IN 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.; Cary Kelley and Trina Kelley, on their own behalves, and by, for and on behalf of V.K. and T.K.; 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.; Teresa May, on her own behalf, and by, for and on behalf of her two children, C.A.A. and C.L.A.; Curtis Chatham and Shane Frazier; and Kaytee Wright,

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,



PLAINTIFFS,

NO. CV 2008-14284

DEFENDANTS.

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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## INTRODUCTION

Plaintiffs filed their Complaint seeking to vindicate several well-established constitutional rights that are infringed by the categorical bans created by Initiated Act 1 ("Act 1"). Contrary to the entire basis and thrust of defendants' Motion to Dismiss ("Motion"), the Complaint does not seek to establish a new constitutional "right to adopt" or "right to be adopted." Rather, the Complaint alleges, and plaintiffs seek, the right to demonstrate with evidence that the effect of Act 1 is to burden, penalize, and impinge on well-established constitutional protections—including the right of children in state care not to be harmed, the right to family integrity, the right to manage the care of one's own child, and the right to be free from classifications that violate equal protection and due process.

Plaintiffs—including heterosexual and gay couples willing to provide homes for children in state care, parents seeking to provide for the care of their children, and children in the State's child welfare system—by their Complaint do not ask this Court to establish an unfettered right to adopt or to serve as foster parents. Rather, as made plain in the Complaint, the plaintiffs challenging Act 1's ban on their fostering or adopting children seek only the same treatment extended to all other Arkansas citizens, who are subject to a rigorous, individualized review of their qualifications to provide homes for children in need. Similarly, the child-plaintiffs seek only the same treatment extended to other children in the State: the right to have their individual best interests govern decisions about their welfare.

By categorically depriving gay couples and unmarried heterosexual couples of the opportunity to show that they are fit adoptive or foster parents, Act 1 unconstitutionally threatens and violates constitutional rights such as: the right of families to live together; the right of children to be free from state-imposed harm; and the right of parents to have the State respect

their judgment as to who would be the best adoptive parents for their children in the event of their death or incapacity. The disparate treatment of gay and unmarried couples required by Act 1 impermissibly interferes with such fundamental constitutional rights and violates the guarantee of equal protection under the law.

Defendants' Motion generally describes the rights plaintiffs seek to vindicate by their Complaint, but—as shown in detail below—then goes on to argue against claims of defendants' own making. Plaintiffs therefore submit this memorandum in opposition to demonstrate both (i) the long-recognized constitutional rights they seek to vindicate; and (ii) the facts alleged in the Complaint that support the conclusion that Act 1 constitutes an impermissible infringement of those rights. Plaintiffs respectfully ask this court to deny the Motion and thereby permit plaintiffs to show through evidence the critical constitutional deprivations engendered by Act 1.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. PLAINTIFFS HAVE CHALLENGED ACT 1 AS VIOLATING WELL-ESTABLISHED RIGHTS UNDER THE CONSTITUTIONAL GUARANTEES OF SUBSTANTIVE DUE PROCESS, PRIVACY, AND EQUAL PROTECTION.

On December 30, 2008, plaintiffs brought this lawsuit challenging the constitutionality of Act 1.[1] Act 1 excludes two classes of persons from adopting or fostering: (i) persons living in a gay or lesbian relationship, since they cannot get married in the State of Arkansas; and (ii) persons in an unmarried heterosexual relationship. The complete text of Act 1, which was voted upon on November 4, 2008, is as follows:

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[1] We do not contest the decision of the Attorney General not to be a party to this lawsuit and therefore agree that he should be dismissed from the case as a named defendant. Although the Attorney General has the right to remain a defendant, we defer to his discretion to be dismissed as a party. *See* Ark. Code Ann. § 16-111-106(b) (requiring that "if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of the state shall also be served with a copy of the proceeding and be entitled to be heard.").

**Ballot Title**

A PROPOSED ACT PROVIDING THAT A MINOR MAY NOT BE ADOPTED OR PLACED IN A FOSTER HOME IF THE INDIVIDUAL SEEKING TO ADOPT OR TO SERVE AS A FOSTER PARENT IS COHABITING WITH A SEXUAL PARTNER OUTSIDE OF A MARRIAGE WHICH IS VALID UNDER THE CONSTITUTION AND LAWS OF THIS STATE; STATING THAT THE FOREGOING PROHIBITION APPLIES EQUALLY TO COHABITING OPPOSITE-SEX AND SAME-SEX INDIVIDUALS; STATING THAT THE ACT WILL NOT AFFECT THE GUARDIANSHIP OF MINORS; DEFINING "MINOR" TO MEAN AN INDIVIDUAL UNDER THE AGE OF EIGHTEEN (18) YEARS; STATING THAT THE PUBLIC POLICY OF THE STATE IS TO FAVOR MARRIAGE, AS DEFINED BY THE CONSTITUTION AND LAWS OF THIS STATE, OVER UNMARRIED COHABITATION WITH REGARD TO ADOPTION AND FOSTER CARE; FINDING AND DECLARING ON BEHALF OF THE PEOPLE OF THE STATE THAT IT IS IN THE BEST INTEREST OF CHILDREN IN NEED OF ADOPTION OR FOSTER CARE TO BE REARED IN HOMES IN WHICH ADOPTIVE OR FOSTER PARENTS ARE NOT COHABITING OUTSIDE OF MARRIAGE; PROVIDING THAT THE DIRECTOR OF THE DEPARTMENT OF HUMAN SERVICES SHALL PROMULGATE REGULATIONS CONSISTENT WITH THE ACT; AND PROVIDING THAT THE ACT APPLIES PROSPECTIVELY BEGINNING ON JANUARY 1, 2009.

Section 1: Adoption and foster care of minors.

(a) A minor may not be adopted or placed in a foster home if the individual seeking to adopt or to serve as a foster parent is cohabiting with a sexual partner outside of a marriage which is valid under the constitution and laws of this state.

(b) The prohibition of this section applies equally to cohabiting opposite-sex and same-sex individuals.

Section 2: Guardianship of minors.

This act will not affect the guardianship of minors.

Section 3: Definition.

As used in this act, "minor" means an individual under the age of eighteen (18) years.

> Section 4: Public policy.
>
> The public policy of the state is to favor marriage, as defined by the constitution and laws of this state, over unmarried cohabitation with regard to adoption and foster care.
>
> Section 5: Finding and declaration.
>
> The people of Arkansas find and declare that it is in the best interest of children in need of adoption or foster care to be reared in homes in which adoptive or foster parents are not cohabiting outside of marriage.
>
> Section 6: Regulations:
>
> The Director of the Department of Human Services, or the successor agency or agencies responsible for adoption and foster care, shall promulgate regulations consistent with this act.
>
> Section 7: Prospective application and effective date.
>
> This act applies prospectively beginning on January 1, 2009.

The enforcement of Act 1 would effectively repeal Arkansas law and policy regarding the welfare of children. Section 9-28-903(3) ("Section 903") of the Arkansas Foster Parent Support Act (the "AFPSA") currently provides that foster parents should be "free from discrimination based on . . . marital status." First Amended Complaint ("FAC" or the "Complaint") at ¶¶ 154-59. Because Act 1 creates a classification whereby persons are categorically barred from serving as foster parents solely because they live in an unmarried relationship, if left to stand, the Act would nullify Section 9-28-903(3). *Id.* at ¶ 157.

Moreover, at the time of its enactment, Act 1 was contrary to the policy and practices of the child welfare professionals at defendant Department of Human Services ("DHS"). Indeed, just one month prior to the November 2008 election, defendant DHS rescinded its policy of excluding cohabiting individuals from serving as foster parents. FAC at ¶¶ 85-87. As part of its re-evaluation of that policy, DHS held a public hearing on October 2,

2008, at which numerous witnesses testified. *Id.* at ¶ 85. The witnesses included many professionals in the field of foster care and adoption. *Id.* at ¶ 86. Following the hearing, and consistent with the advice of these child welfare professionals, DHS determined that categorically banning unmarried cohabiting adults from serving as foster parents did not serve the best interests of children in state care. *Id.* at ¶ 87.

With the exception of Act 1, Arkansas laws, regulations, and standards are drafted to screen out foster and adoptive parent applicants who are unsuitable to provide care for a child without unnecessarily excluding individuals who may be best suited to meet a particular child's needs. FAC at ¶ 61. Each applicant undergoes a rigorous individualized evaluation to determine whether he or she would be a suitable parent. *Id.* at ¶¶ 8, 60, 63, 144. After a home is certified via home study as a suitable foster or adoptive home but before a child is placed there, DHS must further determine that the home is matched to the child's individual physical and emotional needs and serves his or her best interests. *Id.* at ¶ 63. Similarly, prior to any adoption, a court must hold an individualized hearing to assess the home study and DHS's recommendations and to determine whether the adoption is in the child's best interest. *Id.* at ¶ 64.

The plaintiffs in this case are children and adults from nearly a dozen families, all of whom would be harmed by the enforcement of Act 1. Plaintiffs come from diverse geographic and economic backgrounds, and two of the adult-plaintiffs have themselves been in the foster care system. Many plaintiffs have experience raising children—including, in one case, a special-needs child adopted out of the state's foster care system.

The adult-plaintiffs in this case include several unmarried couples, both gay and heterosexual, who desire the opportunity to serve as foster or adoptive parents to children in state care. Plaintiffs Stephanie Huffman and Wendy Rickman is one such couple, who have been in a

committed relationship for ten years. FAC at ¶ 19. Because they are both women, Huffman and Rickman are prohibited from marrying under Arkansas law. Huffman and Rickman are both professors at the University of Central Arkansas in Conway. *Id.* In 2003, Huffman adopted a seven-year-old boy who has special needs through Arkansas' Division of Child and Family Services ("DCFS"), a division of defendant DHS. *Id.* DCFS approved Huffman to be an adoptive parent after evaluating both Huffman and Rickman and deeming them capable of providing a good home for the child. *Id.* Huffman and Rickman wish to adopt another child. *Id.* at ¶ 20. Act 1 now categorically excludes them from even being considered by DHS as potential foster or adoptive parents. *Id.*

Similarly, plaintiff Kaytee Wright, a heterosexual woman who lives with her partner of five years, is categorically barred from adopting or fostering without regard to her qualifications, resources, or ability to provide a good home for a child in need. FAC at ¶¶ 44-49. Plaintiff Wright is active with her partner Alan in raising his eight-year-old daughter and has worked with children through numerous organizations, such as camps for children with special needs, summer activity camps, sports performance camps, and church activities. *Id.* at ¶¶ 44, 46. As Wright herself was adopted from state care when she was four weeks old, she feels very strongly that good homes should be provided to children in the state system. *Id.* at ¶ 45.

