IN THE SUPREME COURT OF THE STATE OF ARKANSAS

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THE STATE OF ARKANSAS, *et al.*,

APPELLANTS/
CROSS-APPELLEES,

vs. NO. 10-00840

SHEILA COLE, *et al.*,

APPELLEES/
CROSS-APPELLANTS.

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

THE HONORABLE CHRISTOPHER C. PIAZZA, CIRCUIT JUDGE

CROSS-APPELLANTS' CORRECTED REPLY BRIEF

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SUMMARY OF ARGUMENT

As the Circuit Court held, Act 1 penalizes constitutionally protected conduct and cannot stand. By explicitly barring persons from applying to adopt or foster solely because they engage in conduct well within the established fundamental right to privacy, Act 1 violates the Arkansas Constitution, and the lower court correctly granted summary judgment on Count 10 of the Complaint. That ruling resolved the dispute among the parties, and it was error for the lower court to reach out to decide other constitutional issues unnecessary to the judgment. As shown at pages 4-7, *infra*, it simply is not the case (as Cross-Appellees argue, *see* Family Council Action Committee, *et al.* ("FCAC"), Cross-Appeal Response Brief dated Nov. 19, 2010 ("Int Cross") Cross Arg 2) that every claim in every case must be decided before an appeal may be lodged.

Should the Court decide to address the merits of the lower court's decisions beyond Count 10, those decisions should be reversed. Each of Plaintiffs' claims presents constitutional rights that are impinged by Act 1 without any justification, rational or otherwise. As shown below, Cross-Appellees' briefs addressing Plaintiffs' Cross-Appeal on these claims confront neither the actual claims pleaded nor the evidence in this record.

First, Cross-Appellees re-cast the rights at issue and trivialize Act 1's substantial impact on the fundamental rights of children and families and,

consequently, the liberties guaranteed to all persons under the Arkansas and United States Constitutions. By narrowly framing each constitutional right so as to make it unrecognizable, Cross-Appellees hope the violations caused by Act 1 will be disregarded. For example, Cross-Appellees acknowledge the fundamental right to intimate association, but then assert that the government has the unfettered discretion to penalize that right short of the extreme measures of imprisonment or outright bans. Likewise, Cross-Appellees recognize that the State owes a constitutional duty to children entrusted to its care, but then claim that action short of starvation or physical abuse does not implicate that right. There is no legal support for Cross-Appellees' argument that the constitutional protections at issue in this case are so constrained and virtually obliterated in the ways they suggest.

Similarly, Cross-Appellees' characterization of this case as one involving "entitlements" or government funding of same-sex or unmarried heterosexual relationships is far from what this case is about: a categorical ban on even applying to adopt or foster solely because one is in an intimate relationship outside of marriage. Affirming the result below on any ground asserted by Plaintiffs would mean no more than that the state agencies and family court judges responsible for the welfare of children in Arkansas would evaluate on a case-by-case basis whether a cohabiting applicant, after a rigorous screening process, may provide a loving home to a child—precisely the procedures that DHS planned to

implement for the good of the children in its care but for Act 1. *See* Plaintiffs' Supplemental Abstract ("Supp Abs") 446-51.

Cross-Appellees are no more faithful to the factual record than they are to the legal issues in this appeal. Defendants' 30(b)(6) witnesses and other policy makers *all* concluded that Act 1 serves no child welfare purpose; that conclusion was not merely the "personal opinion" of an indiscriminate set of DHS employees. Int Cross Arg 12. Similarly, there is no support for the incredible claim that Act 1 "cut[s] out the riskiest, poorest performing environments." FCAC Reply Brief dated Nov. 19, 2010 ("Int Reply") Arg 14. There is no opinion or evidence in the record—*none*—that the persons targeted by Act 1 pose a risk greater than, *e.g.*, low-income people, people who have been convicted of drug possession, drunk driving, or assault, or young-adult applicants—groups that are *not* categorically barred from serving as foster or adoptive parents.

