

CASE NO.: CV 10-840

IN THE SUPREME COURT OF ARKANSAS

THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, et al. and
FAMILY COUNCIL ACTION COMMITTEE, et al.

Appellant,

vs.

3 SHEILA COLE, et al.

Appellees

**AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES, BY
AMICI LISTED ON NEXT PAGE**

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae (“*Amici*”)¹ are non-profit organizations dedicated to improving child welfare and adoption policy in Arkansas and across the United States through research, policy development, and advocacy; the Directors of the Schools of Social Work at the University of Arkansas at Fayetteville and Little Rock; and a former Arkansas foster youth who aged out of the system and now advocates for the rights of children. Collectively, *Amici* possess an extraordinary breadth and depth of knowledge about adoption and child welfare and are recognized leaders in the

¹ *Amici* include the American Academy of Adoption Attorneys; Arkansas Advocates for Children and Families; the Arkansas Chapter of American Academy of Pediatrics; the Arkansas Psychological Association; the Arkansas Chapter of the National Association of Social Workers (“NASW”); the Center for Adoption Policy; the Child Welfare League of America (“CWLA”); the Evan B. Donaldson Adoption Institute; the Foster Care Alumni of America; the National Center for Adoption Law & Policy; the National Center for Youth Law; Barbara Miles (former Arkansas foster youth); the North American Council on Adoptable Children; Dr. Marcia A. Shobe, University of Arkansas at Fayetteville, School of Social Work; and Dr. Howard M. Turney, University of Arkansas at Little Rock, School of Social Work.

field. Some of the *Amici* have performed extensive research focused on adoption by gay and lesbian individuals and individuals in other non-traditional family structures, and others have promulgated national standards for best practices in adoption services. On the basis of their collective knowledge and experience, *Amici* urge this Court to uphold the trial court's judgment striking down Arkansas Act 1, "An Act Providing That an Individual Who is Cohabiting Outside of a Valid Marriage May Not Adopt or Be a Foster Parent of a Child Less Than Eighteen Years Old." Ark. Code Ann. § 9-8-304 (West 2009).

ARGUMENT

Arkansas law, federal law, and a wealth of child welfare expertise agree that adoption—or when not possible, temporary placement with a foster family rather than in an institution—should be the goal for all children who cannot be raised by their biological parents. Child welfare experts further agree that categorical exclusions, such as Act 1’s categorical ban on fostering or adoption by gay and unmarried heterosexual cohabiting couples, are harmful to the best interests of children in State custody because they needlessly limit the pool of adoptive and foster parents, thus exacerbating the massive shortfall of available placements and making it even more difficult to match children in need of homes with willing and appropriate families. An individualized assessment of each adoption and foster applicant is the only way to determine whether an applicant would be a suitable parent who meets the particular needs of the child.

Moreover, child welfare experts and the child welfare agency Defendants confirm that there is no child welfare basis for categorically banning unmarried couples from fostering or adopting—whether they be gay and lesbian or heterosexual cohabiting couples.

Accordingly, *Amici* respectfully request that this Court affirm the trial court’s judgment striking down Act 1.

I. ARKANSAS'S CATEGORICAL BAN ON FOSTERING OR ADOPTION BY GAY AND UNMARRIED HETEROSEXUAL COUPLES IS A STRIKING DEPARTURE FROM WELL-ESTABLISHED CHILD WELFARE POLICY

A. The Child Welfare Field Universally Recognizes That Children Do Best In Families, Not Institutions.

State law, federal law, and the vast bulk of social science research recognize that due to the stability and permanency it provides, adoption is in the best interests of children who cannot be raised by their biological parents. For children in State custody who are not legally available for adoption, child welfare experts agree that children are best served by placement with a foster family, as opposed to institutional care or group homes, so that they can develop healthy emotional attachments and mature into responsible adults. *See infra* § II.E.

Arkansas, like many states, has a duty to act to promote the health, safety, and welfare of children in its custody. Ark. Code Ann. § 9-28-405(c)(1)(A) (West 2009); *see also* Ark. Code Ann. § 9-28-1002(a) (West 2009) (“The General Assembly acknowledges that society has a responsibility, along with foster parents and the Department of Human Services, for the well-being of children in foster care.”). In furtherance of that duty, the Arkansas General Assembly has decreed that “children in the custody of the Department of Human Services should have stable placements.” Ark. Code Ann. § 9-28-410(a)(1) (West 2009).