But for Act 1, the applications of plaintiffs Huffman, Rickman, Wright, and the other adult-plaintiffs who are in gay relationships would be subject to the State's rigorous individualized assessment process. FAC at ¶¶ 63-65. The adult-plaintiffs who wish to provide a home for children in state care do *not* seek through this lawsuit an order *requiring* defendants to allow them to foster or adopt. *Id.* at ¶¶ 143-52. Rather, they seek a declaration that Act 1 is

unconstitutional so that their applications, instead of being automatically rejected, will be subject to the same individualized assessment that applies to married and single applicants.[2] *Id.*

The remaining adult-plaintiffs are parents who object to Act 1's interference with their judgment as parents as to whom, in the event of their death or incapacity, would be the best caregivers for their children. FAC at ¶¶ 129-35. For plaintiffs Cary and Trina Kelley, for example, knowing that their judgment would be respected in the event of tragedy is particularly important. *Id.* at ¶ 30. Trina, who herself was in the Arkansas foster care system from age thirteen until she "aged out" of the system, has first-hand experience of what it is like for a child not to have a stable, loving, and permanent home. *Id.* at ¶ 29. Cary works as a tree trimmer, a job that is inherently dangerous and that has led to the deaths of several of Cary's co-workers. *Id.* at ¶ 28. In the event of their death or incapacity, Cary and Trina desire that Cary's mother adopt their two children. *Id.* at ¶ 30. Cary's mother—the children's grandmother—would be barred from doing so by Act 1 because she lives with, and is not permitted to marry, her same-sex partner of sixteen years. *Id.* at ¶¶ 27, 30. Similarly, plaintiffs Susan Duell-Mitchell and her husband Chris Mitchell desire that their best friends, who already are "uncles" to the Mitchell children, adopt their children in the event of the Mitchells' death or incapacity. *Id.* at ¶¶ 32-35. But under Act 1, defendants are required to give absolutely no weight to the judgment of the Kelleys, the Mitchells, or the other similarly-situated parents concerning their children—solely because the intended caregivers are gay couples who cannot get married in Arkansas. Instead, those designated caregivers must be categorically rejected as adoptive parents.

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[2] Under current DHS regulations, individuals in cohabiting relationships are automatically barred but persons convicted of drunk driving, drug use and distribution, and child abuse are eligible for individualized consideration. 16-15-009 Ark. Code R. § 418, App. C. As plaintiffs will show during discovery, defendants have in fact approved the applications of numerous persons convicted of these or similar crimes to serve as foster/adoptive parents.

For the same reasons, Act 1 deprives the children of the Kelleys, the Mitchells, and those similarly situated of equal protection under the law. Act 1 prevents these children from being adopted by the persons whom their parents, in the event of tragedy, have deemed to be the placement in their children's best interests—solely because of the marital status or sexual orientation[3] of their designated caregivers. FAC at ¶¶ 136-42. In contrast, children whose designated caregivers are not in a cohabiting relationship have the possibility of being adopted by those adults if found by a court to be in their best interests. Accordingly, the child-plaintiffs have challenged Act 1 as unconstitutionally penalizing them for conditions beyond their control.

Plaintiffs have also challenged Act 1 on behalf of children in state care. Plaintiffs have alleged that Act 1 harms children by automatically excluding gay couples who would be fit parents. FAC at ¶¶ 88-115; *see also Dep't of Human Servs. and Child Welfare Review Bd. v. Howard*, 367 Ark. 55, 65, 238 S.W.3d 1, 7 (2006). Plaintiffs also contend that Act 1's ban on unmarried heterosexual couples is detrimental to children in state care because, as evidenced by DHS's own internal policy change in October 2008, there is no child welfare basis for categorically excluding those couples as potential foster or adoptive parents. FAC at ¶¶ 86-87.

Since Act 1 makes no exception for relatives, plaintiffs in this suit include W.H., an infant, and her grandmother Sheila Cole. DHS has initiated termination of parental rights ("TPR") proceedings against W.H.'s parents because of suspected child abuse. FAC at ¶¶ 14-15. But under Act 1, the State is categorically barred from considering Cole, the only suitable relative who could adopt her, as a potential adoptive parent to W.H. *Id.* at ¶ 122. Plaintiffs allege that this result is inconsistent with the best interests of W.H., as evidenced in part by a court order finding that Cole is "a proper person and fully qualified by law to serve as a physical

[3] Because unlike heterosexual couples, gay couples are not permitted to marry under Arkansas law, Act 1 necessarily discriminates on the basis of sexual orientation.

custodian" of W.H. and that it is "in the best interests of W.H." to be in Cole's physical custody pending the outcome of DHS's TPR petition. *In re W.H.*, Case No. J2008-851-D/N, slip op. at 1 (Ark. Cir. Ct. Jan. 13, 2009).[4] Act 1 automatically excludes Cole from adopting W.H. upon termination of parental rights despite their familial relationship and the court's prior findings about W.H.'s best interests. FAC at ¶ 123. Thus, Act 1 will either lead to the placement of W.H. with adoptive parents outside the family or leave W.H. in the custody of Cole, but deprive the child of the permanency and other benefits that flow from an adoptive relationship.

The difference in the benefits that flow from an adoptive versus a guardianship relationship is significant. An adoption decree creates a permanent relationship under which the child is treated as if he or she were a "legitimate blood descendant [to the parent], for all purposes including inheritance and applicability of statutes, documents, and instruments, whether executed before or after the adoption is decreed." Ark. Code Ann. § 9-9-215(a) (2). In contrast, the relationship between a child and a guardian is by its nature impermanent and subject to termination. *See* Ark. Code Ann. §§ 28-65-322, 28-65-401.

There are many important government benefits that are available to adopted children but are denied to children cared for by a guardian. An adopted child is entitled to Social Security survivor benefits flowing from his or her primary caregiver, but a child in a guardianship relationship is not. *See* 42 U.S.C. § 216 (c) (2000) (defining child for the purposes of the Social Security laws as "the child or legally adopted child of an individual").[5] Similarly,

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[4] Plaintiffs ask this Court to take judicial notice of the Order issued on January 13, 2009, case no. J2008-851-D/N issued by the Honorable Judge Finch, in the Circuit Court of Benton County, Arkansas Division III granting temporary custody of W.H. to Sheila Cole (attached hereto as Exh. A).

[5] The difference between an adoptive versus guardianship relationship is even starker for children whose primary caregivers die intestate. In all matters governed by intestate succession, the child placed in the care of a guardian is disregarded entirely. In Arkansas, the estate of an intestate passes first to the intestate's "children." Ark. Code Ann. § 28-9-214. "Child" is defined as "a natural or adopted child, but

dependency compensation to and pensions for surviving children of veterans killed during periods of war are available only to "children" of veterans. *See* 38 U.S.C. § 1313, 1542. "Child" is defined for these purposes as "a legitimate child, a legally adopted child, a stepchild who is a member of a veteran's household or was a member at the time of the veteran's death, or an illegitimate child." 38 U.S.C. § 101 (4) (A). No such provision is made for a child in the care of a guardian, who will receive nothing upon the death of the guardian.

## II. THE CHILD WELFARE ISSUES PRESENTED BY THE COMPLAINT HAVE BEEN SUBJECT TO PREVIOUS LITIGATION IN THIS STATE.

Act 1 was proposed and placed on the ballot after several gay plaintiffs, including gay couples, succeeded in their seven-year-long lawsuit challenging an administrative ban against gay persons, and those living with gay persons, from serving as foster parents. *Howard*, 367 Ark. at 65, 238 S.W.3d at 7. At the time, DHS and the Child Welfare Agency Review Board ("CWARB") asserted that the regulation was necessary to promote child welfare interests. The agencies, who are both defendants in this suit, offered various justifications for the ban, including that gay persons are, relative to heterosexual persons: (i) more likely to engage in domestic violence; (ii) more likely to sexually abuse children; (iii) more likely to be sexually promiscuous and unfaithful to their partners, and (iv) more likely to engage in drug and alcohol abuse.[6] *Id.*; *see also Howard v. CWARB*, No. CV 1999-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004) (Memorandum Opinion). At trial, the court heard and weighed the 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

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does not include a grandchild or other more remote descendant or an illegitimate [unless the illegitimate can comply with certain requirements of proof]." Ark. Code Ann. § 28-1-102(a)(1). Accordingly, if the guardian should die intestate, the child in his or her care will inherit nothing.

[6] These rationales, rejected in *Howard*, are identical to the rationales identified in the Motion as supporting Act 1's adoption and foster care ban. *See* Motion at 25.

and CWARB's proffered reasons for instituting the ban. *Howard*, 2004 WL 3154530, Memorandum Opinion at *2-7.

In its comprehensive Findings of Fact and Conclusions of Law issued after the trial on the merits, the circuit court specifically rejected each of the purported rationales behind the ban. *Howard v. CWARB*, No. CV 1999-9881, 2004 WL 3200916 (Ark. Cir. Ct. Dec. 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 at ¶¶ 4-6.

The court also accepted the testimony of plaintiffs' expert, Dr. Michael Lamb,[7] concerning the predictors for healthy child adjustment. Based on Dr. Lamb's testimony, the court concluded that the following factors, unrelated to sexual orientation, were the best predictors of healthy child adjustment: "(i) the quality of the child's relationship with the parent primarily responsible for his or her care; (ii) the relationship the child has with another parent figure; (iii) the quality of the relationships between the adults; and (iv) the resources available to the child." *Howard*, 2004 WL 3200916, Findings of Fact at ¶ 27. The circuit court's ruling was consistent with what mainstream child welfare organizations, including the Child Welfare League of America ("CWLA") and the National Association of Social Workers ("NASW"), consider to be the best practice with respect to placement of children: "Determination of the foster home that is most appropriate for each child should be based on a careful and thorough

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[7] The circuit court in *Howard* credited Dr. Lamb as the "most outstanding of the expert witnesses" and noted that of "all of the trials in which the court has participated, whether as a member of the bench or of the bar, Dr. Lamb may have been the best example of what an expert witness is supposed to do in a trial." *Howard*, 2004 WL 3154530, Memorandum Opinion at *8.

assessment of each individual child, his or her circumstances and conditions, strengths and needs, at the time of placement." *Id.* at ¶ 24; *see also id.* at ¶¶ 25-26 (noting that both CWLA and NASW oppose categorical exclusions based on sexual orientation and marital status).

On June 29, 2006, by unanimous vote, the Arkansas Supreme Court affirmed the trial court's decision. Relying on the factual findings of the circuit court, the 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*, 2004 WL 3154530, Memorandum Opinion at *6. Because the Court struck down the regulation as violating the doctrine of separation-of-powers, it did not address the plaintiffs' equal protection and privacy claims. *Howard*, 367 Ark. at 66, 238 S.W.3d at 8-9.

However, in a separate concurring opinion, Justice Brown concluded that the regulation "overtly and significantly burden[ed] the privacy rights" of gay couples and individuals, and thus was subject to strict scrutiny. *Howard*, 367 Ark. at 68, 238 S.W.3d at 10. (Brown, J., concurring) (citing *Jegley v. Picado,* 349 Ark. 600, 80 S.W.3d 332 (2002)). Rejecting DHS's argument that "prohibiting foster-parent status due to sexual activity in the bedroom is categorically different from making the conduct a misdemeanor," Justice Brown explained that in both instances "gay and lesbian couples are saddled with an infirmity due to sexual orientation." *Howard*, 367 Ark. at 68, 238 S.W.3d at 10 (Brown, J., concurring). Because DHS had "present[ed] nothing" to support its premise that placing children with gay

couples would be harmful to those children's interests, Justice Brown found that the exclusion could not satisfy rational basis review, much less strict scrutiny. *Id.* at 69-70, 80 S.W.3d at 10-11 (noting that "the Board's proffered reasons surrounding best interest of the child are gossamer thin and have no foundation in objective research").

## ARGUMENT

### I. STANDARD OF REVIEW

When considering a motion to dismiss, the court must treat the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff. *King v. Whitfield,* 339 Ark. 176, 178, 5 S.W.3d 21, 22 (1999); *Neal v. Wilson*, 316 Ark. 588, 595-96, 873 S.W.2d 552, 556 (1994). In viewing the facts in the light most favorable to the plaintiff, the facts should be liberally construed in plaintiff's favor. *Rothbaum v. Ark. Local Police & Fire Retirement Syst.,* 346 Ark. 171, 174, 55 S.W.3d 760, 762 (2001); *Martin v. Equitable Life Assur. Soc'y of the U.S.*, 344 Ark. 177, 180, 40 S.W.3d 733, 736 (2001). All reasonable inferences must be resolved in favor of the complaint, and a trial judge must look only to the allegations in the complaint to decide a motion to dismiss. *Fuqua v. Flowers*, 341 Ark. 901, 904, 20 S.W.3d 388, 390 (2000).

