CASE NO. 10-840

IN THE SUPREME COURT OF THE STATE OF ARKANSAS

THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, ET AL.
APPELLANTS

and

FAMILY COUNCIL ACTION COMMITTEE, ET AL.
INTERVENOR-APPELLANTS

v. CASE NO. 10-840

SHEILA COLE, ET AL. APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY

THE HONORABLE CHRIS PIAZZA, CIRCUIT JUDGE

BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AND OTHER CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF APPELLEES-CROSS-APPELLANTS

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**Motion to practice by comity pending*

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STATEMENT OF INTEREST OF *AMICI*

Amici are organizations dedicated to the advancement of civil rights, including the rights of lesbian and gay individuals. *Amici* rely on federal rights to due process and equal protection as important bulwarks against government discrimination. Each *amicus* organization is described more fully in the accompanying Motion for Permission to File a Brief *Amicus Curiae*.

Amici believe that the voter-initiated statute challenged in this appeal, Ark. Code Ann. §§ 9-8-301-306 (2010), titled "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" ("Act 1"), violates both the Arkansas and the United States Constitutions. Act 1 infringes on the fundamental right of adults to maintain intimate cohabiting relationships and serves no rational, much less compelling and narrowly tailored, child welfare purpose.

This brief specifically addresses the federal constitutional rights to due process and equal protection, guaranteed under the Fourteenth Amendment, which Act 1 impermissibly denies to unmarried cohabiting prospective foster and adoptive parents. *Amici* submit this brief to respond to the conclusion erroneously reached by the court below that Act 1 does not infringe these federal rights, as well as to the arguments advanced on this question by Appellants-Cross-Appellees Arkansas Department of Human Services, *et al.* (the "State") and Intervenor-

Appellants-Cross-Appellees Family Council Action Committee, *et al.* (the "FCAC") (collectively, the "Appellants"). This brief is submitted in support of Appellees-Cross-Appellants Sheila Cole, *et al.* (the "Appellees") to assist this Court in its consideration of the federal rights at stake and appropriate application of federal standards of review.

ARGUMENT

This Court ruled in 2006 that categorically depriving children in need of foster homes of placements with gay and lesbian individuals or couples bears no rational relationship to the "health, safety, and welfare" of foster children. *Dep't of Human Servs. v. Howard*, 367 Ark. 55, 65, 238 S.W.3d 1, 8 (2006). In *Howard* the Court struck down a regulation creating a blanket prohibition on foster parenting by gay and lesbian individuals and those living with them, noting that the "driving force behind" the regulation was "bias against homosexuals." *Id.* In 2008, while homes for Arkansas's children in need of foster care and adoption placements remained in critically short supply, the FCAC propounded Act 1, yet another ill-conceived blanket ban targeting gay and lesbian families and serving no rational child welfare purpose. Like the regulation earlier struck down in *Howard*, Act 1 was motivated by anti-gay bias — in the words of its proponents, it was designed "to blunt the gay agenda." FCAC Abs. 18.

As codified, Act 1 specifically provides 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 that is valid under the Arkansas Constitution and the laws of this state." Ark. Code Ann. § 9-8-304(a) (2010). Act 1 further provides that it "applies equally to cohabiting opposite-sex and same-sex individuals." *Id.* § 9-8-304(b). It thus sweeps within its blanket

prohibition against serving as foster or adoptive parents all unmarried couples, both same- and different-sex, who cohabit in an intimate relationship. It poses a particular burden on committed same-sex couples, who, unlike different-sex couples, have no ability to enter into a marriage recognized as valid under Arkansas law. *See* Ark. Const. amend. 83, § 1.