Consistent with this goal, when an abused or neglected child is permanently removed from his or her family, Arkansas has determined that adoption is the

preferred permanency option. *See* Ark. Code Ann. § 9-27-338(c)(1)-(3) (West 2009). Arkansas's stated policy goal is "[t]o assure, in all cases in which a juvenile must be permanently removed from the custody of his or her parents, that the juvenile be placed in an approved family home and be made a member of the family by adoption[.]" Ark. Code Ann. § 9-27-302(2)(D) (West 2009). Indeed, Arkansas law prefers adoption even over "permanent custody with a fit and willing relative[.]" Ark. Code Ann. § 9-27-338(c)(5) (West 2009); *see also* Ark. Code Ann. § 9-27-338(a)(1)(C) (West 2009) (mandating a plan for permanently placing children who have been removed from their homes with an adoptive family "no later than thirty (30) days after a hearing granting no reunification services").

Similarly, federal child welfare laws recognize adoption as the most appropriate permanent placement for maltreated children who cannot be reunified with their birth families. For example, the Adoption and Safe Families Act of 1997 identifies permanency as the primary goal in placing foster children, 42 U.S.C. § 671(a)(15)(C), sets strict time limits for states to approve and implement permanency plans, *id.* § 671(a)(15)(E), and incentivizes states to increase the number of adoptions of children in public custody, *id.* § 673(b). Significantly, this statute promotes adoption by broadening the pool of fit foster and adoptive parents. *See also* The Multi-Ethnic Adoption Parents Act, 42 U.S.C.A. § 1996b (prohibiting anyone involved in adoption or foster care placements from denying a placement

or the right to become an adoptive or foster parent “on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.”).

This widespread commitment to achieving permanency through adoption reflects a consensus among family and child development specialists as well as social service providers that adopted children fare better than children who remain in foster care or in other non-permanent custodial placements. *See, e.g.,* John Triseliotis, *Long-term Foster Care or Adoption? The Evidence Examined*, 7 CHILD & FAM. SOC. WORK 23, 23-33 (2002); Jill Duerr Berrick, TAKE ME HOME: PROTECTING AMERICA’S VULNERABLE CHILDREN AND FAMILIES 55-56 (2009).

B. There Is A Massive And Chronic Shortage Of Adoptive And Foster Parents In Arkansas.

Unfortunately, the number of children in need of loving adoptive and foster homes far exceeds the number of available placements. According to the Arkansas Department of Human Services Division of Children and Family Services SFY 2009 Annual Report Card (the “Report Card”) (available at <http://www.state.ar.us/dhs/chilnfam/ARC%20SFY%202009%20Final.pdf> (last accessed Oct. 20, 2010)), at the end of 2009, there were 518 children in State custody awaiting adoption, but only 228 available adoptive homes. Report Card at 50, 60. Similarly, there were only 1,077 available foster homes for 3,856 children who required foster care. *Id.* at 16, 25.

This shortage is exacerbated because not every potential foster or adoptive home is suitable for every child in State custody, whether due to a child's medical needs, behavioral problems, attachment to siblings, or geographic location. Arkansas Department of Human Services ("DHS") caseworkers are hamstrung by the shortage of adoptive and foster families from placing children in homes that best align with each child's uniquely determined best interests. *See* Supp Add 11, 31 (¶¶ 9, 67).

In reality, children usually do not face the choice of adoption by a married or unmarried cohabiting couple, but rather the much more stark choice of adoption by whatever couple or individual is available, or no adoption at all. *See* Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L. Q. 381, 386, 388-89 (2006). Categorical placement bans like Act 1

"ignore[] the reality that the choice for many orphans ... is not between placement with homosexual couples or individuals or placement with heterosexual couples or individuals; rather it is between placement and non-placement. Ignoring this reality allows the state to turn a blind eye to the fact that categorical placement bans virtually assure that some children will never be adopted, a result which simply cannot be viewed as promoting their interests."

Tanya M. Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L.J. 1, 51 (2009) (internal quotations and citations omitted).

Thus, poor placement matches or insufficient placement options—senselessly exacerbated by Act 1’s categorical bans—prevent children from developing the stable relationships that state law, federal law, and child welfare experts recognize are necessary for positive outcomes. Mary Eschelbach Hansen, *The Value of Adoption*, 10:2 ADOPTION Q., 65, 70-72 (2008) (concluding that adopted children have better educational, social, health, and economic outcomes than children who remain in foster care).

C. Well-Established Child Welfare Practice Rejects Categorical Exclusions Of Adoption Applicants In Favor Of Individualized Evaluations Of Each Potential Parent-Child Match.