As to the substance of plaintiffs' claims, defendants correctly note that the federal constitution provides valuable guidance in interpreting the rights guaranteed by state constitutions, including that of Arkansas. *See* Motion at 7. Contrary to defendants' assertions, however, the individual rights guaranteed by this State's constitution are not necessarily "in parity" with those guaranteed under the federal constitution. *See Jegley,* 349 Ark. at 631, 80 S.W.3d at 349 (holding the State constitution's right to privacy to be more robust than its federal counterpart). As the Arkansas Supreme Court recently noted, "[w]e have recognized protection

of individual rights greater than the federal floor in a number of cases." *Id.* at 631, 80 S.W.3d at 349.

## II. COUNTS 1 AND 2: PLAINTIFFS ADEQUATELY PLEAD THAT ACT 1 VIOLATES THE DUE PROCESS RIGHTS OF CHILDREN IN STATE CARE NOT TO BE HARMED BY THE STATE.

### A. Defendants' motion to dismiss Counts 1 and 2 is addressed at claims that plaintiffs do not assert, and thus should be denied for that reason alone.

Counts 1 and 2 adequately plead a violation of the well-established constitutional right of children who have been taken into the custody of the State not to be harmed by the State. Plaintiffs assert, *inter alia*, that Act 1 violates the due process rights of children in state custody because the Act forces the State to arbitrarily deprive those children of available fit and appropriate adoptive and foster families, causing them serious harm. FAC at ¶¶ 7-9, 70-71, 83, 86-97, 102-16. Defendants correctly paraphrase the nature of the claims pleaded, but the motion to dismiss is directed at completely different claims that are not the basis of the Complaint. Rather than address the substance of plaintiffs' claims that Act 1 harms wards of the State in violation of the Due Process clause, defendants address a claim of their own making: whether children in state care have an absolute right to be fostered or adopted. But plaintiffs do not assert a right to be fostered or adopted in either these two counts or any other count in the Complaint. Accordingly, defendants' failure to address plaintiffs' actual due process claims as pled in the Complaint is alone a basis to deny the motion to dismiss Counts 1 and 2. *See JurisDictionUSA, Inc. v. Loislaw.com, Inc.*, 357 Ark. 403, 409, 183 S.W.3d 560, 564 (2004) (new issues may not ordinarily be raised on reply, absent intervening circumstances such as new authority).

### B. The claim in Counts 1 and 2 is well-established: children in the State's custody, care, or control have a substantive due process right not to be harmed by their government custodian.

When the State takes an individual into its custody, the Due Process clause imposes upon 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 affirmative duty stems from the fact that, by depriving an individual of his or her liberty, the State has created a situation of dependence between itself and the individual. *Id.; see also Norfleet v. Ark. Dep't of Human Servs,* 989 F.2d 289, 292-93 (8th Cir. 1993).

The State's affirmative duty under the Due Process clause to children in its care is well-established. Because "[f]oster children, like the incarcerated or the involuntarily committed, 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 (in denying qualified immunity, holding that "it was clearly established in 1991 that the state had an obligation to provide adequate medical care, protection and supervision" to children in foster care); *Clark v. Reiss*, 38 Ark. App. 150, 152, 831 S.W.2d 622, 624 (1992) ("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.").

Indeed, the child welfare system rests on the premise that the State will act in the best interests of each individual child that it takes into its custody.[8] *Id.* at 152, 831 S.W.2d at 624 ("The prime concern and controlling factor is the best interest of the child, and the court in its sound discretion will look into the peculiar circumstances of each case and act as the welfare of the child appears to require.").[9] This constitutional duty to act in a child's best interests extends not only to the child welfare professionals within DHS but also to the courts in dependency and other proceedings where the rights of children in state care are at issue. *Ark. Dep't of Human Servs. v. Couch,* 38 Ark. App. 165, 168, 832 S.W.2d 265, 267 (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.").

The precise nature of this due process duty owed to children in state care has been defined by courts in varying ways in a number of different contexts. At a very minimum, the right to substantive due process requires that the defendants not take actions that inflict unnecessary and unjustified harm on the children in its care. *DeShaney*, 489 U.S. at 200-01. Under the federal constitution,[10] in the context of cases seeking monetary liability against the

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[8] The primacy of the best interests of the child and the State's obligation to find a permanent home for the child flows 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 . . .").

[9] The State has itself acknowledged that it stands *in loco parentis* to the foster children in its care. In its brief (relevant page attached hereto as Exh. B) filed on November 17, 2005, in the Arkansas Supreme Court in *Howard*, the State acknowledged the primacy of the State's duty to act in the best interests of children in its care: "When a child is brought into foster care, the State of Arkansas stands *in loco parentis*. Thus, the State's overriding interest must be doing what is in the best interest of the children in its care . . . . The State has a duty of the highest order to protect the interest of minor children."). *See also Howard,* 2004 WL 3200916, Conclusions of Law at ¶ 1 ("The State of Arkansas stands *in loco parentis* to foster children in Arkansas.").

[10] While the Arkansas Supreme Court has not expressly delineated the standard of review that applies to substantive due process claims for violations of the State's affirmative duty to children in its

state for violations of the duty of care, courts have found liability if the state failed 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). Other courts have also applied the "professional judgment" standard to 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) (applying the *Youngberg* standard and holding that in an action alleging injuries sustained in a foster care setting, a plaintiff would have to show that 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 when exercising "a bona fide professional judgment" regarding placement of children in state custody); *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").[11]

Other courts have adopted a "deliberate indifference" standard to determine whether there has been a violation of due process to children in state care in cases involving claims for monetary liability. *White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997) (liability if

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care, it is clear that the Arkansas Constitution in some circumstances recognizes greater due process rights than those set forth in the United States Constitution. *Jegley*, 349 Ark. at 631, 80 S.W.3d at 349. For example, the Arkansas Constitution contains the guarantee of the pursuit of "happiness," language not found in its federal counterpart. Ark. Const. art 2, §2.

[11] *See also T.M. ex rel. R.T. v. Carson*, 93 F. Supp. 2d 1179, 1187-95 (D. Wyo. 2000) (denying a motion for summary judgment and 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).

defendant was "plainly placed on notice of a danger and chose to ignore the danger"); *see also Norfleet*, 989 F.2d at 291 (applying deliberate indifference standard in case involving monetary liability of state for harm inflicted by third party to foster child).

While courts have defined the due process duty in different ways, it is beyond contravention both that such a duty exists and that, under either standard, the Due Process clause requires something more than an ad hoc rational basis to justify actions that harm children in state care. Plaintiffs respectfully suggest, however, that this court need not resolve in the limited context of a motion to dismiss which standard should apply because, as discussed below, under any standard, plaintiffs have adequately stated a claim that Act 1 violates the substantive due process rights of children in the State's child welfare system.[12]

### C. The plaintiffs have alleged facts that if proven at trial would establish that Act 1 violates the duty of care owed to children in state care.

Plaintiffs have alleged facts, accepted as true for purposes of this Motion, that under any applicable standard Act 1 violates the State's constitutionally-mandated duty to children in its custody. Specifically, plaintiffs have alleged and will present proof at trial that Act 1 harms children in State care by denying some of them the home that is most appropriate for their needs and by limiting the opportunities for all of these children to have any foster or adoptive parent at all, condemning more of them to growing up without ever becoming part of a

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[12] Although the court need not resolve this issue at this early procedural stage, ultimately, plaintiffs submit that the "professional judgment" standard is a more appropriate analytic framework than the "deliberate indifference" standard. In *Youngberg*, the Court distinguished instances of non-punitive state custody from the "deliberate indifference" standard applicable to prisoners under *Estelle v. Gamble*, 429 U.S. 97 (1976). *Youngberg*, 457 U.S. at 321-22. The Court ruled that a person involuntarily committed and thereby dependent on the government for basic needs was "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Id.* *See also Braam*, 81 P.3d at 859 (comparing *Youngberg* and cases applying the "deliberate indifference" standard and concluding that "the State owes [foster] children more than benign indifference and must affirmatively take reasonable steps to provide for their care and safety").

family.[13] FAC at ¶¶ 7-9 70-71, 83, 85-87, 102-116. Plaintiffs further have alleged, and the evidence will show, that preexisting Arkansas policy already protects the best interests of children—which defendants must deem paramount—by screening all prospective adoptive and foster parents to determine their suitability to care for a child. *Id.* at ¶¶ 8, 60-64. Thus, Act 1's only accomplishment is to deprive children of placement with adults who would be deemed suitable and appropriate adoptive or foster parents. *Id.* at ¶¶ 65-69, 94-106, 108-09. In sum, plaintiffs have pled that Act 1 serves no purpose other than to harm children, in clear violation of the State's constitutional duty. In addition, plaintiffs have alleged that, in at least some instances, Act 1 will lead to placements that are not in a child's best interests because Act 1 requires defendants to automatically exclude the person who would be most suited to take care of that child's needs.[14] *Id.* at ¶¶ 7-9, 14-18, 63-65, 108-09.

The above allegations in the Complaint sufficiently plead that Act 1's mandate that Arkansas' neediest children be removed from, or denied access to, loving and qualified adoptive or foster parents fails under any applicable standard of review. Plaintiffs have alleged, and will show at trial, that Act 1 fails to meet the "accepted professional judgment, practice, or

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[13] Evidence at trial will establish that DHS's own statistics show that a significant percentage of foster children are awaiting permanent placements, that a large number of foster children are placed in residential group homes or other state facilities because there is a shortage of foster families, and that a significant number "age out" of foster care every year without ever finding a permanent family. *See* "Arkansas DHS Statistical Report" (SFY 2008), *available at* www.state.ar.us/dhs/AnnualStatRpts/dhs2008stats/ASR%202008%20Internet%20ADA/DCFS%20ADA%202008.xls; FAC at ¶¶ 9, 99-103. Moreover, plaintiffs have alleged and will show that the shortage of available adoptive parents causes serious and irreparable harm to children, especially to those who "age out" of the foster care system. *Id.* at ¶¶ 100-01. *See also* Keely A. Magyar, *Betwixt and Between But Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care*, 79 Temple L. Rev. 557, 573-79 (2006) (discussing studies and noting that "research demonstrates that over the past two decades, many of the nearly a quarter of a million individuals who aged out of foster care began living independently without the skills and resources necessary to succeed as adults").

[14] For example, Act 1 categorically bars defendants from approving W.H.'s grandmother, Sheila Cole, as an adoptive parent of W.H. even though a court has deemed placement with Cole as W.H.'s custodian to be in the child's best interest. *See* Exh. A (attached).

standards" of child welfare professionals. *See Youngberg*, 457 U.S. at 314.[15] Plaintiffs have also alleged facts, deemed true in the context of defendants' Motion, that demonstrate that if Act 1 is not enjoined, the State will violate its constitutional duty to children in its care by being "deliberately indifferent" to the harm the Act causes to them. *See Norfleet*, 989 F.2d at 291 Finally, as discussed in Argument Section VI (B), *infra*, plaintiffs have alleged sufficient facts to support the conclusion that Act 1 does not satisfy even the most deferential standard: the rational basis test.[16] The motion to dismiss Counts 1 and 2 should be denied.

