima facie entitlement to summary

---

[19] For the reasons set forth herein and set forth in Plaintiffs' Opposition to Defendants' and Intervenors' Motions to Dismiss, which is hereby incorporated by reference, the motions to dismiss should be denied and the claims not resolved by this Summary Judgment Motion should proceed to trial.

judgment, the Defendants must meet proof with proof and demonstrate the existence of a material issue of fact; otherwise the motion for summary judgment shall be granted. *Sykes* v. *Williams*, 373 Ark. 236, 240, 283 S.W.3d 209, 213 (2008).

II. ACT 1 DEPRIVES CHILDREN IN STATE CARE OF THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS

The Due Process Clauses of the Arkansas and federal constitutions impose an obligation on DHS and the State Defendants to promote and care for, and at a minimum not arbitrarily harm, the well-being of the children in their custody for whom they have assumed the responsibility of caring as a parent. Act 1 violates this obligation by categorically eliminating suitable foster and adoptive parents, thereby depriving children of permanent adoptive and stable foster placements that would occur but for Act 1, leaving children in State care for longer periods than would occur but for Act 1, and doing so all in contravention of the judgment of child welfare professionals in this State and elsewhere.

A. The State Defendants have a constitutional affirmative duty of care towards children in their custody

When the State takes an individual into its custody,[20] the Due Process Clause imposes on the State an affirmative duty of care towards that person. *See DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200-01 & n.9 (1989); *Youngberg* v. *Romeo*, 457 U.S. 307, 317 (1982). This obligation stems from the fact that, by depriving an individual of his or her liberty, the State has created a relationship of dependence between itself

[20] Individuals can enter state custody through a variety of mechanisms, including incarceration, pre-trial detention, juvenile detention, involuntary commitment, and, relevant here, as foster children through the State's child-welfare system. As discussed below, the nature of the duty owed by the State varies depending on the nature of the custodial relationship. *See* Argument Section II.A at 44-45, *infra.*

and the individual. *See DeShaney*, 489 U.S. at 200-01 & n.9; *Youngberg*, 457 U.S. at 317; *see also Norfleet* v. *Ark. Dep't of Human Servs*., 989 F.2d 289, 292-93 (8th Cir. 1993).

When the State takes a child into its custody, the result is the same. The State has an affirmative obligation to the children in its custody. Because "[f]oster children . . . are 'placed . . . in a custodial environment . . . [and are] unable to seek alternative living arrangements,'" *Nicini* v. *Morra*, 212 F.3d 798, 808 (3d Cir. 2000), courts have consistently held that "[t]he relationship between state officials charged with carrying out a foster child care program and the children in the program is an important one involving substantial duties and, therefore, substantial rights." *Taylor* v. *Ledbetter*, 818 F.2d 791, 798 (11th Cir. 1987) (en banc) (finding substantive due process right for children in foster care); *see also Norfleet*, 989 F.2d at 293 (denying qualified immunity and holding that "it was clearly established in 1991 that the state had an obligation to provide adequate medical care, protection and supervision" to children in foster care); *Clark*, 38 Ark. App. at 152, 831 S.W.2d at 624 ("Minors are wards of the chancery court, and it is the duty of those courts to make all orders that will properly safeguard their rights.").[21]

What "standard of review" a court uses to assess whether the State has met its due process obligations varies depending on the circumstances presented. Here, there are three fundamental elements to this case that require application of the "professional judgment" standard to the Plaintiff-children's due process claims: (1) this is a case about children in state

[21] While the Arkansas Supreme Court has not expressly delineated the standard of review that applies to substantive due process claims of violations of the State's duty of care involving adoption and the foster care system, it is clear that the Arkansas Constitution in some circumstances recognizes greater due process rights than those set forth in the United States Constitution. *See Jegley* v. *Picado*, 349 Ark. 600, 631, 80 S.W.3d 332, 349 (2002). Thus, at a minimum, the Arkansas Constitution should be read consistently with the federal constitution.

custody for welfare (not penal) reasons; (2) the State cannot take actions directed toward these children that it knows are contrary to these children's best interests; and (3) the Plaintiffs in this case are seeking injunctive relief, not money damages. When these elements are present, courts have found liability for violations of the due process duty when the State fails to meet "accepted professional judgment, practice, or standards." *See Youngberg*, 457 U.S. at 314-15 (setting forth the minimum applicable substantive due process standard for individuals who are in state custody, but not in prison). Indeed, the professional judgment standard has been applied regularly in cases involving substantive due process claims against the state by children in state care. *See, e.g.*, *In Yvonne L. ex rel. Lewis* v. *N.M. Dep't of Human Servs.*, 959 F.2d 883, 893-94 (10th Cir. 1992) (holding that an action alleging injuries sustained in a foster care setting must be evaluated by whether child welfare workers "failed to exercise professional judgment" when making foster care placements); *K.H. through Murphy* v. *Morgan*, 914 F.2d 846, 854 (7th Cir. 1990) (finding child welfare workers protected from liability only when exercising "a bona fide professional judgment" regarding placement of children in state custody).[22]

Under the professional judgment standard, actions violate due process when they are "such a substantial departure from accepted professional judgment, practice, or standards as

---

[22] *See also Charlie H.* v. *Whitman*, 83 F. Supp. 2d 476, 507 (D.N.J. 2000) (recognizing substantive due process right "to reasonable protection from harm and . . . to receive care, treatment and services consistent with competent professional judgment"); *T.M. ex rel. R.T.* v. *Carson*, 93 F. Supp. 2d 1179, 1187-95 (D. Wyo. 2000) (applying the "professional judgment" standard because the state is substituting the child welfare worker's decision for that of the parent and so has a higher obligation to ensure that the decision to place a particular child is appropriate); *Brian A. ex rel. Brooks* v. *Sundquist*, 149 F. Supp. 2d 941, 953-54 (M.D. Tenn. 2000) (applying *Youngberg*'s "professional judgment" standard to alleged violations of foster children's substantive due process rights); *Braam ex rel. Braam* v. *Washington*, 81 P.3d 851, 856-61 (Wash. 2003) (collecting case law recognizing the substantive due process rights of foster children and concluding that the professional judgment standard represents the proper standard for such alleged violations).