The circuit court correctly found that Act 1 "significantly burdens non-marital relationships and acts of sexual intimacy between adults because it forces them to choose between becoming a parent and having any meaningful type of intimate relationship outside of marriage." State Add. 1008. The court further noted that "it is especially troubling that one politically unpopular group has been specifically targeted for exclusion by the Act." *Id.* The court concluded that the Act does not withstand the heightened scrutiny applied to such an intrusion on a fundamental right, and that therefore Act 1 impermissibly infringes the fundamental right to privacy guaranteed by the Arkansas Constitution. *Id.*

The "significant[] burden[]" Act 1 imposes on unmarried cohabiting adults who seek to become foster or adoptive parents is no less an intrusion on the parallel federal fundamental right to form intimate associations likewise guaranteed under the U.S. Constitution. In asserting that "this case involves no fundamental right" protected under federal, as opposed to state, law, *id.* at 1007, the circuit court misconstrued the federal right to form intimate associations, long

protected under the U.S. Constitution and reaffirmed in *Lawrence v. Texas*, 539 U.S. 558 (2003). Act 1's infringement of Appellees' *federal* rights to substantive due process and equal protection triggers strict scrutiny, which the State effectively concedes Act 1 cannot satisfy. (*See infra* Point I.)

Indeed, although strict scrutiny should govern the determination whether Act 1 passes federal constitutional muster, this Act, shown to further no legitimate purpose relating to the health, safety or welfare of Arkansas children, fails even rational review. The court below erred in asserting otherwise. *See* State Add. 1007. Although deferential to legislative judgments, federal rational review requires that a legislative classification must at minimum rationally further an independent and legitimate governmental purpose beyond mere desire to burden those subject to the classification. Moreover, the courts review with special care classifications such as this one targeting historically disfavored groups or impinging on important personal interests, even if not deemed "fundamental" federal rights. (*See infra* Point II.)

The State's ostensible goal of serving the best interests of children in need of adoption or foster care manifestly is not furthered by Act 1's blanket exclusion of all cohabiting couples, no matter how committed and stable the couple or well-suited to offer a safe and loving home. The undisputed evidence demonstrates that Act 1 serves no legitimate and rational purpose. (*See infra* Point III.) Act 1 should

be declared to violate not only the Arkansas Constitution, but also the United States Constitution as well.

I. The United States Constitution, Like The Arkansas Constitution, Guarantees The Fundamental Right To Maintain Intimate Relationships, A Right Violated By Act 1.

The court below correctly concluded that Act 1 violates the Appellees' state constitutional rights to due process and equal protection and granted summary judgment on Count 10 of their complaint asserting those claims. State Add. 1008, 1010. But Appellees' parallel *federal* rights to due process and equal protection guaranteed under the federal Constitution are likewise violated by Act 1, and Count 9 of their complaint asserting these federal claims offers additional grounds for upholding the judgment below. *See* State Add. 684-86.

Classifications burdening exercise of a fundamental right are subject to strict scrutiny when challenged as a violation either of due process, *see, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 384-88 (1978), or equal protection, *see, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 337-39 (1972). Act 1 significantly burdens the fundamental right of unmarried adults to maintain intimate relationships, and so must fall unless the government can demonstrate that the Act advances a compelling government interest and is narrowly tailored to achieve that goal. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 155 (1973).

The Appellants make no effort even to suggest that Act 1 can meet this stringent standard. Instead, they argue that there is no fundamental right at stake here sufficiently burdened to trigger this level of scrutiny. Appellants misconstrue the nature of the right at stake and the infringement on it, an error followed by the circuit court.

First, as the United States Supreme Court has held, "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State. . . ." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). "[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. 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." *Id.* at 619.

Protection for the right of intimate association has extended to the right to reside in family formations other than the married nuclear family. In *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977), the Court struck down a zoning restriction that had the effect of prohibiting a grandmother from residing with her grandchild. "[T]he Constitution prevents [the government] from standardizing its children — and its adults — by forcing all to live in certain narrowly defined family patterns." *Id.* at 506. *See also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S.

632, 639-40 (1974) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

The Court has also recognized that the adult couple whose shared life includes sexual intimacy is one of the most important and profound forms of protected intimate association. *See, e.g.*, *Lawrence*, 539 U.S. at 572 ("liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"). The government may not "seek to control a personal relationship that . . . is within the liberty of persons to choose," in which sexual intimacy may be "but one element in a personal bond that is more enduring." *Id.* at 567.