## III. COUNTS 3 AND 4: PLAINTIFFS HAVE ADEQUATELY PLED THAT ACT 1 DENIES SHEILA COLE AND HER GRANDDAUGHTER, W.H., THEIR CONSTITUTIONAL RIGHT TO FAMILY INTEGRITY.

Counts 3 and 4 concern the well-established constitutional right of plaintiffs Sheila Cole and W.H., Cole's granddaughter, to maintain the integrity of their family without undue interference by the government. Plaintiffs have alleged facts demonstrating that Act 1 impermissibly interferes with their familial relationship. FAC at ¶¶ 9, 14-18, 118-28. As with the defendants' arguments concerning Counts 1 and 2, the motion to dismiss Counts 3 and 4 does not address the actual claims pled in the Complaint. Instead the Motion addresses phantom assertions that the status of being a grandparent entitles one to a constitutional right to adopt one's grandchild or that children have a constitutional right to be adopted by a particular

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[15] Plaintiffs allege and will prove at trial that, as DHS's own policy change just prior to the enactment of Act 1 demonstrates, the categorical exclusion of gay couples and unmarried couples from serving as foster and adoptive parents is contrary to the judgment of child welfare professionals. FAC at ¶¶ 77, 84-87; *see also* Factual and Procedural Background Section II, *supra* (discussing policy statements of the Child Welfare League of America and the National Association of Social Workers).

[16] As discussed in Argument Section VI (B)(b), *infra*, the rationales proffered by the State are either irrelevant as a matter of law or premised on factual conclusions that cannot be decided on a motion to dismiss. For example, with respect to the asserted goal of "promoting marriage," plaintiffs respectfully submit that the State may not advance that interest at the expense of children in its care, particularly of those children who may never be placed with a family at all as a result of Act 1's misguided blanket exclusion of fit adoptive and foster parents. If Act 1 is to stand, it must be because the Act itself is rationally related to promoting the best interests of children.

individual.[17] Because neither Count 3 nor 4 (nor any other of plaintiffs' claims) asserts a constitutional right to adopt or be adopted, defendants' Motion must be denied.

The claim actually pled in Counts 3 and 4 is the violation of the uncontroverted constitutional right to family integrity. The United States Supreme Court has long recognized that "the Constitution protects the sanctity of the family," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), and that the right to make personal choices in matters of family life "is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974). "[T]he Bill of Rights is designed to secure individual liberty, [and] it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *compare Moore*, 431 U.S. 494, with *Doe v. Miller*, 405 F.3d 700, 710 (8th Cir. 2005) (residency ordinance that merely restricts the *location* of a home as opposed to who may live together in a home does not violate substantive due process because "nothing in the statute limit[ed] who may live with" plaintiffs). "Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Roberts*, 468 U.S. at 619. Specifically, "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id.* at 619-20.

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[17] Contrary to the defendants' description, *Georgina G. v. Terry M.*, 516 N.W.2d 678 (Wis. 1994), did not involve a law barring adoption by a cohabiting adult. The issue in that case was whether Wisconsin's adoption law allows an individual to adopt her unmarried partner's child without severing the parent's parental rights. *Id.*

In *Moore*, the United States Supreme Court recognized that the fundamental right to family integrity extends beyond certain traditional notions of the "nuclear" family. 431 U.S. at 504. The Court struck down a zoning ordinance that would have prohibited a grandmother from continuing to live with her grandson. In invalidating the ordinance that limited occupancy in a home to members of a "single family," defined to exclude families like Mrs. Moore's, the Court reasoned that that type of ordinance "slic[ed] deeply into the family itself." *Id.* at 495-96, 498. The Court held that "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id.*; *see also Roberts*, 468 U.S. at 619 (recognizing that among the relationships that are within constitutional protection "are those that attend the creation and sustenance of a family—marriage . . . the raising and education of children . . . and *cohabitation with one's relatives*") (emphasis added) (internal citations omitted).

Counts 3 and 4 adequately plead that Act 1, if not enjoined, threatens W.H.'s and Cole's well-recognized constitutional right to family integrity. Cole is W.H.'s grandmother. FAC at ¶ 15. She has been a part of her granddaughter's life since the child was born. *Id.* at ¶ 16. Immediately upon learning that the State intended to terminate the rights of W.H.'s parents, Cole sought to have W.H. placed with her. *Id.* To that end, Cole obtained a home study in Oklahoma, where she resides, and was approved as a qualified foster parent. *Id.* Prior to a January 13, 2009 hearing for custody of W.H., Cole made a weekly, six-hour roundtrip drive from her home in Oklahoma to Arkansas to visit her granddaughter for the allotted two-hour time period. *Id.* at ¶ 17. At the January 13 hearing, Cole was found to be "fully qualified by law" to serve as W.H.'s custodian and the court found that it was in the best interest of W.H. that Sheila be awarded temporary custody and, therefore, did so. *See* Exh. A

If DHS succeeds in its efforts to terminate the rights of W.H.'s parents, there is a significant risk that W.H. will be removed from her grandmother's care, in violation of their right to familial integrity. Although Act 1 does not on its face apply to guardianships, defendants have taken the position that the statute prohibits them 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 Proposed Order Re: Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order ("Joint Stipulation") (entered Jan. 12, 2009) at 2 (emphasis added). Given the State's policy of favoring permanent placements over others, *Lloyd,* 343 Ark. at 624, 37 S.W.3d at 606, absent a representation by the defendants that it will not seek to place W.H. with persons other than Cole, Act 1 poses a significant risk to W.H.'s and Cole's family integrity.

Further, but for Act 1, Cole would be eligible to adopt W.H. upon termination of the parents' rights, a step which would ensure that W.H. could remain permanently with her grandmother. Cole's inability to adopt her granddaughter (based on reasons unrelated to her ability to care for the child) denies the family the security against intrusion that comes with adoption. Adoptive parent-child relationships, like biological parent-child relationships, cannot be severed or otherwise intruded upon by courts absent a determination of parental unfitness. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); Ark. Code Ann. 9-9-215(a)(2) (adoption decree creates equivalent of blood relationship). No such security attends a "custodial" placement. *See* Ark. Code Ann. §§ 28-65-322, 28-65-401. By automatically disqualifying Cole from adopting her granddaughter (without any consideration of whether she is qualified or whether the adoption is in the best interests of the child) and, thus, exposing this family to the risk of being separated

solely because Cole lives with her same-sex partner, Act 1 threatens plaintiffs' fundamental right to family integrity. As in *Moore*, where the zoning legislation was found to impermissibly interfere with a family's right to remain together, the State cannot withhold from Cole and W.H. the security provided by adoption and impose upon them the risk that they will be separated by the State, unless the State can prove at trial a compelling interest that justifies this intrusion. Like the plaintiffs in *Moore*, who did not assert an absolute right to be free from all zoning regulations, plaintiffs do not assert or seek an absolute right to adopt. Rather, plaintiffs claim that by erecting an insurmountable barrier that jeopardizes the ability of Cole and W.H. to remain together as a family, Act 1 violates the state and federal constitutions.

Plaintiffs have alleged that there is no compelling government interest narrowly tailored to support Act 1's threat to W.H.'s and Cole's family integrity. FAC at ¶¶ 110, 124. In light of the facts pled in the Complaint, defendants in their Motion have not proved (and could not prove) such an interest as a matter of law. *See, e.g., Jegley*, 349 Ark. at 633, 80 S.W.3d at 350 (burden on fundamental constitutional right must be evaluated under strict scrutiny); *Moore*, 431 U.S. at 499 ("[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interest advanced and the extent to which they are served by the challenged regulation."). While defendants claim that they can justify the deprivation caused by Act 1, this is a disputed fact that must be decided based on evidence presented at trial, not on a motion to dismiss. The motion to dismiss Counts 3 and 4 should be denied.

## IV. COUNTS 5 AND 6: THE PARENT-PLAINTIFFS HAVE ADEQUATELY PLED ACT 1 VIOLATES THEIR CONSTITUTIONAL RIGHT AGAINST STATE INTERFERENCE IN THE CARE, CUSTODY, AND MANAGEMENT OF THEIR CHILDREN, WHICH INCLUDES PLANNING FOR THEIR CARE IN THE EVENT OF PARENTAL DEATH OR INCAPACITY.

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). 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."). Akin to the right to direct a child's religious upbringing and education, planning for the care of children in the event of parental death or incapacity is one of the most important decisions a parent can make. *See Comerford v. Cherry*, 100 So.2d 385, 390 (Fla. 1958) ("A judge treads on sacred ground when he overrides the directions of the deceased with reference to the custody of his children."); *Bristol v. Brundage*, 589 A.2d 1, 2 n.2 (Conn. App. Ct. 1991) (sole surviving parent's testamentary appointment must be given rebuttable presumption that it is in the best interests of his or her child).

Where the government seeks to intrude upon a fit parent's decisions about his or her child, unless there is a competing fundamental interest, it must show that the intrusion is narrowly tailored to meet a compelling interest. *Linder v. Linder*, 348 Ark. 322, 347-48, 72 S.W.3d 841, 855 (2002) (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 point to the independent role of DHS and the courts in the adoption process for the premise that the testamentary wishes of deceased or incapacitated parents need not be considered by a court in making a placement decision. Motion at 14-15. Thus, according to defendants, the parent-plaintiffs' claims must be dismissed because no person has the right to "control[] who, if anyone, might someday adopt their children." *Id.* at 14.

Defendants' arguments are flawed and their Motion should be denied. The parent-plaintiffs recognize that they do not have the absolute right to dictate the adoptive placement of their children through their testamentary wishes. But they do have a protected right to provide a recommendation that will be given weight by the State in considering the best interests of their children. Accordingly, what parent-plaintiffs object to is the fact that Act 1 will require defendants to automatically reject their judgment, as fit parents, as to who would be the best adoptive placement for their children if tragedy were to strike.[18] Moreover, to the extent that it is defendants' claim that neither courts of the state nor DHS gives any preference or special weight to a fit parent's testamentary wishes in evaluating an adoption petition under the

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[18] Act 1 on its face does not apply to the status of legal guardianships and thus presumably would not prohibit a probate court from executing a parent's testamentary wish that a cohabiting person serve as a legal guardian to her child. However, that does not end the inquiry as to whether Act 1 violates these plaintiffs' and their children's constitutional rights. As discussed in Factual and Procedural Background Section I, *supra*, guardianships are by their very nature a status inferior to adoption, particularly for the child. Moreover, defendants have broadly construed Act 1 to prohibit DHS from recommending placement of any kind, including a guardianship, to a cohabiting person even if that placement would be in that child's best interest. Joint Stipulation at 2. Because DHS's recommendations in the context of child welfare placements is given significant weight, Act 1 will in at least some situations place a barrier to guardianship petitions by persons in same-sex and unmarried heterosexual relationships.

best interests test, those practices or policies are unconstitutional. *Linder*, 348 Ark. at 350-51, 72 S.W.3d at 856-57; *Troxel*, 530 U.S. at 70.

Because the parent-plaintiffs have a fundamental right to parental autonomy which is burdened by Act 1, the law is unconstitutional unless it is narrowly tailored to further a compelling government interest. *Linder*, 348 Ark. at 347-48, 72 S.W.3d at 855. This is a disputed fact that must be decided based on evidence presented at trial, not on a motion to dismiss. The motion to dismiss Counts 5 and 6 should therefore be denied.