to demonstrate that the person responsible actually did not base the decision on such judgment." *Jordan* v. *City of Philadelphia*, 66 F. Supp. 2d 638, 646 (E.D. Pa. 1999) (quoting *Youngberg*, 457 U.S. at 323). As the Supreme Court in *Youngberg* further explained, the determination that "professional judgment" has been exercised must be based on a finding that the challenged decision was made by "a person competent, whether by education, training or experience, to make the particular decision at issue" or a person "subject to the supervision of qualified persons." *Id.*

While some other courts have ignored this well-recognized professional judgment standard in favor of a "deliberate indifference" standard, such standard is inapplicable here and, in any event, would not alter the conclusion that summary judgment should be granted.[23]

First, the "deliberate indifference" standard typically applies in the context of prisoners, not to children held in non-punitive state custody. *See Youngberg*, 457 U.S. at 321-22. Where, as here, the individuals are involuntarily committed into state care and are dependent on the government for basic needs, they are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Id*. As the Washington Supreme Court observed in *Braam*, "the State owes [foster] children more than benign indifference and must affirmatively take reasonable steps to provide for their care and safety." *Braam*, 81 P.3d at 859 (rejecting contention that "deliberate indifference" standard

---

[23] Although the professional judgment and not deliberate indifference standard applies, plaintiffs are entitled to summary judgment even under the latter standard. Defendants, after a thorough evaluation and public hearing in 2008, came to the conclusion that any ban on cohabiting couples from serving as foster parents should be eliminated and that—in the words of DHS Director John Selig—it was "important" to do so "so that we can . . . find a family that best meets the needs of every child." DHS Media Release (Ex. 55). Having determined that eliminating the ban was important to meet the needs of children in State care, applying Act 1 to do just the opposite would clearly constitute "deliberate indifference" to the best interests of children in State care.

applies to claims by foster children challenging state policy and holding that "[s]omething more than refraining from indifferent action is required to protect these innocents").

Second, the limited times when courts have used the "deliberate indifference" standard have been when the plaintiffs were seeking money damages for harm to children in state care. *See, e.g.*, *White* v. *Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997) (liability if defendant was "plainly placed on notice of a danger and chose to ignore the danger"); *Norfleet*, 989 F.2d at 291 (applying deliberate indifference standard in case involving monetary liability of state for harm inflicted by third party on foster child). Plaintiffs here are asking this Court to declare invalid a statute that violates the State's obligations to children (and which State Defendants agree serves no child welfare purpose), and do not seek monetary damages. *No court* has applied the "deliberate indifference" standard to assess the constitutionality of a state statute alleged to cause harm to children in state care. This distinction makes sense given that even in the context of due process claims of pre-trial detainees (who, unlike foster children, have been deprived of their liberty because of allegations of criminal activity, not because of their parents' abuse or neglect), a number of other courts have noted the deliberate indifference standard only applies to "episodic" actions or omissions, not "general conditions, practices, rules." *Hare* v. *City of Corinth, Miss.*, 74 F.3d 633, 643 (5th Cir. 1996) (en banc); *accord Or. Advocacy Ctr.* v. *Mink*, 322 F.3d 1101 (9th Cir. 2003) (rejecting argument that deliberate indifference standard applies to a challenge to conditions of confinement); *Jones* v. *Blanas*, 393 F.3d 918 (9th Cir. 2004) (same). Whatever rationales may exist for applying the deliberate indifference standard to individual decisions made by caseworkers in the context of claims for money damages, those rationales do not apply when considering the impact of a state statute on vulnerable children seeking injunctive relief. *See Braam*, 81 P.3d at 858-59.

Plaintiffs here respectfully ask only that same-sex and cohabiting heterosexual couples be treated as any other applicants through the existing individualized review process. Thus, in asking that the State not erect a categorical bar to evaluating foster or adoptive parent applicants—an issue on which child welfare professionals have clearly spoken—it is appropriate to hold the State to a "professional judgment" standard. As discussed below, because Act 1 is in direct contravention of DHS's own professional judgment and all applicable professional standards (and, indeed, bars DHS from exercising its professional judgment), it is without dispute that Act 1 violates the State's due process obligations to children in its custody.

B. Act 1 is inconsistent with professional judgment because it serves no child-welfare purpose

Act 1's categorical ban on same-sex couples and cohabiting heterosexual couples serving as foster and adoptive parents violates the State's due process obligations and the professional judgment standard by directly contradicting the professional judgment of DHS and the leading child welfare associations, and the practice of forty-eight other states.

In October 2008, DHS gave full consideration to a categorical ban on cohabiting foster and adoptive parents, including through public hearings and testimony. It is undisputed that DHS, in the exercise of its professional judgment and consistent with the testimony of virtually every witness, concluded that a cohabitation ban harms children and that individualized review is in the best interests of the children in its care, and DHS decided to eliminate the impediment of the ban to children's best interests. DHS Media Release (Ex. 55). In fact, the State Defendants cannot reconcile Act 1's categorical ban even with their *own* professional judgment of what is in the best interests of children in State care. *See, e.g.*, Zalenski Depo. (Ex. 44) at 145:21-146:23 (Act 1 is contrary to best practices in the social work field); Appler Depo. (Ex. 9) at 93:3-7 (Act 1 inconsistent with best practices in the social work field); Factual

Background Section IV.A, *supra*. As a practice, DHS has virtually no categorical bans—even of those convicted of most crimes[24]—because of the importance of not excluding potentially qualified foster or adoptive parents.

DHS's own professional judgment on this point is reinforced by the fact that, aside from Arkansas, only one other state bans cohabiting individuals from being appointed as foster and adoptive parents. *See* Factual Background Section III at 27 n.9, *supra*; *cf. Schall* v. *Martin*, 467 U.S. 253, 268 (1984) ("The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering . . . ."") (*quoting Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934), *overruled on other grounds by Malloy* v. *Hogan*, 378 U.S. 1, 5 (1964)). And that judgment is further confirmed by the undisputed fact that professional child welfare organizations dedicated to children's health and welfare have concluded that it is not appropriate to ban cohabiting individuals from serving as foster and adoptive parents. *See* Factual Background Section II.A, *supra*.