The Court has thus repeatedly struck down laws that impinge on the liberty of an adult, whether married or not, to engage in private sexual intimacy with a chosen partner, whether different- or same-sex. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down prohibition on sale of contraceptives to married individuals); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down prohibition on sale of contraceptives to unmarried individuals); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (striking down prohibition on sale of contraceptives to minors); *Lawrence*, 539 U.S. 558.

Appellees wrongly contend that *Lawrence*, striking down same-sex sodomy prohibitions, did not treat the right to sexual intimacy of unmarried same-sex couples as one of fundamental dimension. This is contradicted by many features of the *Lawrence* decision. For instance, the Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had held that a sodomy prohibition infringed no fundamental right and had applied only rational review, emphasizing that *Bowers* had misapprehended "the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. The Court described that liberty in terms applicable to a right of fundamental dimension, emphasizing, for example, that "the protected right of homosexual adults to engage in intimate, consensual conduct . . . [represents] an integral part of human freedom." *Id.* at 576-77. *Lawrence* explicitly grounded the right it was applying on such precedents as *Griswold*, *Eisenstadt*, *Roe* and *Carey*, which identified a fundamental right to privacy in making intimate choices. *Lawrence*, 539 U.S. at 565-66. The Court also expressly adopted Justice Stevens's *Bowers* dissent, which was squarely based on this line of fundamental rights cases. *Id.* at 577-78; *see Bowers*, 478 U.S. at 216-18 (Stevens, J., dissenting).

Furthermore, *Lawrence*'s statement that the sodomy law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," *id.* at 578, also conflicts with rational basis standards applicable in the absence of a fundamental right. *Lawrence*'s balancing of the state

interest against the *intrusion* on the individual's interest is a hallmark of heightened scrutiny. *See, e.g.*, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874-75 (1992). Moreover, the Court's use of the word "legitimate" does not mean that the Court applied rational basis review. As a threshold matter, all government purposes must be "legitimate," whether a fundamental or less protected interest is involved. *See, e.g.*, *Roe*, 410 U.S. at 155 (where "fundamental rights" are involved, "legislative enactments must be narrowly drawn to express only the *legitimate* state interests at stake") (emphasis added).

Second, not only does Act 1 infringe on a right of fundamental dimension, but its burden is substantial and triggers strict scrutiny. The State argues that Act 1 does not prevent Appellees from cohabiting, engaging in sexual relations, or becoming foster or adoptive parents, which, the State emphasizes, is not itself a fundamental right. But this ignores the actual impact of Act 1 and the governing federal constitutional principles.

Under Act 1, same-sex couples, who cannot enter into marriages recognized under Arkansas law, must live in celibacy or break apart their homes in order to be considered as foster or adoptive parents. Likewise, different-sex unmarried couples face a similar dilemma, having to live together without sexual intimacy,

move apart, or marry, regardless of their reasons for being unmarried or their suitability to parent.

This type of burden on the exercise of a fundamental right has repeatedly been held to trigger heightened scrutiny. Moreover, contrary to the State's suggestion, heightened scrutiny is appropriate even if the State has not criminally prohibited exercise of the right, or if the penalty imposed for exercise of the right is denial of a privilege (such as foster parenting) rather than another constitutionally-guaranteed right. *See, e.g.*, *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 257-58 (1974) (fundamental right to interstate travel violated by conditioning access to non-emergency medical care on state residency); *Cleveland Bd. of Educ.*, 414 U.S. at 640 (fundamental reproductive rights violated by conditioning public employment on foregoing pregnancy); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (fundamental right to travel violated by conditioning welfare benefits on duration of residency); *see also Witt v. Dep't of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008) (government intrusion on "personal and private lives of homosexuals" from jeopardy of military discharge under "Don't Ask Don't Tell" policy triggers heightened scrutiny); *Log Cabin Republicans v. United States*, No. CV 04-08425-VAP, 2010 U.S. Dist. LEXIS 93612, at *66-*69 (C.D. Cal. Sept. 9, 2010) (same), *appeal docketed* No. 10-56634 (9th Cir. Oct. 15, 2010).