Likewise, no opinion or evidence in this record suggests any error in this Court's prior ruling in *Dep't of Human Servs.* v. *Howard* that there is no rational basis for barring gay persons, including gay couples, from serving as foster parents. 367 Ark. 55, 65, 238 S.W.3d 1, 7 (2006).[1] Indeed, far from cutting out

[1] Lead plaintiff in that case, Matthew Howard, was in a 19 year monogamous relationship with his same-sex partner. *Howard* v. *CWARB*, No. CV 1999-9881, 2004 WL 3154530, at *2 (Ark. Cir. Ct. Dec. 29, 2004).

the "riskiest" environments, Act 1 purposefully reduces the pool of suitable foster and adoptive parents by eliminating even from consideration a group of applicants that this Court already recognized as posing no greater risk to children than married heterosexual couples. *Id.*

The State's own witnesses, this Court's *Howard* opinion and other facts in this record confirm that Act 1 does not satisfy any level of constitutional scrutiny. The undisputed record below shows that Act 1's exclusion of *every single individual* in a same-sex or heterosexual unmarried relationship from applying to be a foster or adoptive parent only serves to exclude good families who would pass the screening process and provide loving homes to children in need. Cross-Appellees' attempt to characterize this case as a conflict between "adult desires," Int Reply Arg 1, and the rights of children therefore has no foundation. The record makes clear that the adult-Plaintiffs and the child-Plaintiffs affected by Act 1 are on the same side—they all seek to eliminate this irrational, and unconstitutional, exclusion of good families.

ARGUMENT

I. The Circuit Court Improperly and Unnecessarily Adjudicated Constitutional Claims That Had No Bearing on the Judgment, Although Counts 5-8 Were Ripe for Adjudication. Once the Circuit Court granted Plaintiffs' motion for summary judgment on Count 10 and declared Act 1 unconstitutional, it was

unnecessary and improper to adjudicate all other constitutional claims raised by Plaintiffs. Should this Court affirm on Count 10, the judgment on other claims should be reversed. Alternatively, to the extent this Court reverses on Count 10, the judgment declaring Act 1 unconstitutional may be affirmed on any other ground asserted by Plaintiffs in their summary judgment motion.

In support of deciding constitutional issues that have no bearing on the outcome of the case, Intervenor-Appellants incorrectly argue that Ark. R. Civ. P. 54(b) required the Circuit Court "to adjudicate all the claims involving all the parties to satisfy the final-judgment rule and render this case appealable." Int Cross Arg 2. In fact, in order to establish appellate jurisdiction, not every claim in every case need be adjudicated once the dispute at issue is resolved. Creating such a rule would further burden trial courts, and require adjudication of claims the parties themselves may have abandoned for all intents and purposes. Here, the Circuit Court could either have entered a Rule 54(b) judgment or entered final judgment that all Counts in the complaint save Count 10 were moot in light of the resolution of Count 10 and the grant of full relief to Plaintiffs.[2] *Dep't of Human*

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[2] Contrary to Defendants' claim, *see* Int Cross Arg 2, a Rule 54(b) judgment would have been appropriate and avoided unnecessary adjudications. *See Eason* v. *Flannigan*, 349 Ark. 1, 5, 75 S.W.3d 702, 705 (2002) (Rule 54(b) judgment not premature if judgment "conclude[s] the merits of the case").

Servs., 367 Ark. at 66, 238 S.W.3d at 9 (quoting *Dodson* v. *Allstate Ins. Co.*, 365 Ark. 458, 462, 231 S.W.3d 711, 714 (2006)).

As to ripeness, Intervenors claim both that the judgment on Claims 5 through 8 should be affirmed, and that such claims were not ripe for determination. *See* Int Cross Arg 19-20. Although Plaintiffs agree that Claims 5 through 8 should not have been adjudicated for the reasons set forth above, those claims were ripe at the time they were filed.

In order for a claim to be ripe for adjudication it must present a concrete, non-hypothetical dispute. *See, e.g., Kurrus* v. *Priest*, 342 Ark. 434, 447-48, 29 S.W.3d 669, 676-77 (2000). Here, Counts 5 and 6 raise claims by parent-Plaintiffs who *currently* have identified caregivers for their children whom they wish to adopt those children, but those parent-Plaintiffs are deprived *now* by Act 1 of the State ever considering the designations they have made.