To further this goal of maximizing the pool of potential foster and adoptive parents, every major professional child welfare organization, nationally and in Arkansas, has established policies opposing categorical bans such as Act 1. For example, *Amicus* Child Welfare League of America (“CWLA”), the chief child welfare organization in the country, has adopted standards opposing the denial of foster or adoptive parenting rights solely on the basis of marital status, sexual orientation, and numerous other demographic characteristics. *See* Child Welfare League of America, *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults* (2005), available at <http://www.cwla.org/programs/culture/glbtcposition.htm> (“CWLA Position Statement”).

Likewise, the National Association of Social Workers (“NASW”), the leading professional association of social workers nationally with over 150,000 members, has a policy statement asserting that barriers to fostering and adoption unsupported by evidence should be removed, including barriers against gay and lesbian parents and other non-traditional families. *Policy Statement of The National Association of Social Workers* (2002), from SOCIAL WORK SPEAKS: NATIONAL ASSOCIATION OF SOCIAL WORKERS POLICY STATEMENTS, 2003-2006 (6th ed. 2006) (“NASW Policy Statement”).

The North American Council on Adoptable Children (“NACAC”), whose mission is to promote permanent homes for children who cannot be with their own families, takes a similar view. The NACAC “opposes rules, legislation, and practices that prevent the consideration of current or prospective foster or adoptive parents based on [numerous] characteristics,” including “marital status” and “sexual orientation.” North American Council on Adoptable Children, *Position Statement on Eliminating Categorical Restrictions in Foster Care and Adoption* (July 25, 2007), available at <http://www.nacac.org/policy/positions.html#eliminating> (“NACAC Position Statement”).

Rather than categorical bans based on demographic characteristics, these professional organizations endorse individualized evaluation as best serving the needs of children. For example, the CWLA recommends that placement decisions

should be based on a “careful review of the information collected in the child assessment and on a determination of which ... adoptive families could most likely meet the child’s needs.” Child Welfare League of America, STANDARDS (rev. ed. 2000) § 4.7. Similarly, the NACAC “recognizes that each child is an individual and therefore each situation requires careful evaluation, looking at the best interests of each child.” North American Council on Adoptable Children, *Position Statement on Permanency Planning/Continuity of Relationships* (Dec. 3, 2005), available at <http://www.nacac.org/policy/positions.html>.

Further to the goal of placing as many children as possible with suitable adoptive families, child welfare experts overwhelmingly agree that placement decisions for children in State custody are best made on the basis of individualized assessments of the needs of each child and the capabilities of each prospective adoptive or foster parent. *See, e.g., Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530, at *9 (Ark. Cir. Ct. Dec. 29, 2004) (“[E]very single expert that testified was in agreement ... that the number one rule with respect to foster children is that the needs of each and every foster child should be individually examined and a foster home placement made based upon that child’s individual needs.”), *aff’d* 367 Ark. 55 (2006). *See also* Supp Add 11, 14, 19 (¶¶ 9, 21, 22, 32-34).

Consistent with these policy positions, federal and state lawmakers have moved away from categorical exclusions of prospective adoptive or foster parents—*e.g.*, on the basis of sexual orientation, marital status, age, income, race, ethnicity, or disabilities—and toward a more inclusive approach that does not rule out an applicant unless an individualized evaluation suggests that he or she would not be an appropriate parent. *See* Alice Bussiere, *The Development of Adoption Law*, 1 ADOPTION Q. 3, 8 (1998); Joan Heifetz Hollinger, *Proposed Uniform Adoption Act of 1994*, in THE PRAEGER HANDBOOK OF ADOPTION, at 653-656 (Kath S. Stolley & Vern L. Bullough eds. 2006); *see also* Child Welfare Information Gateway, *The Adoption Home Study Process* (2010), at 8, available at http://www.childwelfare.gov/pubs/f_homstu.cfm (“many agencies are looking for ways to rule families *in* rather than rule them *out*, in order to meet the needs of children in the U.S. foster care system waiting for adoptive families”).

II. CATEGORICALLY EXCLUDING COHABITING SAME-SEX COUPLES AND UNMARRIED HETEROSEXUAL COUPLES FROM FOSTERING OR ADOPTING HARMS CHILDREN IN STATE CARE

A. Child Welfare Decisions Should Be Individualized, Not Based On Demographic Averages That Say Nothing About An Individual’s Suitability To Foster Or Adopt.

The State’s experts defend Act 1 primarily on the basis of *average* outcomes of children raised by certain demographic groups, reasoning that because some studies suggest that children of married couples fare better on average than

children of unmarried cohabiting couples, it makes sense to categorically bar all unmarried cohabiting couples from fostering or adopting. However, this argument flies in the face of widely accepted child welfare practices and ignores the true import of the available data.