Accordingly, Act 1's categorical ban is "such a substantial departure from accepted professional judgment, practice, or standards" as to show that it is not actually based "on such judgment." *Youngberg*, 457 U.S. at 323; *accord Braam*, 81 P.3d at 859 (due process requires "the exercise of professional judgment made in accord with accepted professional standards or practice").

The reason categorical bans like Act 1 are inconsistent with professional judgment is that they prevent children from being placed with a family who otherwise would be

[24] Current DHS policy states that the only criminal convictions that cannot be waived are those involving violence, sex crimes and other serious crimes. Ark. Code Ann. §§ 9-28-409(e)(1), 9-28-409(h)(1) (West 2009); *see also* Factual Background Section III, *supra*.

deemed appropriate foster or adoptive parents. Prior to Act 1, Arkansas's individualized assessment process appropriately determined which individuals were suitable foster and adoptive parents. *See* Factual Background Section II.F, *supra*. There is no evidence to show a "reason or basis (including any purported scientific, policy or factual basis) . . . [why] the individualized screening process for foster and adoptive care is insufficient to determine" the suitability of cohabiting individuals as foster or adoptive parents. Defendants' Responses to Plaintiffs' First Set of Interrogatories, dated March 13, 2009 (Ex. 59), at 9-10 (noting that "the State Defendants have not taken such a position in this case or otherwise"). Moreover, the State admits that placing a child with a particular cohabiting foster or adoptive couple may be in that child's best interest, *see* Factual Background Section II.E, *supra*, and concedes that it has successfully placed children with cohabiting adults prior to Act 1. *See* Letter from C. Jorgensen to C. Sun, dated November 25, 2009 (Ex. 67) (admitting that the State Defendants are aware of cases where they have approved or recommended placements with gay couples and acknowledging that private child placement agencies may have placed children with gay couples as foster or adoptive parents); Kutz Depo. (Ex. 26) at 49:20-51:22 (DCFS 30(b)(6) witness) (recalling a favorable home-study on a same-sex cohabitation placement), 67:16-20 (DHS recommended Sheila Cole because she was the best placement option for W.H.), 109:24-114:4 (gave favorable assessment where suspected same-sex cohabiting couple and for cohabiting relative placements), and 117:18-123:17, 124:6-127:25 (conducted home-studies and recommended placements with same-sex couples); *see also* Sep. Statement (Ex. 7) ¶¶ 125-127 (citing evidence that the State is aware of cohabiting adults in intimate same-sex relationships who are unmarried and who have served as foster parents in this State, and that Defendants have evaluated and approved

cohabiting adults in intimate heterosexual and same-sex relationships to serve as placements in this State).

By removing qualified cohabiting heterosexual and gay persons from the pool of qualified prospective parents, Act 1 directly harms children in State care. There is a critical shortage of available foster and adoptive homes in Arkansas, particularly of families willing to take in sibling groups, older children, or those with serious special needs. *See* Factual Background Section II.B, *supra*. This shortage of available foster and adoptive homes causes serious harm to children in State care by making children wait longer for permanent placements, reducing the likelihood of permanent placements at all, and increasing the likelihood of multiple placements, sibling separation, and out-of-county placements. *See* Factual Background Section II.G, *supra*. As the Arkansas Supreme Court has recognized, "any delay in affording [foster] children protection or in providing them with a permanency plan works against those children's welfare and best interests." *Hathcock* v. *Ark. DHS*, 347 Ark. 819, 825, 69 S.W.3d 6, 10 (2002); *accord Mayo* v. *Ark. DHS*, No. CA 07-854, 2008 Ark. App. LEXIS 11, at *10 (Ark. Ct. App. Jan. 9, 2008) ("To hold the child in limbo is contrary to the overriding legislative directive to provide permanency for children where return to the home cannot be accomplished within a reasonable time.").

In further violation of the State's due process obligation to children in its care, Act 1 arbitrarily prohibits placements that are clearly in children's best interests, including placements with relatives, friends, and individuals specially equipped to meet a child's special needs. *See* Factual Background Section V, *supra*. For example, here it is uncontroverted that

W.H.'s placement with her grandmother, Plaintiff Sheila Cole, was in the child's best interests.[25] Yet, because Ms. Cole lives with her partner of ten years, Act 1 would categorically bar her from adopting her granddaughter, W.H. Nevertheless DHS found that W.H.'s placement with her grandmother was in the child's best interests and, specifically, that adoption by Ms. Cole was in W.H.'s best interests. Kutz Depo. (Ex. 26) at 62:16-21. But for the ability to use the Interstate Compact on Placement of Children to attempt to effectuate an adoption by Ms. Cole, who resides in Oklahoma, this family could have been separated, even though all the child-welfare professionals involved agree that an adoptive placement with Ms. Cole is in W.H.'s best interests. This example conclusively demonstrates the harmful effects of Act 1 on Arkansas children. Tying the hands of child welfare professionals at DHS and the courts in making appropriate placement decisions, including whether a child would benefit from the stability of an adoptive placement (as opposed to the guardianship permitted by Act 1), is the very antithesis of the professional judgment of DHS and child welfare professionals more generally.