## V. COUNTS 7 AND 8: THE CHILD-PLAINTIFFS HAVE ADEQUATELY PLED A VIOLATION OF THEIR EQUAL PROTECTION RIGHTS.

Counts 7 and 8 of the Complaint claim that Act 1 violates the equal protection rights of children whose parents have designated individuals in same-sex or unmarried heterosexual relationships to care for and adopt them in the event of parental death or incapacity. Defendants' only argument against this claim is the assertion that because parents do not have the right to decide who will adopt their children, there can be no equal protection violation. Motion at 17. Defendants' argument misconstrues the issues before the Court. The child-plaintiffs do not assert that their parents have the right to control the adoption process. As discussed below, 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 a cohabiting relationship. The effect of this unlawful classification is to significantly disadvantage the child-plaintiffs by depriving them of the possibility of obtaining the benefits of an adoptive relationship with the adult deemed by their parents best suited to meet their needs, solely based on factors beyond the children's control: the marital status or sexual orientation of their

designated caregivers. This classification is not substantially—or even rationally—related to a legitimate government interest.[19] FAC at ¶¶ 136-42.

Both the state and federal constitutions prohibit disparate treatment of similarly situated persons. A statute violates the right of equal protection when it "provides dissimilar treatment for [persons] who are similarly situated." *Jegley*, 349 Ark. at 633, 80 S.W.3d at 350 (2002) (citing *Reed v. Reed*, 404 U.S. 71, 92 (1971)). The Arkansas Equal Rights Amendment 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. In accordance with these principles, 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 Casualty & Surety Co.*, 406 U.S. 164, 175-76 (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. 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.* Indeed, 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,*

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[19] Plaintiffs have appropriately analyzed these claims under the "substantial relationship" test set forth in the analogous United States Supreme Court cases. To the extent that the Court determines that Counts 7 and 8 should be analyzed under the rational basis test, plaintiffs submit that no rational basis exists and will prove as much with evidence at trial.

*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 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").

The rationale of *Weber* has been extended beyond the class of children born out of wedlock. In *Plyler v. Doe*, 457 U.S. 202, 205 (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. Applying a heightened level of scrutiny, the Court found that the children's "'parents have the ability to conform their conduct to societal norms,' and presumably the ability to remove themselves from the State's jurisdiction; but the children . . . 'can affect neither their parents' conduct nor their own status.'" *Id.* at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)). Because the law imposed a "lifetime hardship on a discrete class of children not accountable for their disabling status," the Court examined whether the state's legislative goals and the evidence to support those goals was sufficiently substantial to outweigh the "countervailing costs" of discriminating against "innocent children." *Id.* at 223-24. The Court held that a substantial state interest had not been shown and affirmed the lower court's injunction against enforcement of the statute. *Id.* at 230.

Here, the child-plaintiffs and similarly situated children are no more able to control the marital status or sexual orientation of their designated caregivers than the class of children who were excluded from public education in *Plyler* could affect their parents' conduct or their own undocumented status. Defendants concede that Arkansas courts may consider the

testamentary wishes of parents concerning the designation of a caregiver.[20] Motion at 14-15. By categorically prohibiting adults living in a same-sex or unmarried heterosexual relationship from adopting or fostering children, Act 1 divides similarly situated children into two categories: those for whom defendants 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 if adoption by the designated caregiver would be in the best interests of the child. Because there is a dispute of fact over whether the classification under Act 1 serves any substantial, or even rational, relationship to a legitimate state interest, the motion to dismiss Counts 7 and 8 should be denied.

## VI. COUNTS 9 AND 10: THE PLAINTIFF-COUPLES HAVE ADEQUATELY PLED A VIOLATION OF THEIR EQUAL PROTECTION RIGHTS

The adult-plaintiffs who are excluded from fostering or adopting under Act 1 have also challenged the statute as violating the Equal Protection clauses of the state and federal constitutions. Plaintiffs contend that Act 1's classifications based on marital status and sexual orientation are invalid because they serve no child welfare basis. FAC at ¶¶ 77, 86, 143-52; *see also Howard*, 367 Ark. at 65, 28 S.W.3d at 7. Plaintiffs further contend that Act 1 penalizes individuals solely for engaging in their constitutionally protected right to intimate association and therefore is subject to strict scrutiny—a test that the statute cannot come close to satisfying. FAC at ¶¶ 145, 151.

### A. Plaintiffs have adequately pled a claim that the classifications in Act 1 penalize a fundamental right.

[20] As set forth in Argument Section IV, the fundamental right to parental autonomy requires the defendants to give presumption to a fit parent's decisions concerning his or her child, including decisions about the care of the child in the event of parental death or incapacity.

It is well-established that where a government classification burdens or penalizes the exercise of a fundamental right, 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 Center*, 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); *Bosworth v. Pledger*, 305 Ark. 598, 604-05, 810 S.W.2d 918, 921 (1991). This time-honored test applies here: Act 1 explicitly penalizes individuals for exercising their right to form an intimate relationship, that is, the right to live with a same-sex or unmarried partner. *See Jegley*, 349 Ark. at 632, 80 S.W.3d at 350; *see also Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972) (striking down as a violation of substantive due process law barring sale of contraceptives to unmarried 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"); *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").

Defendants assert that Act 1 does not infringe plaintiffs' fundamental right to intimate association because the right to adopt or foster is a privilege. Motion at 18. Defendants are incorrect as a matter of law. Contrary to defendants' assertions, strict scrutiny is triggered whenever the government burdens the exercise of a fundamental right, whether by criminalizing and/or completely barring the exercise of the protected activity, *see, e.g., Loving v. Virginia*, 388

U.S. 1 (1967), or by "penalizing"[21] them by withholding a benefit or privilege because they have exercised the right. Indeed, the United States Supreme Court has struck down laws conditioning the following benefits and privileges on the individual's cessation of the fundamental right at stake:

- Conditioning eligibility for free non-emergency hospital or medical care on living in state for at least a year violated fundamental right to interstate travel, *Memorial Hosp. v. Maricopa County.*, 415 U.S. 250, 257-58 (1974);
- Conditioning employment as teacher on not becoming pregnant violated fundamental right to procreate, *Cleveland Bd. of Educ.*, 414 U.S. at 640;
- 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);
- 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);
- Conditioning eligibility for unemployment benefits on willingness to work on the Sabbath, despite employee's religious beliefs, violated fundamental right to freedom of religion, *Sherbert v. Verner,* 374 U.S. 398, 404 (1963).

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[21] The term "penalize" can connote punishment, but as the cases discussed *infra* show, the Court uses the term more broadly to refer to acts by the government that purposefully disadvantage people, whether or not the intent is to punish.

None of the benefits or privileges threatened in these cases was itself a fundamental right—instead, as with adoption and foster care, they were all statutory creations. But, in every case, the Court held that the state could not condition those benefits or privileges on not exercising a fundamental right. Indeed, the Supreme Court has expressly rejected the very argument that defendants 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; *see also id.* at 404 n.6 (citing "examples of conditions and qualifications upon governmental privileges and benefits which have been invalidated because of their tendency to inhibit constitutionally protected activity"). As these cases and others demonstrate, it is clear that when a statute conditions a government privilege—whether it be welfare benefits, unemployment pay, employment as a school teacher, or the ability to adopt or foster—in such a way as to penalize or burden a fundamental right, it is the government's burden to show that the law is narrowly tailored to meet a compelling state interest. *See also 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*).

Whether defendants here can show that Act 1 will pass the strict scrutiny test is a matter that has yet to be decided by the court. However, there should be no doubt that plaintiffs

have stated a valid claim that Act 1 unconstitutionally burdens the exercise of the fundamental right to intimate association.[22]

### B. Plaintiffs have adequately pled that Act 1 is not rationally related to any legitimate governmental interest.

As explained above, the motion to dismiss plaintiffs' equal protections claims should be denied because Act 1 burdens plaintiffs' fundamental right to intimate association. To the extent that the court believes it necessary to determine on this Motion whether plaintiffs have also stated a valid claim under the rational basis test, however, the Motion should be denied. As discussed below, the defendants' asserted bases for Act 1 should be rejected as irrational as a matter of law or as resting upon factual contentions that either have been rejected by the *Howard* decision or—at a minimum—are the subject of disputed fact and expert evidence that cannot be resolved on a motion to dismiss.

#### a. Defendants' assertion that the court has no authority to reexamine the wisdom of the voters of Arkansas should be summarily rejected.

As an initial matter, plaintiffs respectfully submit that the defendants' motion is extraordinary in that it asks the court to find as a matter of law, without the benefit of expert testimony and the factual record, that Act 1 bears the requisite relationship to a legitimate child welfare interest. Motion at 21-22 (urging the court to accept at face value the State's position that Act 1 is "in the best interest of children in need of adoption or foster care"). The defendants'

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[22] To the extent that defendants contend that plaintiffs have no constitutional rights at stake because the State is permitted to impose residency and other types of requirements on potential foster and adoptive parents, that argument misses the point. The State may in fact have a compelling interest in imposing certain requirements that infringe upon an individual's fundamental rights. But whether Act 1's infringement on plaintiffs' fundamental rights is supported by a compelling, or even legitimate, government interest is the central dispute between the parties and not one that can be decided on a motion to dismiss. Similarly, the fact that the State may have a compelling interest in placing a child based on religious or racial criteria under an individualized assessment of the child's needs does not answer the question of whether Act 1 can withstand constitutional scrutiny.

position is all the more remarkable given that just two and a half years ago, the Arkansas Supreme Court unanimously held that the blanket exclusion of gay persons, including those in relationships, from serving as foster parents bore no correlation to the health, welfare, and safety of foster children.[23] *Howard*, 367 Ark. at 65, 238 S.W.3d at 7.

Defendants' basis for requesting such extraordinary relief appears to rest on the premise that the Court "may not interfere with the determination" of the people who voted for Act 1. Motion at 21. According to defendants, "the Court is without authority to reexamine or review the wisdom of the majority of Arkansas voters who determined that Initiated Act 1 is in the best interest of children in need of adoption or foster care." *Id.* at 21-22.

Setting aside the fact that this premise is troubling given Act 1's effect on foster youth who lack any significant political power, defendants' argument eviscerates the constitutional guarantee of equal protection. Contrary to the defendants' position, rational basis review does not act as a blank check to the legislature or to the electorate. *Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (striking down voter-enacted law under rational basis review). As the United States Supreme Court has noted, the government cannot be allowed to make "mere recitation" of government interests into "an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); *see also Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 666 (1994) ("[T]he

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[23] Indeed, as applied to gay couples, the court could conclude that Act 1 violates the plaintiffs' equal protection rights based solely on the findings and conclusions in *Howard*. Moreover, given the history of Act 1, the court could conclude that Act 1 was unlawfully motivated by a dislike of gay people or by disproven stereotypes about gay families. *Romer v. Evans*, 517 U.S. 620, 634 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") (emphasis in original).

deference afforded to legislative findings does not foreclose our independent judgment of the facts bearing on an issue of constitutional law.") (internal citations and quotations omitted).

The court's review is especially important where the challenged law burdens a politically unpopular group. *Romer*, 517 U.S. at 632; *see also Jegley*, 349 Ark. at 633-34, 80 S.W.3d at 350-51. The guarantee of equal protection serves to "[protect] minorities from discriminatory treatment at the hands of the majority." *Id.* at 633, 80 S.W.3d at 350. "Government cannot avoid the strictures of equal protection simply by deferring to the wishes or objections of some fraction of the body politic." *Id.* at 635, 80 S.W.3d at 352 (citing *City of Cleburne*, 473 U.S. at 448).