Average outcome data provides absolutely no insight into whether a *particular* couple (married or unmarried) is the best match for a *particular* child. This is because the average behavior of a demographic group does not predict the individual behavior (positive or negative) of any particular member of that group—*i.e.*, there are good and bad parents in every demographic group. Under Defendants' reasoning, it would be good policy to ban all low- and middle-income couples from adopting because children of such couples, on average, fare worse than children of upper-income couples. However, no reputable child welfare proponent would ever support such a policy because there are many good parents in the low- and middle-income groups, and because numerous factors other than income are more important to child outcomes. The same reasoning applies to the bans created by Act 1: there are many good cohabiting parents, and numerous factors are more important than parental marital status or sexual orientation in bringing about positive child outcomes (*e.g.*, being raised by a relative, or by a parent with special expertise in dealing with a child's unique needs, such as a medical condition).

In sum, years of research demonstrates that the optimal approach to promoting child welfare is to adopt policies that maximize the pool of potential foster and adoptive parents, and then use individualized assessments to choose the best parent-child match from that broad pool.

B. Arkansas Has An Individualized Assessment Process That Screens Out Unsuitable Parents.

Consistent with this consensus in the child welfare field, Arkansas has generally rejected categorical bans in favor of individualized evaluations when making foster and adoptive placements. Other than the categorical ban that is the subject of this case, Arkansas categorically excludes from adopting only those who have tuberculosis or have committed certain felonies, such as violent or drug-related crimes. Supp Add 24 (¶ 48). Married couples, single adults, adults with physical disabilities, divorced men and women, and adults of a different race or ethnicity than the adoptive child—all may adopt in Arkansas. Ark. Code Ann. § 9-9-204 (West 2009); *see also* Ark. Code Ann. § 9-9-102(b) (West 2009) (“The [Department of Human Services] and any other agency or entity that receives federal assistance and is involved in adoption or foster care placement shall not discriminate on the basis of the race, color, or national origin of the adoptive or foster parent or the child involved nor delay the placement of a child on the basis of race, color, or national origin of the adoptive or foster parents”); *id.* at § 9-9-

102(d) (“The court shall not deny a petition for adoption on the basis of race, color, or national origin of the adoptive parent or the child involved”).

Arkansas law requires that the Child Welfare Agency Review Board (“CWARB”) “shall select the home that is in the best interest of the child, the least restrictive possible, and is matched to the child’s physical and emotional needs,” and that “[t]he placement decision shall be based on an individual assessment of the child’s needs.” Minimum Licensing Standards For Child Welfare Agencies § 200.1, promulgated by the CWARB and Arkansas Department of Human Services Division of Children and Family Services; *see also* ARKANSAS DEPARTMENT OF HUMAN SERVICES DIVISION OF CHILDREN AND FAMILY SERVICES: FAMILY SERVICES POLICY AND PROCEDURE MANUAL (rev. Sept. 2010) (“DHS Manual”) at 77, 139-49, 199-200.

A major component of this individualized assessment is a comprehensive screening process of all prospective foster or adoptive parents to ensure that they would provide a safe and stable home. During this screening process, DHS performs a detailed assessment of prospective parents and all adults and teenagers living in the household, including interviews, background checks, a written home-study, physical examinations, and more than thirty hours of training over ten weeks. *See generally* DHS Manual at 139-149. Moreover, this individualized evaluation continues once the prospective parents have been approved and a child

has been placed in their home. DHS caseworkers conduct extensive follow-up, including monthly visits to the family and regular communication with the child, DHS Manual at 146-147, and the juvenile court conducts periodic review hearings to assess DHS's home-study and independently evaluate the best interests of the child, Ark. Code Ann. § 9-27-337 (West 2009).

C. There Is No Scientific Basis To Support Categorically Banning Gay And Lesbian Couples From Fostering Or Adopting Children.

Individualized assessment of cohabiting applicants clearly serves the interests of children in State custody. Moreover, a substantial body of evidence also confirms that there are no disadvantages to allowing adoption by otherwise-qualified applicants who fall within the group excluded by Act 1. As to gay and lesbian parents, the growing body of research has fortified the resounding consensus among the country's leading pediatric, psychological, psychiatric, and child welfare service providers and scholars that children of gay and lesbian couples are as well-adjusted and as psychologically, emotionally, educationally, and socially successful as children of married heterosexual couples.² This

² See, e.g., Ellen C. Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 341 (2002) (reaffirmed May 2009); American Psychiatric Association ("APA"), *New Position Statement Adopted by the American Psychiatric Association, Adoption and Co-parenting of*

consensus stems both from the professional experiences of these experts and their review and analysis of the social science research related to the effects of parenting by gay and lesbian couples on children's development and well-being. *See Florida Dep't of Children & Families v. In re Matter of Adoption of X.X.G. and N.R.G.,*