For these reasons, the undisputed facts make clear that Act 1 fails to meet the State's due process obligation to children in its custody, and indeed harms children in State care by denying some of them the home most appropriate for their needs and condemning more of them to growing up without ever becoming part of a family. *See* Factual Background Section II.G, *supra*; *see also* Tanya M. Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 Hastings Race & Poverty L.J. 1, 51-52 (2009) ("These bans categorically foreclose permanent placement opportunities without conducting the individualized determination of the needs of the orphan, the qualities of the

[25] The Honorable Jay Finch from the Circuit Court of Benton County found that "[i]t is in the best interests of W.H. that Sheila Cole be awarded physical custody" of W.H. Order, *Arkansas DHS* v. *Caldwell*, dated January 13, 2009 (Ex. 71).

available placement, and the competencies of the prospective adoptive parents, which the best interests standard requires. The best interests of an orphan cannot be served effectively in the absence of a particularized determination of the benefits and detriments of an available placement option, in full view of the alternative, more harmful option of extended temporary or institutionalized care."). Because the undisputed facts show that Act 1 is inconsistent with professional judgment and not only fails to protect children in State care but actually causes harm, Plaintiffs are entitled to summary judgment on Counts 1 and 2 of the Third Amended Complaint. Plaintiffs respectfully ask this Court to protect the interests of children—and, indeed, advance the views of DHS professionals—by declaring Act 1 unconstitutional and unenforceable.[26]

III. ACT 1 VIOLATES EQUAL PROTECTION AND DUE PROCESS BY PENALIZING SAME-SEX COUPLES AND COHABITING HETEROSEXUAL COUPLES FOR THEIR RELATIONSHIPS WITHOUT ANY CHILD-WELFARE JUSTIFICATION

The categorical exclusion of people living with intimate partners from applying to foster or adopt children, solely because of that intimate relationship, violates the right to equal protection and due process guaranteed by the Arkansas and federal constitutions. Act 1's burden on the right to privacy, which works a particular hardship on gay men and lesbians (who may not marry under Arkansas law), makes the Act invalid because the undisputed facts show that it

---

[26] Because Act 1 narrows the pool of possible foster and adoptive families, it causes children in State care to remain in foster care or other institutional settings longer than they would otherwise, and in certain instances suffer multiple foster placements. These consequences of Act 1 require the additional and unnecessary expenditure of taxpayer dollars, constituting an illegal exaction of taxpayer dollars. *See* Factual Background Section VI, *supra*. Accordingly, the Arkansas taxpayer plaintiffs also are entitled to summary judgment on their claim that Act 1 is an illegal exaction in violation of Article 16, Section 13 of the Arkansas Constitution. *See Mackey* v. *McDonald*, 255 Ark. 978, 504 S.W.2d 726 (1974).

lacks any connection to a child welfare interest. *See* Factual Background Section IV.A.-B, *supra*; *see also Howard*, 367 Ark. at 65, 238 S.W.3d at 7. Thus, Plaintiffs are entitled to summary judgment on Counts 9 and 10.

A. Act 1 burdens the exercise of the fundamental right to privacy

Even before the United States Supreme Court's decision in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), holding that same-sex couples have a constitutionally protected right to form intimate relationships, the Arkansas Supreme Court recognized same-sex couples' fundamental right to form intimate relationships free from government interference. *See Jegley*, 349 Ark. at 632, 80 S.W.3d at 350 (striking law criminalizing same-sex intimacy). Government actions that intrude on this protected right to form intimate relationships have repeatedly been struck down as unconstitutional. *See, e.g., Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) (striking down as a violation of substantive due process a law barring the sale of contraceptives to unmarried persons but permitting sale to married persons because "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *see also Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 617-18 (1984) (holding that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme").

Act 1 penalizes the exercise of the fundamental right to privacy. It absolutely excludes individuals from applying to adopt or foster on the basis of engaging in an intimate relationship with a partner. Couples who live together but will forego their intimate relationship are not barred by Act 1. Same-sex couples in Arkansas who want to foster or adopt children must cease their intimate relationship or break their family apart and move into separate

residences, no matter how committed, healthy or lengthy the relationship, in order to be considered as potential foster or adoptive parents.[27] As Justice Brown noted in *Howard*, "prohibiting foster-parent status due to sexual activity in the bedroom is [not] categorically different from making the conduct a misdemeanor," because in both instances, "gay and lesbian couples are saddled with an infirmity due to sexual orientation."[28] 367 Ark. at 68, 238 S.W.3d at 10 (Brown J., concurring).[29] Likewise, heterosexual cohabiting couples wishing to apply to adopt or foster, in turn, face similar choices—end their intimate relationship, separate, or marry—regardless of the reasons they may have for not wanting to marry or the length, depth and stability of their relationships.

---

[27] Same-sex couples cannot marry under Arkansas law (Ark. Const. amend. 83, § 1), and even those like plaintiffs Pennisi and Harrison who do marry in a jurisdiction that allows same-sex couples to marry are barred by Act 1 from consideration as foster or adoptive parents (Ark. Code Ann. § 9-8-304 (West 2009)).

[28] Defendants' primary response to Plaintiffs' claims premised on the fundamental right to privacy is to mischaracterize this case as about fundamental rights to adopt or foster, or the right to be adopted or fostered. *Plaintiffs do not claim a fundamental right to adopt or foster children, or a right to be adopted or fostered.* As Justice Brown recognized in *Howard*, the fundamental right at stake in Claims 9 and 10 is the right to have intimate relationships, which is impermissibly burdened and penalized by Act 1's categorical exclusion. Government action conditioning benefits and privileges—whether employment, welfare benefits or the ability to foster or adopt—on the individual's cessation of a fundamental right requires heightened scrutiny. *See, e.g.*, *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 640 (1974) (holding that conditioning employment as teacher on not becoming pregnant violated fundamental right to procreate). By way of example, there is no fundamental right to a driver's license. But the State plainly cannot condition the privilege of having a driver's license on the requirement that an individual surrender an intimate relationship or pledge not to engage in sexual conduct with their life partner.

[29] Because the Court struck down the regulation as violating the doctrine of separation-of-powers, the full Court did not address the plaintiffs' equal protection and privacy claims. *Howard*, 367 Ark. at 66, 238 S.W.3d at 8-9.