The cases on which Appellants rely to suggest that Act 1 does not infringe a fundamental right or pose an insubstantial burden are inapposite. *See* State Br. Arg. 11-15; FCAC Br. Arg. 13-15. For example, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), involved a zoning restriction that *would allow* an unmarried cohabiting couple to reside in the town. It thus reflected no "animosity to unmarried people who live together" and did not infringe the fundamental right at issue in this case. *Id.* at 8. Instead, the ordinance precluded larger groups of unmarried, unrelated roommates, none of whom claimed to be a couple in a protected intimate cohabiting relationship, from residing together as a group. *See id.* at 2-3.

Lyng v. Castillo, 477 U.S. 635, 636 n.1 (1986), and *Califano v. Jobst*, 434 U.S. 47, 48 n.2 (1977), involved allocations of government economic benefits that took into account household family size and structure, among other factors, to gauge financial need. Those programs used the existence of the family relationships to make a reasonable assessment about the economics of living arrangements. They did not, as Act 1 does, treat those relationships pejoratively, as posing a hazard and a reason to bar children from the household.

Harris v. McRae, 448 U.S. 297, 326 (1980), held that it was not an unconstitutional condition on the right to terminate a pregnancy for the government to refuse to fund the procedure for indigent women. But the Court expressly noted

that it would be a very different matter for the government categorically to refuse *all* Medicaid coverage to an otherwise eligible woman simply because she exercised her right to terminate a pregnancy. *See id.* at 317 n.19. Such "a broad disqualification from receipt of public benefits" would be the type of penalty on exercise of a fundamental right prohibited under the Constitution. *Id.*

In fact, an indigent woman may, albeit with great difficulty, be able to obtain a privately-funded abortion and other medical services, even without a government subsidy. In contrast, the State has an absolute monopoly on access to becoming a foster or adoptive parent, which can occur only with government authorization. Act 1's "broad" — indeed, absolute — "disqualification" of unmarried cohabiting couples imposes an unconstitutional penalty on exercise of a fundamental right without the compelling justification required to sustain it.

II. The U.S. Supreme Court Applies Rational Review To Strike Down Legislative Classifications That In Reality Do Not Advance A Legitimate Government Goal, Reviewing With Special Care Classifications Impinging On Important Personal Interests Or Targeting An Historically Disfavored Group.

Although strict scrutiny is the appropriate standard to apply to Act 1's deprivation of Appellees' fundamental rights, the Act cannot survive even rational basis review. The lower court erred in its framing and application of the federal rational review test, turning rational review into nothing more than a rubber-stamp of legislative choices. The circuit court accepted at face value the State's "theory"

that cohabiting couples "facilitate poorer child performance outcomes and expose children to higher risks of abuse" than married couples or single adults. State Add. 1007. But rational review requires more than that the government simply express some purported legitimate goal behind the enactment. Moreover, where, as here, important personal interests are at stake, and an historically disfavored group has been targeted through the enactment, federal rational review standards require a more searching inquiry and substantiation of the fit between legislative purpose and classification. "[S]peculation" alone will not suffice. *See* State Add. 1007 (quotations omitted).

Federal equal protection principles require that legislative classifications at minimum (1) have a legitimate governmental purpose, *and* (2) rationally further that purpose. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 633-35 (1996). Under these "conventional and venerable" principles of rational review, courts focus on whether the ends purportedly explaining a law's design are truly furthered by the exclusionary means employed. *Id.* at 635. Thus a purported state interest that is not logically furthered by the legislative classification or does not adequately explain why one group but not another was singled out for adverse treatment fails even the most deferential rational review. *See, e.g.*, *id.* at 632; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985) (equal protection will not

permit "a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational").

Run-of-the-mill "economic or tax legislation . . . scrutinized under rational basis review normally pass[es] constitutional muster, since 'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.'" *Lawrence*, 539 U.S. at 579-80 (O'Connor, J., concurring) (quoting *Cleburne*, 473 U.S. at 440). Thus the Supreme Court's federal rationality review has been "especially deferential" towards classifications "made by complex tax laws," *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); industry regulatory schemes, *e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981); or large, complex social welfare programs involving distributions of limited funds, *e.g.*, *Lyng*, 477 U.S. at 638-41.