Children by Same-sex Couples (2002), available at http://www.psych.org/Departments/OCPA/Newsroom/2002NewsReleases/adoption_coparenting121802.aspx ("APA Position Statement"); American Psychological Association, *Policy Statement: Sexual Orientation, Parents, and Children* (2004), available at <http://www.apa.org/about/governance/council/policy/parenting.aspx> (formalizing conclusion previously reached in American Psychological Association, *Lesbian and Gay Parenting* (1995), available at <http://www.apa.org/pi/lgbt/resources/parenting.aspx>); American Academy of Child & Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement* (rev. 2008), available at http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; CWLA Position Statement (reaffirming prior opposition to assessing adopting applicants on their sexual orientation, which was incorporated into the 2000 Standards); NASW Policy Statement; NACAC Position Statement.

No. 3D08-3044 (Fla. Dist. Ct. App., Sept. 22, 2010) (finding no rational basis for categorical ban of gays and lesbians from serving as adoptive parents).

The social science research pertaining to the effects on children of having gay or lesbian parents spans over thirty-five years and is published in reputable, peer-reviewed journals. This considerable body of research—which relies on well-established scientific methodologies and consists of scores of different studies, including numerous longitudinal studies that examine the circumstances of children and their families at various intervals during their lives—has consistently demonstrated the following key findings:

- Lesbian and gay couples are as devoted to their children and perform at least as well as heterosexual married parents on every measure of parenting skill.³

³ See, e.g., Rachel H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14(3) APPLIED DEVELOPMENTAL SCI. 164, 175 (2010); Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47-3 DEMOGRAPHY 755, 756 (2010); Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. MARRIAGE & FAM. 3, 5 (2010); CWLA Position Statement; NASW Policy Statement.

- No adverse relationship exists between parental sexual orientation and a child's cognitive abilities and development.⁴
- Children raised by gay and lesbian couples do not experience higher rates of, or more severe, emotional or behavioral problems than children of heterosexual married parents.⁵
- Children raised by gay and lesbian couples are not more likely to experience gender identity confusion or to be gay or lesbian themselves.⁶

⁴ See, e.g., Nanette Gartrell & Henny Bos, *U.S. National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 PEDIATRICS 28, 33 (2010); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 172 (2001); Evan B. Donaldson Adoption Institute, *Expanding Resources for Waiting Children II: Eliminating Legal and Practice Barriers to Gay and Lesbian Adoption from Foster Care*, 6 (2008) available at http://www.adoptioninstitute.org/publications/2008_09_Expanding_Resources_Legal.pdf.

⁵ See, e.g., Gartrell & Bos, *supra* note 4, at 34; Ellen C. Perrin, SEXUAL ORIENTATION IN CHILD AND ADOLESCENT HEALTH CARE 118-126 (2002); APA Position Statement, *supra* note 2.

⁶ See, e.g., Farr et al., *supra* note 3; Perrin, *Technical Report*, *supra* note 2;

- Children raised by gay and lesbian couples fare as well on assessments of peer relationship quality and popularity among peers as children of heterosexual parents.⁷

In sum, this research demonstrates that lesbian and gay couples can and do provide the same loving and secure parent-child relationships (with attendant benefits) as their heterosexual married counterparts. Indeed, there have even been findings of *higher* levels of family functioning for special-needs children adopted by gay or lesbian parents than for heterosexual couples. Patrick Leung, et al., *A Comparison of Family Functioning in Gay/Lesbian, Heterosexual and Special Needs Adoptions*, 27:9 CHILD. & YOUTH SERVICES REV. 1031, 1042 (2005). Not a

Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children?: Findings from a Longitudinal Study of Lesbian Families*, 32 DEVELOPMENTAL PSYCHOL. 3, 8 (1996).

⁷ See, e.g., Jennifer L. Wainright & Charlotte J. Patterson, *Peer Relations Among Adolescents With Female Same-Sex Parents*, 44-1 DEVELOPMENTAL PSYCHOL. 117, 121 (2008); Katrien Vanfraussen, et al., *What Does It Mean for Youngsters to Grow Up in a Lesbian Family Created by Means of Donor Insemination?*, 20 J. REPROD. & INFANT PSYCHOL. 237, 250 (2002).

single legitimate scholar argues that growing up with gay parents is somehow bad for children.