It is well-established that where a government classification burdens or penalizes the exercise of a fundamental right (such as the right to maintain an intimate relationship with a life partner), it passes constitutional muster only if it advances a compelling government interest and is narrowly tailored to achieve that goal. *See, e.g.*, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (strict scrutiny "is due when state laws impinge on personal rights protected by the Constitution"); *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969) (holding that conditioning eligibility for welfare benefits on a durational residency requirement burdened the fundamental right to interstate travel, and applying strict scrutiny); *Bosworth* v. *Pledger*, 305 Ark. 598, 604-05, 810 S.W.2d 918, 921 (Ark. 1991) ("Once equal protection is invoked . . . we must determine . . . whether the statute impinges on a fundamental right or is based on a suspect criterion, in which case the state is required to prove not only that the statute is reasonable but also that it promotes a compelling state interest.").

When a statute such as Act 1 conditions a government privilege on actions that penalize or burden the fundamental right to form intimate relationships, it is the government's burden to show that the law is narrowly tailored to meet a compelling state interest. *See Howard*, 367 Ark. at 68, 238 S.W.3d at 10 (Brown, J., concurring) (concluding that regulation banning gay couples from serving as foster parents "overtly and significantly burdens the privacy rights" the Supreme Court declared to be fundamental in *Jegley* v. *Picado*). If a law burdens "the personal and private lives of homosexuals [or heterosexuals], in a manner that implicates the rights identified in *Lawrence* [v. *Texas*,] the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Witt* v. *Dep't of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008); *see also Cook* v. *Gates*, 528 F.3d 42, 52-56 (1st Cir. 2008) (holding that *Lawrence* "did

indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy" and that government action penalizing same-sex couples for forming intimate relationships requires heightened scrutiny). Act 1 thus cannot stand unless the State establishes that it is narrowly tailored to meet a compelling justification, which, as discussed below, it is not.[30]

B. Uncontested findings from the *Howard* Court establish that no child welfare purpose is served by prohibiting gay men and lesbians in intimate relationships from applying to foster or adopt children

In *Howard*, DHS and the CWARB asserted that prohibiting gay men and lesbians from fostering was necessary to promote child welfare interests. At trial, the court heard and weighed testimony from no fewer than eight experts, including two child development psychologists, an epidemiologist, and a former Director of Arkansas DHS, to evaluate the legitimacy of DHS's and CWARB's proffered reasons for instituting the ban on gay men and lesbians. *Howard* v. *CWARB*, No. CV 1999-9881, 2004 WL 3154530, at *2-*7 (Ark. Cir. Ct. Dec. 29, 2004) (mem.) In its comprehensive Findings of Fact and Conclusions of Law issued after a trial on the merits, the circuit court specifically rejected each of the purported rationales behind the ban as being unsupported by the evidence. *Howard*, No. CV 1999-9881, 2004 WL 3200916 (Ark. Cir. Ct. Dec. 29, 2004) (Findings of Fact and Conclusions of Law). After assessing all of the testimony and evidence, the court concluded that the blanket exclusion of gay individuals, including those living as couples, from serving as foster parents was *not* "rationally related" to the legitimate state interest of promoting the health, welfare and safety of foster children. *Howard*, 2004 WL 3200916, Conclusions of Law ¶¶ 4-6.

---

[30] While Plaintiffs submit that heightened scrutiny applies to Act 1's significant infringement of the fundamental right to privacy, Act 1 fails even rational basis, as the State Defendants admit that it serves no child-welfare purpose.

On June 29, 2006, by unanimous vote, the Arkansas Supreme Court affirmed the circuit court's decision. Relying on the factual findings of the circuit court, the Arkansas Supreme Court held that "there is no correlation between the health, welfare, and safety of foster children *and* the blanket exclusion of any individual who is a homosexual or who resides in a household with a homosexual." *Howard*, 367 Ark. at 65, 238 S.W.3d at 7. As part of that holding, the Court relied upon the circuit court's factual finding that the blanket exclusion of gay persons from serving as foster parents could be "harmful to promoting children's healthy adjustment because it excludes a pool of effective foster parents." *Howard*, 367 Ark. at 63, 238 S.W.3d at 7 (citing *Howard*, 2004 WL 3200916, Findings of Fact at *2).

With respect to same-sex couples, including the gay and lesbian Plaintiffs, Act 1 is déjà vu all over again. The conclusions of the Supreme Court in *Howard* compel the conclusion here that Act 1 serves no purpose when applied to gay and lesbians. As discussed above, Act 1 impinges on the fundamental right of same-sex couples to privacy and, therefore, must be struck down unless the State can establish that it is narrowly tailored to meet a compelling justification. While Plaintiffs do not dispute that protecting children's well-being is a compelling state interest (indeed, that is a primary goal of Plaintiffs' efforts here),[31] the *Howard*

[31] It is undisputed even by the sponsors of Act 1, Intervenor-Defendants Jerry Cox and the Arkansas Family Council, that the *only* legitimate purpose of Act 1 would be to promote the welfare of children. J. Cox Depo. (Ex. 15) at 20:9-20, 103:10-13; *see also* Thomas Depo. (Ex. 37) at 10:18-24 (stating that the sole purpose of Act 1 is to protect the welfare of children). This is unsurprising because DHS has a legal obligation to act in children's best interests and cannot promote any other interest at the expense of the children entrusted to its care. *See* Factual Background Section II.C, *supra*.

court's findings, which are undisputed here, compel the conclusion that Act 1's exclusion of same-sex couples[32] bears no relationship at all to advancing child welfare:

- The blanket exclusion of gay men from fostering children is not rationally related to the legitimate state interest of protecting the health, welfare and safety of foster children. *Howard*, 367 Ark. at 65, 238 S.W.3d at 8 (citing *Howard*, 2004 WL 3200916, Conclusions of Law at *4).

- Children of lesbian or gay parents are equivalently adjusted to children of heterosexual parents. *Id*. (citing Findings of Fact at *3).

- Arkansas needs more qualified foster parents and categorical exclusions eliminate from consideration people who would otherwise be good foster parents. *Id*. (citing Findings of Fact at *2).

- A blanket exclusion may be harmful to promoting children's healthy adjustment because it excludes a pool of effective foster parents. *Id*. (citing Findings of Fact at *2).

- Determination of the foster home that is most appropriate for each child should be based on a careful and thorough assessment of each individual child, his or her circumstances and conditions, strengths and needs, at the time of placement. *Howard*, 2004 WL 3200916, Findings of Fact at *2.