Yet even this deferential review requires that the rationale for the legislation "find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe,* 509 U.S. 312, 321 (1993); *see also Beach Commc'ns,* 508 U.S. at 316-20; *Clover Leaf,* 449 U.S. at 461-66. Indeed, the Court has not hesitated to invalidate legislation even in the tax and business regulatory realm where the state purpose is a legitimate one but the challenged classification cannot be seen actually to advance it. Thus, in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869

(1985), the Court struck down a provision taxing domestic insurance companies at a lower rate than out-of-state companies operating within the state, rejecting as inadequate the government's general purpose of aiding domestic industry. *Id.* at 879, 882. The Court explained: "If we accept the State's view here, then any discriminatory tax would be valid if the State could show it reasonably was intended to benefit domestic business. A discriminatory tax would stand or fall depending primarily on how a State framed its purpose. . . ." *Id.* at 882.

As this and many other Supreme Court cases demonstrate, "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause. . . ." *Romer*, 517 U.S. at 632. *See, e.g.*, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 619-20 (1985) (striking down law granting tax exemption to veterans who had resided years before in state because it logically did not advance governmental goal of encouraging veterans to move now to state); *Williams v. Vermont*, 472 U.S. 14, 15, 23-24 n.8 (1985) (invalidating classification imposing automobile tax on only some groups of drivers where fit between classification and statutory purpose was too imprecise and "purposes of the statute would be identically served, and with an identical burden, by taxing each"); *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) (striking

down preferences for long-time residents because classification did not rationally advance state interests in promoting state residency and prudently managing state funds).

The conventional, deferential rational basis standard under federal law embodies a separation of powers principle in which the judicial branch accords substantial leeway to legislative enactments expressing majoritarian preferences. Rational review is applied with less deference to legislative enactments, however, when warranted to enforce the overriding guarantee the Constitution makes to each individual of equal protection of the laws. It is, after all, only "absent some reason to infer antipathy" that the "Constitution presumes" that the "democratic process" will correct "improvident decisions . . . and that judicial intervention is generally unwarranted. . . ." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). If there is, however, "reason to infer antipathy," the courts are less liable to assume that the "democratic process" will rectify the legislative inequity, and will then play a less deferential role in order to protect the interests of the specially burdened group. *Id.* "[W]e have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring).

Thus in cases where not tax schemes or industry regulation but civil liberties — even if not deemed "fundamental"— are at stake, the Supreme Court has more

rigorously examined the fit between legislative means and ends. The Court has applied federal rational basis review with most care, first, when a classification impinges on personal and family relationships and liberty interests that, even if not deemed "fundamental," are nonetheless important to the individual, or, second, when a classification is drawn to target an unpopular group, even without a finding that the class is "suspect." *See Lawrence*, 539 U.S. at 580 ("We have been most likely to apply rational basis review to hold a law unconstitutional . . . where . . . the challenged legislation inhibits personal relationships" or reflects a "'desire to harm a politically unpopular group.'") (O'Connor, J., concurring) (collecting cases); *see also Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) ("[A] court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.").

This is exactly the situation here. While Appellants dispute the fact that Act 1 infringes on a fundamental right, there can be no dispute that it implicates the ability of unmarried adults, particularly those who are lesbian or gay, to live with their intimate partners and build their families through foster or adoptive parenting. Moreover, as the circuit court emphasized, "it is especially troubling that one

politically unpopular group has been specifically targeted for exclusion by the Act." State Add. 1008.