Accordingly, the leading professional organizations dedicated to children's health and well-being uniformly oppose the categorical exclusion of gay and lesbian couples as foster and adoptive parents. *See supra* § I.C. These include the Child Welfare League of America, established in 1920, and the National Association of Social Workers, established in 1955—which together consist of over 150,000 members and serve over 600 child welfare groups nationwide—and such venerable medical associations as the American Academy of Pediatrics (60,000 members), the American Psychiatric Association (38,000 members), the American Psychological Association (150,000 members), and the American Academy of Child and Adolescent Psychiatry (7,500 members). Indeed, *Amici* are unaware of any authoritative child welfare or medical organization that has taken a contrary view of the research and its policy implications.

Consistent with this consensus of expert opinion, this Court has already found that no child welfare purpose is advanced by categorically prohibiting gay persons and those living with gay persons from serving as foster parents. *See Dep't of Human Servs. & Child Welfare Agency Review Bd. v. Howard*, 367 Ark. 55, 62, 238 S.W.3d 1 (2006) (“Regulation 200.3.2 [prohibiting foster parenting if any adult member of the applicant's household is a homosexual] does not promote

the health, safety, or welfare of foster children but rather acts to exclude a set of individuals from becoming foster parents based upon morality and bias.”). In *Howard*, the State stipulated that it is “not aware of any child whose health, safety, and/or welfare has been endangered by the fact that such child’s foster parent, or other household member, was ‘homosexual,’” *id.* at 63, and the record below in this case shows no evidence to the contrary, Supp Add 28-29 (¶¶ 60-62).

Following a trial on the merits, the Circuit Court in *Howard* issued comprehensive Findings of Fact and Conclusions of Law rejecting the purported basis for the ban on fostering by gay individuals and those living with gay individuals. These findings included that: (i) “Being raised by gay parents does not increase the risk of problems in the adjustment of children”; (ii) “There is no evidence that gay people, as a group, are more likely to engage in domestic violence than heterosexuals”; and (iii) “There is no evidence that gay people, as a group, are more likely to sexually abuse children than heterosexuals.” *Id.* at 63-64. See also *Florida Dep’t of Children & Families v. In re Matter of Adoption of X.X.G. and N.R.G.*, No. 3D08-3044, slip op. at 4, 13 (Fla. 3d Dist. Ct. App., Sept. 22, 2010) (striking down law banning homosexual adoption and noting that the Florida Department of Children and Families “agrees that gay people and heterosexuals make equally good parents”).

Unsurprisingly, the State's experts were unable to dispute the research showing that children cared for by same-sex couples fare as well as children cared for by married heterosexual parents. *See* Supp Add 43 (¶¶ 114-15). Accordingly, there is simply no basis for concluding that it is harmful for a child to be fostered or adopted by a gay or lesbian couple. *See* Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 176 (2001) ("Because every relevant study to date shows that parental sexual orientation, *per se*, has no measurable effect on the quality of parent-child relationships or on children's mental health or social adjustment, there is no evidentiary basis for considering parental sexual orientation in decisions about children's best interest.").

D. There Is No Scientific Basis To Support Categorically Banning Unmarried Heterosexual Couples From Fostering Or Adopting Children.

Nor do children suffer disadvantages from allowing cohabiting unmarried heterosexual couples to foster and adopt. Defendants rely on studies reporting differences in average child outcomes among children of cohabiting heterosexual couples compared to children of married heterosexual couples, yet inexplicably ignore the evidence showing that children of single parents—who are not excluded by Act 1—have average outcomes comparable to (or even worse than) those of unmarried heterosexual couples. *See* Wendy D. Manning & Kathleen A. Lamb,

Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families, 65 J. MARRIAGE & FAM. 876, 885 (2003); Cynthia Osborne & Sara McLanahan, *Partnership Instability and Child Well-Being*, 69 J. MARRIAGE & FAM. 1065, 1072 (2007); Wendy D. Manning & Susan Brown, *Children's Economic Well-Being in Married and Cohabiting Parent Families*, 68 J. MARRIAGE & FAM. 345, 359 (2006). Putting aside the irrelevance of such studies for child welfare determinations, these studies do not support the categorical exclusion of unmarried cohabiting heterosexual couples for several additional reasons.

First, these studies make clear that cohabitation does not cause bad outcomes. The studies show—and Defendants do not dispute—that most children of unmarried cohabiting heterosexuals, like most children of married heterosexual couples and single parents, are well-adjusted. Supp Add 43-44 (¶ 116). The disparities in average outcomes seen in the literature reflect the lower socioeconomic status of cohabiting heterosexual couples compared to married couples—which is not a basis to exclude applicants from fostering or adopting in Arkansas or any other child welfare system. This evidence shows that there is nothing about cohabitation *per se* that makes a parent unfit or causes poor child outcomes.