Defendants have not come forward with any evidence to rebut these findings and, in fact, have offered no expert qualified to testify on matters relating to gay and lesbian parents. *See* Factual Background Section V, *supra*. Plaintiffs, on the other hand, have adduced extensive and undisputed testimony of DHS, DCFS, CWARB, and Plaintiff's experts that children would be far better served by allowing same-sex couples who wish to foster and adopt to be individually assessed like all applicants, thereby increasing the pool of potential parents for Arkansas children in State care. *See* Factual Background Section II.F, *supra*. It therefore remains undisputed that no child-welfare purpose is served by categorically excluding same-sex

[32] While the classification in *Howard* was not based on relationship status, the exclusion applied to gay and lesbian couples and the court's findings about gay parents were not restricted to single gay parents. Indeed, some of the *Howard* plaintiffs lived with their partners.

couples from caring for children as foster or adoptive parents, and certainly there is no narrow tailoring. As these undisputed facts show that categorically excluding same-sex couples does nothing to promote, and instead, undermines children's welfare, Act 1 must be declared unconstitutional as applied to gay and lesbian couples.

C. Because DHS individually screens all applicants, Act 1's categorical exclusion of suitable foster and adoptive parents solely because of their intimate relationships lacks any tailoring to advance children's welfare

Act 1's burden on the fundamental rights of same-sex couples and cohabiting heterosexual couples is also unconstitutional because categorically excluding all cohabiting applicants, without any assessment of their suitability to parent, lacks any relationship to promoting children's welfare, and certainly cannot be said to be narrowly tailored. *See Reno* v. *Flores*, 507 U.S. 292, 301-02 (1993) (reaffirming that due process "forbids the government to infringe certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest"); *cf. also Fullilove* v. *Klutznick*, 448 U.S. 448, 498 (1980) (Powell, J., concurring) ("[E]ven if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected must be narrowly drawn to fulfill the governmental purpose.").

As previously explained, DHS screens all applicants for suitability to serve as foster or adoptive parents. *See* Factual Background Section II.F, *supra*. DHS agrees that its system works well, and that there is no reason to believe it would be any less effective for screening out those cohabiting applicants who are inappropriate for some reason. *Id*. It is further undisputed by DHS, DCFS, CWARB, and the experts retained by Defendants, that the only way to determine whether *any* applicant—married, single, or cohabiting—would pose a risk of harm to a child is to individually screen them. *Id*. Because a comprehensive screening process already exists to evaluate the suitability of prospective parents, including the risk of any harm, Act 1's

categorical exclusion of cohabiting applicants lacks any tailoring at all to its ostensible goals of protecting children, let alone the narrow tailoring required to justify the infringement on constitutional rights. *Cf. Grutter* v. *Bollinger*, 539 U.S. 306, 336-37 (2003) (discussing the narrow tailoring requirement in the context of affirmative action, and emphasizing that narrow tailoring requires "individualized consideration" and "each applicant [must be] evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application").

Moreover, given that it is undisputed that some cohabiting couples make good parents—and, indeed, that the majority of cohabiting parents raise children who have positive outcomes, *see* Factual Background Section V, *supra*—and that in some cases, cohabiting couples could be the best placement for a particular child, there is no basis to argue that individuals in cohabiting relationships are universally unsuitable parents and, thus, must all be excluded to promote children's interests. Accordingly, Defendants cannot justify the infringement on fundamental rights because Act 1 is not narrowly tailored to advance a compelling interest, and Plaintiffs respectfully request that this Court grant their motion for summary judgment on Counts 9 and 10.

IV. ACT 1 VIOLATES FUNDAMENTAL RIGHTS OF PARENTAL DECISION MAKING

Act 1 also violates the parent-Plaintiffs' (Meredith and Benny Scroggin, and Susan Duell-Mitchell and Chris Mitchell) right to make decisions about their own children, as guaranteed by the Arkansas and federal constitutions. In the event of their death or incapacity, the parent-Plaintiffs have exercised their judgment as to what is best for their children and have designated cohabiting gay individuals to be adoptive parents for their children. Act 1 eviscerates the effect of this parental designation, requires instead that DHS and the courts utterly disregard

the parents' wishes, and denies Plaintiffs their right to parental autonomy without any inquiry into the best interests of the Plaintiffs' children. Because Defendants lack any (let alone compelling) justification to support this interference with the parent-Plaintiffs' rights, Plaintiffs are entitled to summary judgment on Counts 5 and 6.

The constitutional right at issue in Counts 5 and 6 is well-established and beyond credible dispute. The fundamental right of a parent to make decisions concerning the care, custody, and control of his or her children is one of the oldest liberty interests recognized under the United States Constitution. *Troxel* v. *Granville,* 530 U.S. 57, 65 (2000); *Stanley* v. *Illinois,* 405 U.S. 645, 651 (1972) (right to custody and care of one's children has found protection in the due process and equal protection clauses of the Fourteenth Amendment and the Ninth Amendment); *see also Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"). Nearly a century ago, the United States Supreme Court explained that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce* v. *Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925); *see also Parham* v. *J.R.*, 442 U.S. 584, 602 (1979) ("[N]atural bonds of affection lead parents to act in the best interests of their children.").

A parent providing for the care of children in the event of parental death or incapacity is one of the "high duties" a parent has and, indeed, is one of the most important decisions a parent can make about their children's well-being and future. *See Bristol* v. *Brundage*, 589 A.2d 1, 2 n.2 (Conn. App. Ct. 1991) (finding that the sole surviving parent's testamentary appointment must be given rebuttable presumption that it is in the best interests of

his or her child). "A judge treads on sacred ground when he overrides the directions of the deceased with reference to the custody of his children." *Comerford* v. *Cherry*, 100 So. 2d 385, 390 (Fla. 1958). The parent-Plaintiffs, of course, recognize that they do not have the absolute right to dictate the adoptive placement of their children through their testamentary wishes should there be an appropriate basis—the child's best interest—to interfere. But Plaintiffs do have a protected right to have their caregiver designation at least considered by the State in determining the best interests of their children. *See Linder* v. *Linder*, 348 Ark. 322, 350-51, 72 S.W.3d 841, 856-57 (Ark. 2002); *Troxel*, 530 U.S. at 70. Act 1 not only fails to give any weight to the parent-Plaintiffs' judgment, but Act 1 requires the State, and the judges overseeing probate decisions, to categorically *disqualify* the individuals selected by parent-Plaintiffs and to disgregard the parent-Plaintiffs' determination that adoption by these individuals is in their children's best interests, without any regard to the children or caregivers at issue. Act 1 not only categorically bars parents such as Plaintiffs from exercising their constitutional rights, but also prevents the courts from following their own obligation to act in the best interests of children.