In such circumstances the Supreme Court's rational review has been most assertive, requiring *substantiation* that the differential treatment itself serves a valid purpose. The Court has not rested on speculative explanations of how the classification relates generally to a government interest. The Court instead has evaluated whether the burden on one group rationally *furthers* a legitimate interest based on real-world facts. *See, e.g.*, *Cleburne*, 473 U.S. at 446, 448-49. Likewise, in such cases the Court has been especially vigilant in requiring that the laws at issue be "grounded in a sufficient factual context for [a court] to ascertain some relation between the classification and the purpose it serve[s]." *Romer*, 517 U.S. at 632-33. Another important corollary of the Supreme Court's closer rational review is that a challenged classification is more apt to be rejected if it is significantly over- or under-inclusive. *See, e.g.*, *Cleburne*, 473 U.S. at 449-50. In such cases concerns with the logic of a law's means reinforce doubt about the legitimacy of its ends. *See, e.g.*, *Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-37 (1973).

Where impermissible state objectives appear to underlie a classification, the Supreme Court not only has rejected those interests, but also has reviewed any other proffered interests with particular care to ensure that improper motives were not, in fact, the overriding basis for the classification. *See, e.g.*, *Cleburne*, 473

U.S. at 448-50. In such cases, moreover, the Court has not itself attempted to conceive of some legitimate rational explanation for the classification beyond those advanced by the government, but instead has considered only any additional government purposes actually put forward by the state. *See, e.g., id.* at 449-50; *Moreno*, 413 U.S. at 534-38. To do otherwise would be to disregard the actual evidence of illegitimate government goals and make the judiciary complicit in their advancement.

Cleburne, for example, applied rational basis review to a city's denial of a special use permit to a group home for people with mental retardation, where other group facilities were permitted in the community. The Supreme Court first evaluated the city's argument that the exclusion was justified by the "negative attitude of the majority of property owners" towards institutions for those with mental disabilities. 473 U.S. at 448. The Court found this "justification" to be illegitimate: "[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" in a legislative determination, "are not permissible bases for treating a home for the mentally retarded differently" from other multiple dwellings. *Id.* at 448. The Court also refused to accept at face value additional government claims that the restriction served safety and other goals and instead scrutinized whether the differential treatment of those with mental retardation rationally promoted the government interests. The Court concluded that it was

"difficult to believe" that these government concerns justified singling out those with mental retardation for exclusion, since there was insufficient basis to assume a group home for them would cause the feared problems any more than other congregate facilities that were permitted. *Id.* at 449. The classification was at once over- and under-inclusive, and so too "attenuated" from the "asserted goal," to be rational. *Id.* at 446.

In *Moreno*, another case invalidating a classification that impinged on personal relationships and reflected disapproval of an unpopular group, the Supreme Court rejected a law that denied food stamps to households of unrelated persons. Legislative history indicated that the measure was targeted at "hippies." 413 U.S. at 534. The Court rejected this "bare congressional desire to harm a politically unpopular group" as an illegitimate government interest. *Id.* at 534. The Court dismissed further arguments that the measure served a government interest in preventing fraud because households of unrelated persons might be '"relatively unstable'" as well as more likely to include individuals inclined to commit fraud. *Id.* at 535. The Court found these explanations not only "wholly unsubstantiated" but, in any event, insufficient to support a status-based ban on households otherwise eligible and suitable to receive the benefits of the food stamp program. *Id.* Independent statutory provisions designed to address fraud "cast[]

considerable doubt upon the proposition that [the restriction] could rationally have been intended to prevent those very same abuses." *Id.* at 536-37.

In *Romer* the Supreme Court held that a Colorado constitutional amendment prohibiting any governmental measures that would protect lesbians and gay men from discrimination within the state could not satisfy even rational basis review. 517 U.S. at 635. The government offered as rationales for the law respecting the liberties of other citizens who have "personal or religious objections to homosexuality," and "conserving resources to fight discrimination against other groups." *Id.* The Court determined that the decision to classify based on sexual orientation was "so far removed from these particular justifications that we find it impossible to credit them." *Id.* Because the amendment bore no credible relationship to the state's proffered legitimate justifications, it gave rise to "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634. Moreover, it also defied the equal protection requirement that a classification serve "an independent and legitimate legislative end," rather than be drawn simply "for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

III. Act 1 Fails Rational Review Because The Exclusion Of Cohabiting Couples From All Consideration As Foster And Adoptive Parents Does Not Rationally Further A Legitimate Government Purpose.