Counts 7 and 8 are based on the denial *now* to children who are deprived of their parents' choice of adoptive caregiver without any justification—rational or compelling. The result *now* of Act 1 for children whose parents would designate a cohabiting person to adopt them is that either (1) the parents must designate someone other than the parents' best and first choice or (2) the child is deprived of the effect of the parents' choice. Either way, the child-Plaintiffs are denied equal protection by Act 1 because their parents' choice of a cohabiting

person to adopt them is ignored, while a parents' choice of a married or single person is considered. Claims 5 through 8 are ripe, but were unnecessary to reach.

II. Count 9—The Federal Fundamental Right to Intimate Association. Act 1's burden on the fundamental right to intimate association is plain: the statute prohibits persons in intimate relationships from applying to foster or adopt *because* they engage in constitutionally protected conduct.[3]

Contrary to Cross-Appellees' claim, *see* Int Cross Arg 5; Arkansas Department of Human Services, *et al.*'s Cross-Appellees' Response to Cross-Appellants' Brief dated Nov. 19, 2010 ("State Cross") Arg 4-5, the U.S. Supreme Court has long held that penalizing the exercise of a fundamental right by withholding a benefit or privilege (as Act 1 does) triggers strict scrutiny; that standard does not arise only when exercise of the right is barred outright. Thus (i) conditioning eligibility for certain free medical care on living in state for at least one year violated fundamental right to interstate travel, *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250, 257-58 (1974); (ii) conditioning employment as

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[3] Intervenors continue to improperly characterize the right recognized in *Lawrence* v. *Texas* as the right to "private sexual conduct" despite the Supreme Court's explicit rejection of that framing. Int Cross Arg 4-6. Regardless, Act 1 on its face penalizes "private sexual conduct" by barring those who "cohabit with a sexual partner" from applying to serve as an adoptive or foster parent.

teacher on not becoming pregnant violated fundamental right to procreate, *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 640 (1974); (iii) conditioning eligibility for welfare benefits on living in state violated fundamental right to interstate travel, *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969), *overruled in part on other grounds, Edelman* v. *Jordan*, 415 U.S. 651 (1974); (iv) conditioning property tax exemptions on taking a loyalty oath violated fundamental right to freedom of speech, *Speiser* v. *Randall*, 357 U.S. 513, 528-29 (1958); and (v) conditioning eligibility for unemployment benefits on willingness to work on the Sabbath, despite religious beliefs, violated fundamental right to freedom of religion, *Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963). The constitutional analysis employed in these and other cases demonstrates the infirmity of Act 1: conditioning eligibility to adopt or foster on refraining from an intimate relationship outside of marriage violates the right to intimate association.

None of the benefits or privileges threatened in the cases cited above were themselves a fundamental right—but, in every case, the Supreme Court held that the state could not condition those benefits or privileges on not *exercising* a fundamental right. Indeed, the Supreme Court in *Sherbert* expressly rejected the very argument that Cross-Appellees assert here: "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but

merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert,* 374 U.S. at 404.

Cross-Appellees do not even attempt to distinguish these Supreme Court cases, and instead mischaracterize the right that Plaintiffs seek to vindicate as an entitlement to government funding of their relationships. Int Cross Arg 4-5. This argument plainly is wrong because, among other reasons, eliminating Act 1 will not result in any entitlement to Plaintiffs, who will have to submit to the same rigorous evaluation as single and married applicants. Moreover, unlike the women in *Harris* v. *McRae*, 448 U.S. 297 (1980), who could not obtain an abortion because of their indigency, the burden here on Plaintiffs' exercise of the fundamental right is of the State's creation—Act 1 directly penalizes individuals and does so solely because they "cohabit with a sexual partner." As the Court explained in *Harris:* "[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category." *Id.* at 316. Cross-Appellees' argument thus finds no support even in the case on which they rely. By plainly conditioning eligibility to adopt or foster on refraining from exercising a right to engage in intimate relationships. Act 1 impermissibly burdens the federal right recognized by, among other cases, *Lawrence* v. *Texas*.