Accordingly, because the enforcement of Act 1 intrudes on a fit parent's decisions about his or her child, the burden is on the State to establish that the intrusion is narrowly tailored to meet a compelling interest. *Linder*, 348 Ark. at 347-48, 72 S.W.3d at 855 (applying strict scrutiny to grandparent visitation law). A statute or application of a statute is unconstitutional where it fails to give "special weight" or a "presumption" in favor of a fit parent's decision about the care of his or her child. *Id.* at 350-51; *Troxel*, 530 U.S. at 70.

Here, Defendants have offered no justification that could support Act 1's complete disregard for parent-Plaintiffs' determinations. These parents, who know their children better than anyone, have determined that their children would be best cared for if they were

adopted by specific cohabiting individuals, including, in one instance, the children's uncle. *See* Factual Background Section II.A, *supra*. There is no justification for the intrusion on parental rights caused by Act 1 that requires that this determination be ignored. There is no compelling interest served by an intrusion on parental rights which effectively ensures that a placement that may be in a child's best interests is not even considered. Act 1 provides no effort to tailor the intrusion on parental rights, let alone narrowly tailor the intrusion to any compelling interest, and the State Defendants confirm that Act 1 serves no child welfare purpose. *See* Factual Background Section IV.A, *supra*. It is therefore unsurprising that two of the State's experts agree that there is no basis (rational or otherwise) for Act 1's mandate that parents' testimonial wishes be disregarded. *See* Wilcox Depo. (Ex. 42) at 194:2-195:6 (stating that he would defer to a parent's designation of a cohabiting couple as a placement because "on average, parents are more likely to have the best sense of interest of the child than other people"); Morse Depo. (Ex. 27) at 200-02, 207-09 (admitting that adoption by a same-sex couple could be in a child's best interest when the designated couple has a pre-existing relationship with the child, and stating that parents should be able to choose same-sex couples to raise their children).

The availability of guardianship, an inferior substitute that places the child with the same caregiver, but fails to provide the requisite permanency and legal safeguards that parent-Plaintiffs directed for their children in the event of parental death or incapacity, does not make Act 1's interference with parental judgment any less impermissible. Indeed, the existence of the "guardianship" exception in Act 1 highlights that there is no conceivable justification for the intrusion on parental rights. As discussed above, guardianships fall far short of adoptions in

protecting the legal rights of children and securing emotional stability through permanency.[33] The parents-Plaintiffs wish to ensure that their children have the full range of protections and security that can only come from legal adoption and that decision is entitled to significant constitutional deference; Act 1 requires that it be given none.

Because there is no material dispute that Act 1 mandates that a fit parent's designation about who should adopt his or her child in the event of death or incapacity be rejected out of hand, without any consideration of parental wishes much less the best interest of the child, Plaintiffs Meredith and Benny Scroggin, and Susan Duell-Mitchell and Chris Mitchell are entitled to summary judgment on Counts 5 and 6.

---

[33] The State Defendants acknowledged that, absent unusual circumstances, guardianship is inferior to an adoptive placement, as it fails to provide sufficient permanency for the child. *See, e.g.,* Appler Depo. (Ex. 9) at 121:17-25 ("[T]here's a greater benefit to an adoption than a guardianship because of the implication of a stronger permanency . . . thus helping the child's mental health, making a child feel more loved, more secure."); Blucker Depo. (Ex. 11) at 83:19-84:14. *See also* Factual Background Section II.D, *supra.* More specifically, an adoption ensures that the legal benefits and obligations associated with legal parenthood flow to the child, including eligibility for health insurance benefits, social security benefits, and the ability to inherit if a parent dies intestate. *See* 42 U.S.C. § 416 (e) (West 2009) (defining child for the purposes of the Social Security laws as "the child or legally adopted child of an individual"); 38 U.S.C. §§ 1313, 1542 (West 2009) (dependency compensation to and pensions for surviving children of veterans killed during periods of war are available only to "children" of veterans); Ark. Code Ann. § 28-9-214 (West 2009) (under intestacy laws, estate passes first to "children," which does not include children in the care of a guardian). In contrast, a custodial placement such as a guardianship can be disrupted by court order "for any . . . reason, [if] the guardianship is no longer necessary or for the best interest of the ward." Ark. Code Ann. § 28-65-401 (West 2009). Further, Arkansas policy and courts favor permanent placement of children, and therefore in a contest between a guardian and a potential adoptive family, the guardian may lose. *Lloyd* v. *Butts,* 343 Ark. 620, 624 (2001); DHS Manual (Ex. 54), Policy I-A.

V. ACT 1 DEPRIVES CHILDREN WITH COHABITING DESIGNATED CAREGIVERS OF THEIR RIGHT TO EQUAL PROTECTION OF THE LAWS

Just as Act 1 violates the rights of the parent-Plaintiffs to parental autonomy, the undisputed facts demonstrate that Act 1 constitutes a violation of the rights of Plaintiff-children to equal protection of the laws. Simply put, Act 1 treats children whose parents want them to be adopted by individuals in cohabiting relationships differently than children whose designated caregivers are not in cohabiting relationships. The former are deprived of their parents' designation solely because their designated caregivers are cohabiting, while the latter are not. The effect of this unlawful disparate treatment is to significantly disadvantage the child-Plaintiffs by depriving them of the possibility of obtaining the security and benefits of an adoptive relationship with the adults deemed by their parents best suited to meet their needs. The State, through Act 1, disadvantages these children because of factors beyond the children's control—the marital status or sexual orientation of their designated caregivers. Because this classification is not substantially—or even rationally—related to a legitimate government interest, Plaintiffs respectfully ask this Court to enter summary judgment on Counts 7 and 8.