The circuit court wrongly concluded that Act 1 serves a "legitimate governmental purpose" based on the State's "theory" that cohabiting environments "on average, facilitate poorer child performance outcomes and expose children to higher risks of abuse than do home environments where the parents are married or single." State Add. 1007. Act 1 cannot survive even rational basis review because it fails the most basic requirement of that test: the Act lacks a "link between the classification" and any child welfare "objective." *Romer*, 517 U.S. at 632.

First, the State's assertion that cohabiting couples pose too high a risk of being unfit parents cannot be credited, given that the State allows cohabitants to serve as parents through guardianship, with *less* oversight and monitoring than occurs with foster placements. *Compare* Ark. Code Ann. § 28-65-203 (2010) (qualifications of guardian), *with* Child Welfare Agency Review Board & Arkansas Department of Health and Human Services, Division of Children and Family Services, *Minimum Licensing Standards for Child Welfare Agencies* § 200.9 (2006), *available at* http://www.state.ar.us/dhs/chilnfam/PUB-04%20%28Final%29%20 Aug%2014,06.pdf, *and* FCAC Add. 111-21 (Arkansas Division of Children and Family Services policy regarding selection, training and monitoring of foster parents). The State's asserted justification thus is directly

contradicted by its own policy of permitting this excluded group to care for children through guardianships. FCAC Abs. 15.

Second, the State relies on inapposite and misleading statistics to claim that children reared in cohabiting environments have poorer outcomes and are at risk of abuse. For example, much of the statistical data presented by the State's experts involve children reared in intact heterosexual married households by their biologically-related parents. *See* FCAC Add. 322-30. This data is not at all probative, given that children in state care in need of foster or adoptive homes do not have as an option placement with their married biological parents. The reality is that children in care who would be affected by Act 1 face the choice of being placed with a suitable cohabiting family or remaining in state facilities, which is harmful to children (as well as costly to the State). FCAC Add. 225, 492-93, 898. The State's apples-to-oranges statistical comparisons do not provide a rational basis for Act 1.

With regard to same-sex couples, Appellants' experts concede that none of the studies of cohabitors on which they rely include same-sex couples. FCAC Abs. 27. Nor do they dispute the research showing average outcomes for children of same-sex couples are no different than for children raised by married couples. FCAC Abs. 29, 88, 332. Moreover, this Court already concluded in *Howard* that excluding gay couples from serving as foster parents is not rationally related to

protecting the health, welfare and safety of children. *Howard*, 367 Ark. at 65, 238 S.W.3d at 7. The State's purported statistical arguments do not apply to same-sex couples and should be rejected as any kind of rational justification for Act 1.

Furthermore, other demographic groups, such as singles, people with low incomes and people with limited education, show comparable or less positive statistical average outcomes than cohabiting couples, yet are permitted under Act 1 to foster and adopt. FCAC Abs. 82-83; FCAC Add. 234-35, 388. Ultimately, all that the State's statistical data proves is that Act 1 is so grossly over- and under-inclusive as to be irrational. *See, e.g., Cleburne,* 473 U.S. at 449-50.

Third, far from advancing child welfare goals, Act 1 needlessly diminishes the already critically inadequate pool of prospective foster and adoptive parents, FCAC Abs. 137, eliminating many who would be well-suited to care for children in need. FCAC Add. 224-26. The expert testimony in the case demonstrates that children raised by same-sex couples have the same positive outcomes as those raised by married heterosexual parents. FCAC Abs. 87; FCAC Add. 491. The testimony also shows that unmarried cohabiting heterosexual couples can and do make good parents. FCAC Abs. 21, 74, 80, 84, 124; FCAC Add. 490. There is no rational reason categorically to exclude one group of otherwise qualified prospective foster and adoptive parents when there is a shortage of resource foster and adoptive families for children in care. FCAC Add. 224-26. *See Cornerstone*

Bible Church v. City of Hastings, 948 F.2d 464, 471-72 (8th Cir. 1991) (rational review requires a government justification to explain ordinance's different treatment of similarly situated groups).