III. Counts 1 and 2—Substantive Due Process. Cross-Appellees continue to misapprehend the claims raised by the child-Plaintiffs who are asserting their due process rights to have DHS act in accord with what DHS itself decided in 2008 was in these children's best interest: elimination of cohabitation bans because such bans harm children. *See* Supp Abs 446-51. Contrary to Intervenors' assertion, the child-Plaintiffs do not contend that the State has a "nebulous, all encompassing duty 'to promote and care for the well-being of children in [State] custody.'" Int Cross Arg 9.

Indeed, no "new ground" need be broken for the Court to recognize that Act 1 violates the substantive due process rights of children in State care by creating arbitrary barriers to adoption and foster care recognized as harmful by DHS itself. Int Cross Arg 10. The duty owed to children in State custody is not limited to nourishment and physical well-being, Ark. Code Ann. § 9-28-1002 (a)-(b); § 9-28-1003 (a)-(b) (West 2010), but plainly is broad enough to include avoiding the emotional and other harms inflicted on children that DHS itself recognized would occur as a result of a ban like Act 1.

Moreover, the State has previously represented to this Court that it owes a duty of "the highest order" to children in its care that extends far beyond meeting their most basic needs, and that the State stands *in loco parentis* to such children. State Addendum 775; *see also* Appellants' Abstract, Brief, and

Addendum at Arg-4, *Dep't of Human Servs.* v. *Howard*, No. 05-814, 367 Ark. 55 (2006) (filed Nov. 17, 2005) (explaining that "the State's overriding interest must be doing what is in the best interests of children in its care"); *Braam ex rel. Braam* v. *Washington*, 81 P.3d 851, 859 (Wash. 2003) ("the State owes [foster] children more than benign indifference" under the constitutional right to substantive due process).

In the face of these facts (and the litany of evidence provided by *amici*, *see* Amici Curiae Briefs in Support of Appellees dated Oct. 28, 2010), Cross-Appellees' attempt to divest this Court of its constitutional role by claiming that inquiry is closed because a single party expert (who did not in any event claim expertise on parenting by gay couples) claimed that Act 1 is consistent with professional judgment.[4] Int Cross Arg 13. Even under the rational basis test, the mere fact that a party's proposed expert witness says something is not sufficient.

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[4] Intervenors' reliance on the unsupported opinion of law professor Lynn Wardle is similarly misguided. Without basis, Wardle conflates laws restricting *joint* adoption to married couples with laws barring the placement of children with *individuals* in a cohabiting relationship. As Intervenors concede, Arkansas and Utah are the only two states to have enacted cohabitation adoption bans, and the claim that nevertheless such a ban "is generally followed throughout the nation" is nothing more than unsupported speculation. Int Cross Arg 14.

Romer v. *Evans*, 517 U.S. 620, 632-33, 635 (1996) (classification must be grounded in a "factual context"); *see also Howard* v. *CWARB*, No. CV 1999-9881, 2004 WL 3154530, at *6, 8 (Ark. Cir. Ct. Dec. 29, 2004) (refusing to credit expert witness's testimony that gay households are an inferior family structure for raising children).[5]

Finally, cases cited by Cross-Appellees for the proposition that the professional judgment standard should not be applied to legislative actions as opposed to executive acts actually support the opposite conclusion—that legislative acts are subject to *at least* the same scrutiny as executive acts. In those cases, courts note that the standard of review "differ[s] depending on whether it is legislation or specific act of a government official" in order to explain that only challenges to executive acts are required to satisfy the threshold question of whether the act "shocks the conscience." *See, e.g., County of Sacramento* v. *Lewis,* 523 U.S. 833, 846 (1998) (holding that "only the most egregious official conduct" will violate substantive due process in executive act cases).

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[5] Intervenors also make a peculiar attempt to justify Act 1 on the ground that the public debate over the initiative raised awareness about the shortage of adoptive homes. Int Cross Arg 16-17. But as the Intervenors acknowledge, any such effect stems not from Act 1 itself but, rather, from the obvious benefits of public awareness. Clearly, under Act 1, the State will be required to turn away qualified Arkansans, including of course, Plaintiffs.