Second, the studies cited by Defendants do not focus on the kinds of couples who would voluntarily apply to foster or adopt children and undergo the required

exhaustive screening process. Rather, the cohabiting couples in these studies include many stepfamilies as well as couples who become parents as a result of an unplanned pregnancy, two scenarios that are generally associated with poorer-than-average child outcomes. *See, e.g.*, FCAC Add 324-25 (§ 15) (State expert W. Bradford Wilcox citing Sandi Nelson, et al., *Beyond the Two-Parent Family: How Teenagers Fare in Cohabiting Couple and Blended Families*, NEW FEDERALISM, No. B-31 (2001), whose sample of “cohabiting families” included only mothers with live-in boyfriends). These family situations are easily distinguished from the cohabiting couples at issue in this case, who intentionally choose together to bring a child into their family, and who will both parent the child.

Third, children in unmarried cohabiting households arguably fare *better* on average than children raised by single parents—who are not subject to a categorical ban under Arkansas law. For example, one prominent study concluded that “[c]hildren in cohabiting and married stepfamilies fare better than children living with single mothers.” Wendy D. Manning & Susan Brown, *Children’s Economic Well-Being in Married and Cohabiting Parent Families*, 68 J. MARRIAGE & FAM. 345, 359 (2006); *see also* Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. MARRIAGE & FAM. 3, 17 (2010) (“vast body of research indicates that, other things being equal ... two compatible parents provide advantages for children over single parents”).

Finally, because the only way to determine if an applicant will be a good foster or adoptive parent for a particular child is through individualized review, it makes no sense from a child welfare perspective to reject all cohabiting couples. *See supra* § II.A.

E. Banning Gay And Unmarried Couples From Serving As Adoptive And Foster Parents Is Detrimental To The Health, Safety, And Welfare Of Children In State Custody.

Rather than fulfill its duty to promote the health, safety, and welfare of children, Arkansas's prohibition on adoption and fostering by same-sex and unmarried heterosexual couples actually harms children in Arkansas State custody in numerous ways.

First, Act 1 prevents Arkansas's child welfare professionals and family courts from making the best child-parent match in the numerous instances when a cohabiting applicant will best meet the needs of a particular child. For example, Arkansas has recognized the desirability of placing children permanently with relatives or current custodians with whom they have formed strong attachment relationships. *See* Ark. Code Ann. § 9-9-102(a) (West 2009); Ark. Code Ann. § 9-27-338(c)(1)-(2) (West 2009). However, Act 1 categorically prohibits adoption by relatives or current custodians who are living with, but not married to, their sexual partner—as is the case with Plaintiff-Appellee Cole, who is categorically prohibited from adopting her own granddaughter. *See* Supp Add 22 (¶ 38).

Indeed, even DHS and CWARB believe that Act 1 is inconsistent with children's best interests by categorically excluding otherwise-fit adoptive parents. *See* Supp Add 37-39 (¶¶ 96-97). Accordingly, Arkansas officials frequently find that placements with families that are currently excluded by Act 1 best meet the needs of the child. Supp Add 20-21, 22 (¶¶ 35, 38-39).

Second, Act 1 further undermines the interests of Arkansas children in State custody by reducing the pool of potential foster and adoptive parents, thus exacerbating an already severe shortage. *See supra* § I.B. This shortage means that more children will suffer from lack of permanent placements. *Id.* For example, frequent moves among non-permanent placements cause behavioral problems for children, including academic skill delay, an increase in outpatient mental health visits, behavioral disturbances in school, and lower probability of adoption. *See* Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47-3 DEMOGRAPHY 755, 770-72 (2010) ("Children living at least five years with same-sex couples and children living at least five years with cohabiting couples have odds of making good progress through school that are twice as high as noninmate children who spent the previous five years in group quarters....Children not living in group quarters, including children in households headed by same-sex couples, are dramatically more likely to make normal progress through school than students living in group quarters."); Gary J.

Gates, et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States* 17 (2007) available at <http://www.law.ucla.edu/williamsinstitute/publications/FinalAdoptionReport.pdf> (last accessed Oct. 26, 2010). Compared to children who languish in foster care, those who are adopted complete a higher level of education, are less likely to experience teen pregnancy, abuse drugs and alcohol, have mental health problems, or be arrested or incarcerated, and are more likely to be employed and earn an adequate income. See Mary Eschelbach Hansen, *The Value of Adoption*, 10:2 ADOPTION Q. 65, 65-87 (2008).