Thus, under well-established constitutional jurisprudence, it is not merely appropriate for the judiciary to test the asserted rationales behind a legislative or voter-enacted law, but it is necessary in order to give meaning to the right of equal protection. *Romer*, 517 U.S. at 633 ("By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."). To the extent that the Motion rests on the premise that the judicial branch has no authority to test whether Act 1 is rationally related to a legitimate state interest, it should be denied.

**b. The State may not promote marriage, or any other interest however legitimate, at the expense of children's welfare.**

The first rationale proffered by defendants is that Act 1 promotes the legitimate state interest of marriage. This argument is misplaced for at least the following reasons.

With respect to gay and lesbian cohabiting couples, there is no rational relationship between Act 1 and promoting marriage because same-sex couples are legally precluded from marrying under Arkansas law; thus, there is no incentive to marry that could

possibly result in gay couples marrying in the State. Indeed, the fact that Act 1 specifically requires that couples have a marriage that is valid and recognized in Arkansas means that gay couples who *are* married in other jurisdictions[24] are still ineligible. Thus, as applied to the plaintiffs in gay couple relationships, Act 1 is not rationally related to an interest in promoting marriage.

More importantly, even if it were proper to accept at this procedural stage the factual assertion that Act 1 leads heterosexual couples to get and stay married, the government cannot advance this interest to the detriment of children in state custody. As discussed above in Argument Section II (A)-(B), *supra,* the child welfare system exists in order to promote the health, safety, and welfare of the thousands of children in Arkansas who do not have the good fortune of having a loving and stable home. *See also Howard*, 2004 WL 3200916, Conclusions of Law at ¶ 1 ("The State of Arkansas stands *in loco parentis* to foster children in Arkansas."). The "State's overriding interest [in] doing what is in the best interest of the children in its care"[25] requires that in the context of laws affecting child welfare, the government may not pursue an otherwise legitimate government interest if that interest harms children in its care.

Plaintiffs respectfully submit that defendants' argument to the contrary is wholly misguided. Taken to its logical conclusion, this argument would mean that the State could exclude all applicants who lack graduate school degrees from serving as foster/adoptive parents solely because advancing education is a legitimate governmental interest. But such a policy, which would disqualify countless applicants for a reason unrelated to their ability to parent, would seriously harm the children in state custody by exponentially shrinking the pool of

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[24] Presently, gay couples may marry in Massachusetts, Connecticut, Canada, and a handful of other countries. Moreover, there are presently thousands of same-sex couples who are married under California law.

[25] *See* Exh. B (attached).

available parents. Just as the State cannot promote education without regard to its consequences, plaintiffs submit that the State cannot pursue an interest in promoting marriage to the detriment of children for whom it is responsible. For the same reason, the court should reject the rationale that Act 1 promotes the link between marriage and child-rearing as such rationale is on its face unconnected to the welfare of children in state care. If Act 1 is to stand, it must be because the court finds that the statute itself promotes children's welfare—a conclusion that cannot be decided on a motion to dismiss.

**c. The other rationales proffered by the defendants have been rejected by the Arkansas Supreme Court, are illogical, or are questions of fact that cannot be decided on a motion to dismiss.**

The other rationales asserted by the defendants are that Act 1: (i) promotes the stability of parental relationships; (ii) promotes adoption and fostering by individuals who are committed to responsible parenting; and (iii) promotes the State's interest in children being raised by both a mother and father. Essentially, defendants contend that Act 1 is rationally related to the welfare of children in state care because persons living in same-sex or unmarried heterosexual relationships are more likely to pose an emotional or physical risk to children.

As an initial matter, the assertion that Act 1 is necessary to reduce harm to foster/adoptive children is contrary to the judgment of the child welfare professionals within defendant DHS. As discussed in Factual and Procedural Background Section I, *supra*, just a month prior to the enactment of Act 1, DHS rescinded its internal policy barring cohabiting couples from serving as foster parents. Plaintiffs submit that the fact that the state officials most directly responsible for the welfare of children rescinded the ban at issue here raises significant doubt that there is any correlation between Act 1 and a legitimate child welfare interest. Therefore, further factual development is needed before any assessment of whether Act 1 serves children's welfare is possible.

Moreover, as applied to the gay couple plaintiffs, the Arkansas Supreme Court determined in *Howard* that there is no rational relationship between a blanket exclusion on gay couples from serving as foster parents and the health, safety, and welfare of children. *Howard*, 367 Ark. at 65, 238 S.W.3d at 7. Indeed, among the many findings of the circuit court that the Court relied upon were the following:

- "Being raised by gay parents does not increase the risk of problems in adjustment for children."
- "Being raised by gay parents does not increase the risk of psychological problems for children."
- "Being raised by gay parents does not increase the risk of behavioral problems."
- "There is no evidence that gay people, as a group, are more likely to engage in domestic violence than heterosexuals."
- "There is no evidence that gay people, as a group, are more likely to sexually abuse children than heterosexuals."

*Id.* at 63-64, 238 S.W.3d at 7; *see also Howard*, 2004 WL 3200916, Findings of Fact at ¶¶ 29-31, 46-47.

Based on these factual findings and the others decided in *Howard*, the court should reject for all purposes the asserted child welfare rationales as applied to the plaintiffs in same-sex relationships. At a minimum, the *Howard* decision calls into serious question whether Act 1 is related to a child welfare interest or is instead premised on impermissible negative stereotypes about gay parents or moral disapproval of gay persons. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-39 (1973) (rejecting the "unsubstantiated" charge that hippies are more likely to commit fraud as a justification for unequal access to food stamp program);

*Cleburne*, 473 U.S. at 450 (holding that "a bare . . . desire to harm a politically unpopular group" is not a legitimate state interest) (internal citations omitted).

With respect to Act 1's application to unmarried heterosexual couples, plaintiffs submit that there is no child welfare basis for categorically excluding them from serving as foster or adoptive parents. As will be shown in discovery, there is no child welfare basis for categorically excluding unmarried heterosexual couples particularly given the state's existing procedures for screening out those who would pose a risk to children. The rigorous individualized evaluation that all foster and adoptive applicants undergo already serves as a mechanism to address the very purported concerns raised by the defendants. As such, there is no child welfare basis to categorically exclude heterosexual cohabiting persons from adopting or fostering.[26] FAC at ¶¶ 8, 60-64. The Motion should be denied because the court cannot decide these issues of fact on a motion to dismiss.

Finally, the claim that Act 1 encourages children to be raised in homes with a mother and father fails the test of logic. If plaintiff Wright and others like her in unmarried heterosexual committed relationships were permitted to adopt or foster, there would be an increase—not decrease—in the number of children in homes with a mother and father. Act 1, in that instance and many others, hinders the very goal that defendants claim is the basis for the law. *Cleburne*, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). With respect to this rationale as applied to gay couples, as discussed above, the *Howard* decision

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[26] *See Eisenstadt*, 405 U.S. at 452 (in view of federal and state laws already regulating distribution of harmful drugs, contraception ban for unmarried couples not rationally related to desire to protect public health); *Moreno*, 413 U.S. at 534 (under rational basis review, striking down law categorically excluding certain households from food stamps where there were existing mechanisms to address the purported rationale behind the law).

confirmed that children with same-sex parents do just as well as children with opposite sex parents. *See also* Factual and Procedural Background Section II, *supra.* There is no rational relationship between Act 1 and the welfare of children, and the Motion should be denied.

## VII. PLAINTIFFS MAY PROPERLY CHALLENGE AN INITIATED ACT THAT WAS ADOPTED WITH A CONSTITUTIONALLY DEFICIENT BALLOT TITLE.

Defendants contend that Count 11 is untimely because Arkansas law limits the time period during which a challenge may be made to the "sufficiency of a ballot petition" seeking to have an initiative placed on the ballot pursuant to Amendment 7, and moot because it is "too late to challenge the procedures leading to the passage of the law." Motion at 26-29. Defendants misunderstand the nature of Count 11.[27] Plaintiffs do not challenge the sufficiency of the petition or the procedures by which Act 1 appeared on the ballot, and therefore are not bound by any time limitations that apply to such pre-election challenges. Rather, plaintiffs allege that because of Act 1's constitutionally deficient ballot title, "the submission of the question at the election was unauthorized under Amendment No. 7 . . . and that [Act 1] therefore did not become a law notwithstanding the favorable vote thereon." *Phillips v. Rothrock*, 194 Ark. 945, 110 S.W.2d 26, 28 (1937).

It is well-settled that initiated proposals under Amendment 7 are constitutionally required to have a sufficient and non-misleading ballot title.[28] *See Hoban v. Hall*, 229 Ark. 416, 418, 316 S.W.2d 185, 186 (1958) (ballot title must "supply the voter with the information that

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[27] Defendants do not challenge the substance of Count 11 on this motion, and object only that it is untimely and moot.

[28] Amendment 7 expressly requires that a ballot title be used for any state-wide election on an initiated act. *See* Ark. Const. art. 5, § 1, Amended (providing that "the exact title to be used on the ballot shall by the petitioners be submitted with the petition, and on state-wide measures, shall be submitted to the State Board of Election Commissioners, who shall certify such title to the Secretary of State, to be placed upon the ballot").

the constitution expects him to have"); *see also Roberts v. Priest*, 341 Ark. 813, 826, 20 S.W.3d 376, 383 (2000) (constitution places on court responsibility to ensure that ballot title fairly represents issue to be presented to electors); *cf. Chaney v. Bryant*, 259 Ark. 294, 300, 532 S.W.2d 741, 745 (1976) (noting that the constitution does not require ballot initiatives proposed by the *General Assembly* include ballot title). "[T]he great body of the electors . . . will derive their information about [an initiative] from the ballot title . . . [t]his is the purpose of the title." *Westbrook v. McDonald*, 184 Ark. 740, 43 S.W.2d 356, 360 (1931). There is little that could be more threatening to our system than misleading voters into enacting a law they were not permitted to fully understand.

The Supreme Court of Arkansas has recognized that a ballot initiative that does not comply with requirements of Amendment 7 is null and void, and may be challenged even after its adoption by the voters. In *Phillips*, the appellant brought a post-election challenge to a county-level ballot initiative that had already been adopted by the voters. 110 S.W.2d at 27-28. Appellant argued that the ballot initiative had not complied with the requirements of Amendment 7 because the initiative petitions were not filed with the county clerk at least sixty days prior to the election, as required by Amendment 7. *Id.* at 29. The Court held that the failure to file the petitions as required by Amendment 7 precluded any "presumption that the public had the notice of the proceeding which the Constitution contemplated and required." *Id.* at 34. As a result, the Court held that that "there was no authority for holding the election" and declared it "a nullity."[29]

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[29] The Court reasoned that because the "amendment prescribes the time within which petitions for initiative measures must be filed," it is "essential" that they be timely filed in order "to confer authority to hold an election." *Phillips*, 110 S.W.2d at 29. Where there is no authority to hold the election, "no majority—however large—can adopt a measure which was submitted without constitutional authorization." *Id.*; *see also Chaney*, 259 Ark. at 298, 532 S.W.2d at 744 (courts will hold that amendment was not properly adopted by voters if constitutional requirements for submission of amendment are disregarded).

*Id.* at 34; *see also Ark.-Mo. Power Corp. v. City of Rector*, 214 Ark. 649, 657, 217 S.W.2d 335, 338 (1949) (enjoining collection of tax under ordinance adopted pursuant to misleading ballot title). *Compare with Chaney*, 259 Ark. at 299-300, 532 S.W.2d at 745 (holding that a challenge to the ballot title used for voting on a constitutional amendment proposed by the General Assembly could not be challenged after the election because the constitution did not require a ballot title for proposed amendments initiated by the legislature).