IV. Counts 5 and 6—Parental Autonomy. Consistent with their narrowing the constitutional rights at issue and mischaracterizing Cross-Appellants' claims, Cross-Appellees claim that (1) parents' fundamental right to make determinations regarding their child's care, does not include "the ability to control who may adopt one's children posthumously through a testamentary instrument" and (2) even if Act 1 adversely impacts this fundamental right, it "does not 'directly and substantially' interfere with, and thus does not 'burden,' that right." State Cross Arg 11-12; Int Cross Arg 25.

To the contrary, Act 1's requirement that a court ignore parents' judgment that, *e.g.*, a cohabiting relative is the best person to adopt their child in the event those parents are incapacitated, impinges on parental autonomy—"perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court. *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000); *see also Linder* v. *Linder*, 348 Ark. 322, 342, 72 S.W.3d 841, 851-52 (2002) (applying *Troxel*). By categorically eliminating the parents' choice (even if a court concludes that carrying out the parents' wish is in the best interests of the child), Act 1 is unconstitutional.

Cross-Appellees' attempt to distinguish *Troxel* and *Linder* because those cases did not involve "testamentary adoptive designations" or the "right to raise [one's] children" is without merit. State Cross Arg 12, 13. The fundamental right recognized in *Troxel* is exercised in many diverse ways. *See, e.g., Meyer* v.

Nebraska, 262 U.S. 390, 399-401 (1923) (fundamental parental autonomy includes right to "establish a home and bring up children" and "to control the education of their own"). Perhaps no exercise of this right is more significant than the one Act 1 prevents: having the State evaluate who a parent believes is best able to adopt the child if the parent can no longer care for her.

Nor does the guardianship exception render Act 1 constitutional. *See* Int Cross Arg 25. For many reasons, guardianship offers inferior emotional and legal benefits as compared to adoption, not the least because guardianship fails to provide permanency. *See, e.g.*, Supp Abs 31-32. Adoption also ensures that the financial 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 2010) (Social Security); 38 U.S.C. §§ 1313, 1542 (West 2010) (veterans benefits); Ark. Code Ann. § 28-9-214 (West 2010) (intestate inheritance).

V. Counts 7 and 8—Children's Right to Equal Protection. The United States Supreme Court has long held that laws that subject children of unmarried parents to disparate treatment must satisfy heightened scrutiny. Cross-Appellants' Brief dated Oct. 28, 2010 Cross Arg 26-27. That those cases did not involve adoption or foster care is beside the point—those cases did not turn on the nature of the benefit being withheld, but on the constitutionality of treating children

differently because of factors beyond their control, such as their parents' marital status. Just like the laws struck down in those cases, Act 1 violates equal protection by treating children differently solely because their designated potential adoptive parents are in unmarried intimate relationships.

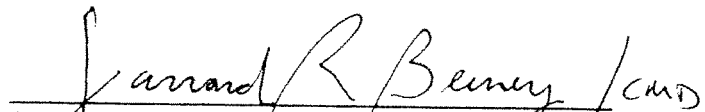
In response, the State claims that "Act 1 does not even identify any different classes of children, and Act 1 explicitly treats all children exactly the same." State Cross Arg. 18. But as this Court has previously recognized, a statute is not immune from equal protection scrutiny simply because the challenged classification does not appear on the face of the statute. *See Bosworth* v. *Pledger*, 305 Ark. 598, 604, 810 S.W.2d 918, 920 (1991). Plainly, Act 1 does create irrational and disparate results for children based on factors beyond their control, and thus is unconstitutional. *See, e.g., 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.")

CONCLUSION

Cross-Appellants respectfully request that the Court affirm the Circuit Court's ruling striking down Act 1 in its entirety. In addition, in light of *Howard* and the complete absence of any evidence undermining that ruling, Cross-Appellants respectfully submit that the principles of *stare decisis* compel upholding the judgment of unconstitutionality as applied to same-sex couples.

Dated: December 7, 2010

RESPECTFULLY SUBMITTED,



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