Indeed, Act 1's categorical exclusion of cohabiting couples is inconsistent with the professional consensus of the child welfare field, which supports individualized assessments of potential foster and adoptive parents and views same- and different-sex unmarried couples as important resources for children in need. Every authoritative child welfare and health organization recognizes that children fare just as well in families with same-sex parents as in families with heterosexual parents. FCAC Add. 491. Accordingly, it is impossible to reconcile the expert consensus that children raised by cohabiting heterosexual and same-sex couples have positive outcomes with Act 1's sweeping judgment condemning all cohabiting couples as invariably unsuited to be foster or adoptive parents.

Fourth, the very legitimate state interest in placing foster children only in foster homes that are safe and suitable for them is addressed by the case-by-case evaluation and screening processes already mandated in the State for licensing and monitoring foster parents. FCAC Add. 111-21. The undisputed evidence also demonstrates that the current system's individualized evaluation process will screen out those potential foster and adoptive parents who, regardless of marital or cohabiting status, pose a risk to children. FCAC Abs. 72, 194; FCAC Add. 224.

This comprehensive screening process, which carefully evaluates the suitability of prospective foster parents — not the bludgeon of a categorical ban — advances the State's goal to protect children from harm. *See Moreno*, 413 U.S. at 536-37 (existing provisions for weeding out fraud in food stamp program cast doubt on the rationale for a status-based ban on benefits to households of unrelated persons).

Act 1's irrationality is particularly driven home by the recent decision of a Florida appellate court striking down that state's ban on adoption by gay and lesbian adults as violative of the state guarantee of equal protection, parallel to the federal constitutional guarantee. *See Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G.*, No. 3D08-3044, 2010 Fla. App. LEXIS 14014 (Fla. Dist. Ct. App. Sept. 22, 2010). The Florida ban prohibited adoption by gay men and lesbians, but did not prohibit them from serving as foster parents or (like Act 1) as guardians. *Id.* at *15. Rationales and evidence strikingly similar to those presented in this case were at issue in the Florida challenge, including, for example, unsupported government contentions about the parenting skills and stability of gay and lesbian couples, and the contrasting overwhelming expert evidence demonstrating the irrationality of the ban. *See id.* at *18-*43. The Florida court concluded that the ban failed even rational review: "It is difficult to see any rational basis in utilizing homosexual persons as foster parents or guardians on a temporary or permanent basis, while imposing a blanket prohibition

on adoption by those same persons." *Id.* at *17-*18. "All other persons are eligible to be considered case-by-case to be adoptive parents." *Id.* at *33.[1]

Act 1's categorical exclusion of same-sex and heterosexual cohabiting couples likewise is "so far removed" from any legitimate child welfare justification that it is "impossible to credit" the Appellants' purported rationales. *Romer*, 517 U.S. at 635. Like the Florida ban, Act 1 cannot withstand even rational basis review.

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[1] The Florida Department of Children and Family Services ("DCFS") has announced that it is not appealing *Adoption of X.X.G.* Brenden Farrington, *DCF Won't Appeal Overturn of Gay Adoption Ban*, Miami Herald, Oct. 12, 2010, *available at* http://www.miamiherald.com/2010/10/12/1869795/fla-wont-appeal-overturn-of-gay.html. That ruling, and DCFS's determination not to appeal it, make fruitless any further reliance by Appellants on *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), *rehearing en banc denied*, 377 F.3d 1257 (11th Cir. 2004), previously upholding the Florida adoption ban against a federal challenge based on "unprovable assumptions" about the superiority of heterosexual couples as parents. *Id.* at 819-20.

CONCLUSION

For the foregoing reasons and those asserted in Appellees' briefing, Act 1 should be held to violate both the Arkansas and U.S. Constitutions.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark Burnette, certify that on October 27, 2010, I caused the above and foregoing **Brief of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc. and Other Civil Rights Organizations In Support of Appellees-Cross-Appellants** to be served by U.S. mail, postage pre-paid, on the following persons at the addresses indicated:

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