For purposes of the Motion, the challenge raised by plaintiffs in this case is no different from the challenge raised in *Phillips*. Plaintiffs assert—and defendants do not dispute in their motion to dismiss—that the submission of Act 1 to the voters was unauthorized under Amendment 7 because the ballot title was constitutionally insufficient in so far as it failed to disclose that Act 1 would effectively repeal Section 9-28-903(3) ("Section 903") of the Arkansas Foster Parent Support Act (the "AFPSA"). FAC at ¶¶ 154-59; *see Bailey v. McCuen*, 318 Ark. 277, 288, 884 S.W.2d 938, 944 (1994) (ballot title must disclose that initiative would repeal existing law to avoid being materially misleading).

The failure to so advise the electorate is material. Section 903 provides that foster parents should be "free from discrimination based on . . . marital status." Ark Code Ann. § 9-28-903(3) Therefore, the policy of Arkansas at the time of the vote on Act 1 as reflected in section 903 was to prohibit discrimination against foster parents and foster-parent applicants on the basis of marital status. In contrast, Act 1 expressly discriminates against prospective and existing foster parents on the basis of marital status by prohibiting them from fostering or adopting a child. Act 1 and Section 903 cannot be reconciled. The indisputable fact that Act 1 would have the effect of repealing the current policy of the State as reflected in an anti-discrimination law was clearly information that would "give the voter serious ground for reflection." *Bailey*, 318

Ark. at 285, 884 S.W.2d at 942. Plaintiffs have pled that this omission rendered the ballot title fatally deficient, *see id.* at 285, 884 S.W.2d at 942, and the election a nullity. *See Phillips*, 110 S.W.2d at 29; FAC at ¶¶ 11, 154-59. Thus, the limitations cited by defendants concerning the sufficiency of pre-election procedures do not apply to this action.[30]

Plaintiffs do not dispute that the process to gather signatures to place an issue on the ballot is beyond review after a ballot initiative has been adopted by the voters. *See Beene v. Hutto*, 192 Ark. 848, 96 S.W.2d 485, 488 (1936). The "sufficiency of a petition," however, refers to these pre-election procedures used in gathering signatures to place the issue on the ballot in the first instance, not to fundamentally misleading voters as to the issue actually on the ballot. *See Herrington v. Hall*, 238 Ark. 156, 158, 381 S.W.2d 529, 530 (1964) (holding that challenges to the signatures on a petition could only be brought prior to the election). Irregularities and deficiencies in such procedural requirements are cured by the adoption of the measure by the voters, because such vote indicates that a majority of the people do indeed believe the measure should become law. *See Beene*, 192 Ark. at 848, 96 S.W.2d at 488. At issue here, in contrast, is a post-election challenge asserting that the threshold requirements of Amendment 7 were not met by the ballot title that was voted upon.[31] As in *Beene*, 96 S.W.2d at

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[30] Under defendants' argument, an initiated act that *raised* the sales tax under a ballot title of "Sales Tax *Reduction* Act" could never be challenged if no person or interest group filed suit within the time frame set forth in Ark. Code. Ann. § 7-9-107(a). Constitutional requirements cannot be so easily dispensed with. *See Bradley v. Hall*, 220 Ark. 925, 930, 251 S.W.2d 470, 472 (1952) (enjoining certification of ballot title because "the voter, after reading this ballot title, could not be blamed for supposing that the measure would tend to restrict charges other than interest, when in fact its purpose is quite the contrary").

[31] Defendants' citation to *House v. Fogleman*, 359 Ark. 206, 195 S.W.3d 897 (2004), is inapposite. Defendants claim that the Supreme Court denied *certiorari* because the impending election did not permit enough time to consider the matter, and that the Court's failure to "even consider the possibility" of reviewing the petition post-election shows that "judicial review of proposed initiatives beyond the general election . . . is not contemplated by Amendment 7." Motion at 28. Defendants' argument is unavailing. Denying *certiorari* meant that the status quo would be maintained in the lower court, where it had already been determined that there was a "deficiency in the petitions." *House*, 359 Ark. at 207, 195 S.W.3d at

489, which allowed a post-election challenge when the ballot title was not properly printed on the ballot by the board of election commissioners, the problem here was a failure to submit to the voters a constitutionally sufficient ballot title. If the voters could not understand Act 1 because of a constitutionally insufficient ballot title, the fact that the voters enacted Act 1 in no way cures that defect.

Likewise, defendants' argument that Count 11 is moot because the Court is not empowered to provide a remedy is wrong. The Court may declare the election a nullity with respect to the adoption of Act 1. *See Phillips,* 110 S.W.2d at 29 (holding that "the failure to file petitions . . . sixty days before the election, renders the election nugatory"). Accordingly, plaintiffs respectfully request that defendants' motion to dismiss Count 11 be denied.

## VIII. DISMISSAL OF THE STATE FROM THIS ACTION WOULD OBSTRUCT THIS COURT'S ABILITY TO ISSUE A RULING ON THE VALIDITY OF ACT 1 THAT IS APPLICABLE TO THOSE CHARGED WITH ENFORCING THE STATUTE.

Defendants' motion to dismiss the State from this lawsuit begins with the straw man contention that sovereign immunity protects the State from suits that might "subject it to liability" or "money damages." Motion at 2. Plaintiffs here are not seeking monetary damages or other similar relief against Act 1. Rather, plaintiffs seek prospective relief in the form of a declaration of rights and injunction against the enforcement of the statute.

Defendants also assert that, in all circumstances, sovereign immunity bars any action for "declaratory and injunctive relief" against the State. Motion at 2. This is an incorrect statement of the law. The Arkansas Supreme Court has held that illegal or unconstitutional acts by the State may be enjoined despite the doctrine of sovereign immunity. *Cammack v.*

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898. Thus, denying *certiorari* meant that the initiative would not be placed on the ballot at the upcoming election, and unlike this case, there could be no voter-approved initiative for the Supreme Court to review post-election. Thus, *House* stands for no proposition relevant to this case.

*Chalmbers*, 284 Ark. 161, 163, 680 S.W.2d 689, 690 (1984); *see also Ark. Game & Fish Comm'n v. Lindsey*, 292 Ark. 314, 320, 730 S.W.2d 474, 478 (1987) (holding that "[a]n exception to the prohibition against a suit against the State exists where the act sought to be enjoined is illegal or is causing irreparable injury"). Additionally, a party may seek declaratory relief against the State. *Commission on Judicial Discipline & Disability v. Digby*, 303 Ark. 24, 792 S.W.2d 594 (1990). In this case, because plaintiffs have alleged that Act 1 will cause "irreparable harm" and "destroy rights," and because an "adequate remedy at law is not available," a suit seeking declaratory and injunctive relief against the State is appropriate. *Toan v. Falbo*, 268 Ark. 337, 339, 595 S.W.2d 936, 938 (1980); *see also Cammack*, 284 Ark. at 163, 680 S.W.2d at 690 ("We view our cases as allowing actions that are illegal, are unconstitutional, or are *ultra vires* to be enjoined.").

Moreover, the cases that have found that sovereign immunity does not bar a suit often turn on the observation that the State entity or official is an essential party to ensure an *adequate* remedy at law. That is why, as defendants recognize, a lawsuit may be properly maintained against state officials who are charged with enforcement of a statute that is charged as unconstitutional. Motion at 5-7. Here, contrary to defendants' assertions, DHS and the CWARB are not the sole entities with enforcement responsibility for Act 1. In addition to those defendants, every court in the State of Arkansas has such responsibility. This responsibility stems from the fact that state courts are statutorily required to approve all adoption petitions. Ark. Code Ann. § 9-9-214(c). In fact, in certain situations, where the parties are not indigent, DHS may play no role at all, not even in conducting a home study. *Id.* § 9-9-212(b); *see also Cox v. Stayton*, 273 Ark. 298, 303, 619 S.W.2d 617, 620 (1981) (finding that, under state adoption statutes, DHS is not a "necessary party" to an adoption proceeding).

But unlike DHS, the courts of this state play a critical role in each adoption petition. Because the courts are the final arbiter of every adoption, the courts are the institution taxed with ultimate enforcement of Act 1.[32] There is only one entity that can bind the entire court system—the State of Arkansas. Simply put, it is necessary for the State to remain a party for a ruling by this Court to afford plaintiffs complete relief by binding all of those charged with enforcement of Act 1, including the courts of this State.[33]

## IX. ALL PLAINTIFFS HAVE ADEQUATELY PLED THAT THEY HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF ACT 1.

Defendants contend that the adult-plaintiffs who seek the opportunity to serve as foster or adoptive parents lack standing to challenge Act 1 because the Complaint alleges no facts showing that they would be eligible but for Act 1. Motion at 30-31. Defendants also assert that the parent-plaintiffs lack standing because the Complaint does not allege that in the event of their death or incapacity, their children would be adopted by persons who would be eligible to adopt them but for Act 1. *Id.* Defendants also contend that the child-plaintiffs lack standing because the Complaint alleges no facts showing that they would in fact be adopted by the caregivers that their parents have determined to be in their children's best interests. *Id.* at 31. Finally, defendants contend that all plaintiffs' claims are unripe because they rest on contingent future events. *Id.* Defendants' arguments misconstrue the law and seek to impose unwarranted pleading burdens on plaintiffs.

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[32] As defendants note in their Motion, courts need not accept DHS's recommendations concerning child placements as "adoptions are granted at the discretion of the court." Motion, p. 15; *see also* Ark. Code Ann. § 9-9-214(c). Accordingly, absent the participation of the State or another representative of the judicial branch as a party to this suit, plaintiffs will be unable to obtain complete injunctive or declaratory relief against Act 1.

[33] Plaintiffs agree that the Complaint should be construed as not including a Section 1983 claim against the State of Arkansas.

At the pleading stage, the standing inquiry is made in light of the factual allegations of the Complaint. *City of Clarkson Valley v. Mineta*, 495 F.3d 567, 570 (8th Cir. 2007); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "[I]n response to a motion to dismiss, 'general factual allegations of injury resulting from the defendant's conduct may suffice, for . . . we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *City of Clarkson Valley*, 495 F.3d at 569 (quoting *Lujan*, 497 U.S. at 889 (alteration in original)). Where "the plaintiff is himself an object of the [challenged government] action . . . there is ordinarily little question that the action . . . has caused him injury." *Lujan*, 504 U.S. at 561-62. As discussed below, all of the plaintiffs have adequately pled standing to seek injunctive relief and a declaration of their rights against Act 1.

The Arkansas Supreme Court[34] has held that to have standing to challenge a law, plaintiffs "must show that [they have] a right which a statute infringes upon and that [they are] within the class of persons affected by the statute." *Howard*, 367 Ark. at 59, 238 S.W.3d at 4; *see also Ghegan & Ghegan, Inc. v. Weiss*, 338 Ark. 9, 14, 991 S.W.2d 536, 539 (1999) ("In numerous cases, we have held that a litigant has standing to challenge the constitutionality of a statute if the law is unconstitutional as applied to that particular litigant.") Moreover, the Arkansas Declaratory Judgments Act provides that: "Any person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." Ark. Code Ann. § 16-111-104. The Arkansas Supreme Court has held that this Act

[34] "Standing in Arkansas courts is a question of state law, and federal cases based on Article III are not controlling." David Newbern & John J. Watkins, Arkansas Practice Series, *Civil Practice and Procedure* § 7:3 (4th ed. 2006).

is "liberally construed" to confer standing, particularly where the issue before the court is a matter of significant public interest and a matter of constitutional law. *Bryant v. English*, 311 Ark. 187, 190, 843 S.W.2d 308, 319 (1992); *see also* Ark. Code Ann. § 16-111-102 (b) & (c) (stating that the legislative intent of the Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations" and that the Act is to be "liberally construed" to meet this purpose).