The Arkansas and federal constitutions prohibit disparate treatment of similarly situated persons. Act 1 creates diametrically opposed outcomes for the child-Plaintiffs as compared with those children whose parents believe their children would be best cared for by single or married caregivers in the event of parental death or incapacity. As a consequence, the child-Plaintiffs' rights to equal protection are violated. As the Supreme Court held in *Jegley*, a statute violates the Equal Protection Clause of the United States Constitution when it "provides dissimilar treatment for [persons] who are similarly situated." *Jegley* v. *Picado*, 349 Ark. 600, 633, 80 S.W.3d 332, 350 (Ark. 2002) (citing *Reed* v. *Reed*, 404 U.S. 71, 92 (1971)). The Arkansas Equal Rights Amendment similarly prohibits any law that "grant[s] to any citizen, or

class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Ark. Const. art. 2 § 18. Consistent with these cases and the Constitution, the United States Supreme Court has long recognized that laws that disadvantage a class of children based on factors beyond their control are unconstitutional.

For example, in *Weber* v. *Aetna Cas. & Sur. Co*., 406 U.S. 164 (1972), the United States Supreme Court held that Louisiana's workmen's compensation law, which relegated "unacknowledged illegitimate children" to a lower priority status in the distribution of benefits than "legitimate children," violated the equal protection rights of children born out of wedlock. *Weber*, 406 U.S. at 175-76. The Court explained that:

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

Id. In the wake of *Weber*, the Supreme Court has repeatedly held that laws that disadvantage children who are born to unmarried parents are subject to heightened scrutiny. *See, e.g.*, *Mills* v. *Habluetzel*, 456 U.S. 91, 99 (1982) (restrictions on support suits by children born out of wedlock "will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest"); *United States* v. *Clark*, 445 U.S. 23, 27 (1980); *Lalli* v. *Lalli*, 439 U.S. 259, 264-65 (1978) (plurality opinion); *see also Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) ("[W]e have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.'") (quoting *Weber*, 406 U.S. at 175); *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973) ("[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.").

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

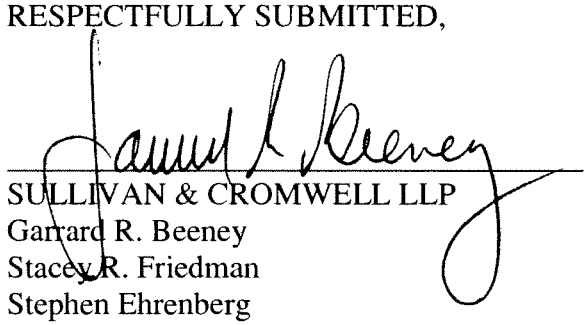
Here, the child-Plaintiffs and other similarly-situated children are no more able to control the marital status of their designated caregivers than the class of children who were paid less in *Weber* or excluded from public education in *Plyler*. Act 1 divides similarly situated children into two categories: those for whom the State may consider a parent's testamentary wishes that a designated caregiver adopt the child, and those whose parents' wishes concerning the adoption of their children must be automatically excluded from consideration, even when adoption by the designated caregiver would be in the best interests of the child. There is no compelling (or even legitimate) governmental interest served by imposing this hardship on a discrete class of children not accountable for their parents' testamentary decisions. There is likewise no governmental interest served by denying the children in this case the opportunity to be adopted by their parent-designated caregiver and instead offering them the lesser protections afforded by guardianship. The child-Plaintiffs respectfully ask this Court to enter summary judgment on Counts 7 and 8.

CONCLUSION

The children in State care awaiting adoption or foster care placement are among those in society least able to protect themselves. Defendants, the State's own child welfare professionals, would do away with Act 1 because it harms those very children whose care has been entrusted to the State in place of the children's parents. Because Act 1 violates the due process rights of children in State care, impermissibly impinges on the fundamental right to intimate association, denies the right to exercise parental authority, and denies children their right to equal protection of the laws, Plaintiffs respectfully ask that their motion be granted and that this Court declare Act 1 to be unconstitutional and immediately unenforceable.

Dated: February 9, 2010

RESPECTFULLY SUBMITTED,



SULLIVAN & CROMWELL LLP
Garrard R. Beeney
Stacey R. Friedman
Stephen Ehrenberg
Emma Gilmore
Christopher Diffee
Angelica Sinopole
125 Broad Street
New York, New York 10004
(212) 558-4000

WILLIAMS & ANDERSON PLC, ON BEHALF OF THE ARKANSAS CIVIL LIBERTIES UNION FOUNDATION, INC.
Marie-Bernarde Miller (Ark. Bar #84107)
Daniel J. Beck (Ark. Bar #2007284)
111 Center Street, Suite 2200
Little Rock, Arkansas 72201
(501) 372-0800

THE AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
Christine P. Sun
Leslie Cooper
Rose Saxe
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2605

Attorneys for Plaintiffs

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was served, pursuant to agreement among the parties, by e-mail and copies of exhibits were sent by overnight delivery to the following persons on the 9th day of February, 2010:

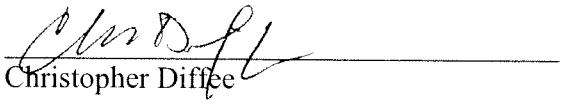
C. Joseph Cordi, Jr.
Colin R. Jorgensen
Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, Arkansas 72201

Counsel for Defendants

Martha Adcock
Family Counsel
414 S. Pulaski, Suite 2
Little Rock, Arkansas 72201

Byron J. Babione
Sara Tappen
Alliance Defense Fund
15100 N. 90th Street
Scottsdale, Arizona 85260

Counsel for Intervenor-Defendants



Christopher Diffee