Further to the goal of permanency, research also suggests that in order to mature into psychologically healthy adults, children need a long-term relationship with at least one adult who is nurturing and cultivates trust. Lorrie L. Lutz, *Achieving Permanence for Children in the Child Welfare System: Pioneering Possibilities Amidst Daunting Challenges*, 3 (2003) available at <http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/achieving-permanence.pdf> (last accessed Oct. 26, 2010). Such a relationship is impossible to develop in a group home or institutional setting because of the “enormous advantages of personal attention that families have (even single parents and other nontraditional family types) over the state in raising children well.” Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47-3 DEMOGRAPHY 755, 772 (2010).

Even children fortunate enough to be adopted often spend years in foster or group homes as legal orphans awaiting adoption. *See* Report Card at 35 (noting that as of the end of 2009, 37% of Arkansas foster children had spent more than one year in foster care). Notably, the likelihood of being adopted decreases dramatically as a child gets older. *See, e.g.*, North American Council on Adoptable Children, *Arkansas Adoption Facts* (2009) available at <http://www.nacac.org/policy/statefactsheets/AR.pdf> (last accessed Oct. 12, 2010) (“The average age of Arkansas’s adopted children is about 6.3 years, while waiting children are, on average, roughly 9 years old. Research shows that for youth over the age of 9, the likelihood of being adopted drops significantly.”). *See also* Madelyn Freundlich, *The Future of Adoption for Children in Foster Care: Demographics in a Changing Socio-Political Environment* (1999), available at <http://www.adoptioninstitute.org/policy/polfos.html> (percentage of children placed for adoption decreases dramatically by age: 7.7% for children ages 13-18 vs. 55% for children five years old and younger).

Third, Act 1’s exclusion of gay and unmarried heterosexual couples also has a significant financial impact on the State. Arkansas will incur increased foster care expenditures due to the cost of recruiting and training new foster or adoptive parents, as well as the higher cost of caring for children in group or institutional settings rather than in family homes. Supp Add 46-47 (¶ 123); *see also* Gary

Gates, et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States* 19 (2007). Moreover, children without families often mature into adults ill-equipped to become productive members of society, experiencing higher incarceration rates and greater reliance on government aid. *See id.* at 21. If Act 1 remains in effect, not only will Arkansas bear these additional costs, but it will also have fewer resources to spend on the greater number of children left in the State's care.

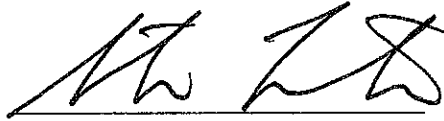
Fourth, Act 1's categorical exclusion is especially detrimental to the most disadvantaged children in State custody. Because special-needs children are among the most difficult to place for adoption, a policy such as Act 1 that significantly decreases the adoptive pool harms these children the most—as evidenced by the fact that Plaintiffs-Appellees Huffman, Rickman, and Chatham and Frazier are prepared to accept special-needs children into their homes, but are categorically prohibited from doing so by Act 1. *See* Evan B. Donaldson Adoption Institute, *Expanding Resources for Children: Is Adoption by Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?* 3 (2006) available at http://www.adoptioninstitute.org/publications/2006_Expanding_Resources_for_Children%20_March_.pdf (“Many prospective parents are interested in adoption, but the significant majority of them are interested in adopting infants or young children without histories of maltreatment and without physical or mental disabilities.”).

Finally, Act 1's exclusion of cohabiting same-sex couples in particular harms the best interests of children. As of March 2007, gay and lesbian parents were raising four percent of all adopted children, three percent of all foster children, and six percent of non-kin foster children nationwide. See Gary J. Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States* 11, 15 (2007). Lesbian and gay parents are also more likely to adopt difficult-to-place children, including those with physical and mental handicaps. Sarah Kaye & Katherine A. Kuvalanka, *State Gay Adoption Laws and Permanency for Foster Youth*, 1 (2006) available at [http://www.sph.umd.edu/fmsc/_docsContribute/Gay adoptionbriefFINAL0806.pdf](http://www.sph.umd.edu/fmsc/_docsContribute/Gay%20adoptionbriefFINAL0806.pdf). Accordingly, the Evan B. Donaldson Adoption Institute, one of the nation's leading adoption policy organizations, concludes that "[b]ased on both the available research and growing experience, adoption by gays and lesbians holds promise as an avenue for achieving permanency for many of the waiting children in foster care." Evan B. Donaldson Adoption Institute, *Expanding Resources for Children: Is Adoption by Gays and Lesbians Part of the Answer for Boys and Girls Who Need Homes?* 3 (2006).

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court affirm the order of the trial court invalidating Act 1.

Respectfully submitted,



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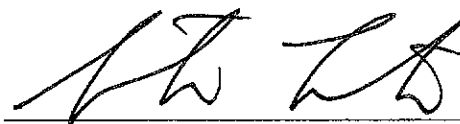
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