As an initial matter, contrary to defendants' description of the Court's decision in *Howard*, that case does not stand for the proposition that the plaintiffs who seek to be foster or adoptive parents here must show that they have filed an application and were turned away. Motion at 31. Rather, the Court held in *Howard* that "even if Appellees had not applied to become foster parents, they still had standing to bring suit because they are within the class of persons affected by the regulation and each Appellee's attempt to become a foster parent would be *futile because of the regulation.*" *Howard,* 367 Ark. at 59, 238 S.W.3d at 4 (emphasis added). Here, there can be no question that the plaintiffs[35] living in gay and unmarried heterosexual relationships are within the class of persons categorically excluded from serving as foster and adoptive parents by Act 1 and that it would be futile for these plaintiffs to apply. Thus, they have standing to challenge the constitutionality of the statute. *Id.*

Similarly, the parent-plaintiffs[36] have standing to seek a declaration concerning the validity of Act 1 as applied to their constitutional right to parental autonomy. *Jegley*, 349

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[35] These plaintiffs include Cole, Huffman, Rickman, Pennisi, Harrison, Chatham, Frazier, and Wright—all of whom are living in gay relationships or in unmarried heterosexual relationships and desire the opportunity to adopt or foster a child in the custody, care, or control of the State of Arkansas. FAC at ¶¶ 14-24, 41-50. Although plaintiff Huffman was previously approved by DCFS to adopt a child and did so in 2003, she is now categorically barred from adopting or fostering under Act 1. *Id.* at ¶¶ 19-20.

[36] These plaintiffs include Meredith and Benny Scroggin, Cary and Trina Kelley, Susan Duell-Mitchell and Chris Mitchell, and Teresa May. FAC at ¶¶ 25-40.

Ark. at 618, 80 S.W.3d at 341. As discussed in Argument Section IV, *supra,* the parent-plaintiffs seek a declaration that Act 1 unlawfully prohibits the defendants from giving presumptive weight to their judgment as fit parents in determining the best adoptive placement for their children in the event of parental death or incapacity. For these plaintiffs, Act 1 presently interferes with, and creates uncertainty as to, one of the most important rights belonging to a parent: the planning for the care of children in event of tragedy and the sense of security that comes from having made those decisions.[37] Thus, they have standing to seek a declaration of their rights against Act 1. Ark. Code Ann. § 16-111-104; § 16-111-102; *see also Jegley,* 349 Ark. at 618, 80 S.W.3d at 341; *Springdale Sch. Dist. No. 50 v. Evans Law Firm, P.A.*, 360 Ark. 279, 283, 200 S.W.3d 917, 920 (2005) (holding that "a person must have suffered an injury *or belong to a class that is prejudiced* in order to have standing to challenge the validity of a law") (emphasis added).

The child-plaintiffs[38] also have standing to seek declaratory relief because Act 1 prejudices their rights. As described in Factual and Procedural Background Section II and Argument Sections II, III, and V, *supra,* Act 1 harms the child-plaintiffs by shrinking the pool of available foster and adoptive parents for no child welfare basis and/or by categorically disqualifying adoptive placements that would otherwise be in their best interests. As with the adult-plaintiffs, the child-plaintiffs need not wait until Act 1 is actually enforced against them to seek a declaratory relief. *Jegley,* 349 Ark. at 816, 80 S.W.3d at 341 (noting that the Arkansas

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[37] Moreover, the court cannot wait until these parent-plaintiffs die or become incapacitated to hear their petition for a declaration of their rights and the rights of their children under Act 1. Under the defendants' theory—which requires that the designated caregiver actually apply to adopt the child and be denied—the parent-plaintiffs will never have standing because their injury will only be imminent after their death or incapacitation. If the parent-plaintiffs cannot contest this statute during their lifetime, then they will have no remedy for the clear—and current—intrusion upon their right to parental autonomy.

[38] These plaintiffs include W.H., V.K., T.K., N.S., L.S., N.J.M., N.C.M., C.A.A., and C.L.A.

Supreme Court has "heard challenges to the constitutionality of statutes and regulations by persons who did not allege that they had been penalized under the statutes or regulations"); *see also Magruder v. Ark. Game and Fish Comm'n,* 287 Ark. 343, 344, 698 S.W.2d 299, 300 (1985) (holding that there was a justiciable controversy over the validity of regulation despite no allegation by plaintiff that he was either penalized for the conduct or threatened with enforcement of the regulation). Under Arkansas law, a person "whose rights are thus affected by a statute has standing to challenge it on constitutional grounds." *Jegley,* 349 Ark. at 619, 80 S.W.3d at 341; *Magruder,* 287 Ark. at 344, 698 S.W.2d at 300.

Further, the present harm to the child-plaintiffs caused by Act 1 provides an additional reason as to why the court should hear their challenge. For the children in state care, including W.H., Act 1 currently prevents the defendants from placing those children with adults living in gay or unmarried relationships, including their own grandmothers, regardless of those children's individual best interests or the harm caused to those children. FAC at ¶¶ 104-28. For the other child-plaintiffs, presently, Act 1 categorically rejects their parents' determination as to their best interests in the event of parental death or incapacity. Because there is a present controversy over whether Act 1 as applied to the child-plaintiffs is constitutional, the court should hear their challenge. Ark. Code Ann. § 16-111-104; § 16-111-102; *see also Jegley,* 349 Ark. at 619, 80 S.W.2d at 341; *Springdale Sch. Dist. No. 50,* 360 Ark. at 283, 200 S.W.3d at 920.

Finally, the Arkansas taxpayers have alleged that Act 1 misapplies and illegally uses public funds generated from Arkansas tax dollars to support Act 1 in violation of article 16, section 13, of the Arkansas Constitution ("Section 13"). FAC at ¶¶ 4, 109-22. The taxpayer-plaintiffs have standing to pursue an illegal-exaction claim under Section 13, which provides that "[a]ny citizen of any county, city or town may institute suit, in behalf of himself and all others

interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." Under Section 13, any citizen of Arkansas who has "contributed tax money to the general treasury" has standing to challenge the misuse of public funds generated from tax dollars. *McGhee v. Ark. State Bd. of Collection Agencies*, 360 Ark. 363, 370-371, 201 S.W.3d 375, 379 (2005). All adult-plaintiffs (other than Teresa May) reside in Arkansas and pay taxes in Arkansas. FAC at ¶¶ 19-36, 41-44, 104, 112, 114. Plaintiffs are injured because Act 1 keeps children in state care longer than they would be in the absence of Act 1 and therefore wastes taxpayer dollars. *Id.* at ¶¶ 4, 104-16. In *McGhee,* the court found that similar "allegations [were] sufficient to withstand a motion to dismiss for lack of standing." *McGhee*, 360 Ark. at 370-71, 201 S.W.3d at 379 (citing *Ghegan & Ghegan, Inc., v. Weiss*, 338 Ark. 9, 991 S.W.2d 536 (1999)).[39]

In sum, Act 1 presents important constitutional issues and is a matter of significant public interest, particularly as it affects both public expenditures and the fate of children that are in, or who will enter, state care. Act 1 is also of significant interest to each individual plaintiff in this case, as their family rights, obligations, and arrangements are at stake. The Court therefore should resolve these issues and provide children, parents, and families with the certainty and stability they need and deserve.

## CONCLUSION

For the reasons above, plaintiffs respectfully request that the Court deny the Motion in its entirety.

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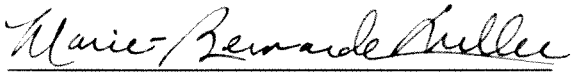
[39] Although the defendants may contest the financial impact of Act 1, this is an issue of fact that cannot be decided on a motion to dismiss.

Respectfully submitted,

Dated: February 27, 2009



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## CERTIFICATE OF SERVICE

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on this 27th day of February, 2009.

Marie-Bernarde Miller

IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
DIVISION III

ARKANSAS DEPARTMENT OF HUMAN SERVICES — PLAINTIFF

V. — CASE NO. J2008-851-D/N

[redacted] — MOTHER
[redacted] — PUTATIVE FATHER

[redacted] — DOB [redacted] — FEMALE

JUVENILE — DEFENDANTS

FILED
2009 JAN 13 PM 4 14
BRENDA DESHIELDS
CLERK AND RECORDER
BENTON COUNTY, AR.

**ORDER**

On this 13th day of January 2009, comes on for consideration the physical custody of [redacted] ("W.H."), and upon consideration of the facts and evidence, the Court finds:

1. This Court has jurisdiction and venue properly lies in Benton County.

2. W.H. is an incapacitated person in need of a custodian pending the closure the above captioned matter.

3. Sheila Cole is the maternal grandmother of W.H., and is a proper person and fully qualified by law to serve as a physical custodian for W.H., as evidenced by the approved ICPC home study from the State of Oklahoma.

4. Legal custody of W.H. has been removed from her parents, and W.H. is currently in the legal custody of the Arkansas Department of Human Services ("DHS"), and W.H. has been placed in foster care.

5. It is in the best interests of W.H. that Sheila Cole be awarded physical custody.

EXHIBIT
A
PENGAD 800-631-6989

It is therefore CONSIDERED, ORDERED and ADJUDGED that physical custody of W.H., a minor, is hereby awarded to and shall be with Sheila Cole.

Original Signed By
Jay T. Finch

Hon. Jay Finch, Circuit Judge

1-13-08

DATE

Prepared by:

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I, Brenda DeShields, certify this instrument is a true Copy of the Order in Habeas, [redacted] on file in this office, dated 1-13-09 Book A at page [illegible]

Brenda DeShields, Clerk

By [illegible] D.C.

*Lofton v. Sec. of Dep't of Children*, 337 F.3d 1275 (11th. Cir. *en banc* 2004). Additionally, this Court has consistently held that it is not in the business of second guessing the legislature. *Berry v. Gordon*, 237 Ark. 547, 376 S.W.2d 279 (1964). As part of a custody ruling, the Arkansas Court of Appeals affirmed a trial court which based its initial decision partially on the rationale that homosexually is generally unacceptable, that children could be exposed to ridicule and teasing by other children and that it was contrary to the trial court's sense of morality to expose children to a homosexual lifestyle, and that it was no more appropriate for a custodial parent to cohabit with a lover of the same sex than with a lover of the opposite sex. *Thigpen v. Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987). Currently, the State does not permit non-related cohabitating couple to be foster parents. Should the regulation at issue fall, any 'couple,' regardless of level of commitment, will be able to become foster parents provided all other screenings are passed.

Here, the applicants seeking to become foster parents invite the State to come into their home and assess the functionality, stability and safety of the home. When a child is brought into foster care, the State of Arkansas stands *in loco parentis*. Thus, the State's overriding interest must be doing what is in the best interest of the children in its care, not serving the interest of the foster parent applicant. The entire foster care system exists to protect children. The State has a duty of the highest order to protect the interest of minor children. *Palmore v. Sidot*, 466 U.S. 429 (1984). As stated in *Lofton v. Sec., Dep't of Child & Family*, 358 F.3d 804 (11th Cir. 2004):

> It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its citizens to become productive participants in society—particularly when those future citizens are displaced children for whom the state is standing *in loco parentis*.