

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.; 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.; Curtis Chatham and Shane Frazier; and S.H., R.P. and E.P., by and through their next friend, Oscar Jones,

PLAINTIFFS,

VS.

NO. CV 2008-14284

The State of Arkansas; the Attorney General for the State of Arkansas, Dustin McDaniel, in his official capacity, and his successors in office; the Arkansas Department of Human Services and John M. Selig, Director, in his official capacity, and his successors in office; and the Child Welfare Agency Review Board and Charles Flynn, Chairman, in his official capacity, and his successors in office,

DEFENDANTS.

FOURTH AMENDED COMPLAINT

Plaintiffs 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 and Benny Scroggin, on their own behalves, and by, for and on behalf of their two children, N.S. and L.S.; Susan Duell-Mitchell and Chris Mitchell, on their own behalves, and by, for and on behalf of their two children, N.J.M. and N.C.M.; Curtis Chatham and Shane Frazier; and S.H., R.P. and E.P., by and through their next friend, Oscar Jones

(collectively "Plaintiffs") allege against Defendants 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 ("DHS") and John M. Selig, Director, in his official capacity, and his successors in office; and the Child Welfare Agency Review Board ("Child Welfare Board") and Charles Flynn, Chairman, in his official capacity, and his successors in office, (collectively "Defendants") as follows:

INTRODUCTION

1. The State of Arkansas, and all of its governmental branches and agencies, has an overriding obligation to act in the best interests of the children in its custody, all of whom are in need of stable and loving homes through adoption or foster care.

2. On November 4, 2008, a ballot initiative entitled "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") was approved by a majority of Arkansas voters. Act 1 is scheduled to take effect on January 1, 2009.

3. As described below, Act 1's blanket exclusion of a whole class of potentially qualified foster and adoptive parents, both gay and heterosexual—including even those who are kin to the children they seek to foster or adopt—violates the State's legal duty to place the best interests of children before all else. Plaintiffs bring this lawsuit because Act 1 is not related, rationally or otherwise, to protecting the best interests of children, and seek declaratory and injunctive relief against its enforcement.

4. Act 1: (1) disregards the best interests of children and prevents their placement in willing, eligible and loving foster or adoptive homes; (2) keeps children in state custody at additional and unnecessary costs to taxpayers of the State; (3) burdens private, consensual acts of sexual intimacy between adults with no corresponding benefit

to children; (4) denies natural parents the right to decide who shall be entrusted to adopt their children, such as the children's own grandparents, in the event parents can no longer care for those children; and (5) discriminates in an unlawful and unconstitutional manner against a group of adults willing to serve as loving foster and adoptive parents. Because Act 1 is neither a legitimate use of State power, nor of Amendment 7's initiative power, and because Act 1 is neither narrowly tailored to meet any compelling government interest nor rationally related to protecting the welfare of children for whom the State bears statutory responsibility, Ark. Code Ann. § 9-28-1002(a), Plaintiffs bring this action to invalidate Act 1 under the Constitutions of the State of Arkansas and the United States.

5. The purpose of the ballot initiative was made clear by its sponsors: Act 1 was conceived, drafted and sponsored as part of a long-running campaign to "ban homosexual couples from adopting children or serving as foster parents." *See* Act 1 Flyer (describing the purpose of Act 1 to "Blunt[] the Gay Agenda") (attached).

6. In 2006, a regulation barring fostering by gay people was struck down by this Court and the Arkansas Supreme Court in *Howard v. Child Welfare Agency Review Board* because it did not further, and in fact hurt, the health, safety and welfare of children. In response to *Howard*, the proponents of Act 1 crafted a broader exclusion based on cohabitation that extends not only to same-sex couples, who are prohibited from marrying under Arkansas law, but also to numerous heterosexual couples.

7. Act 1 categorically and automatically will ban unmarried adults cohabiting with a sexual partner (hereinafter "an intimate relationship") from being considered as potential foster or adoptive parents despite the fact that there is no legitimate basis, scientific or otherwise, to deem such individuals per se unfit to parent.

8. This ban is a departure from Arkansas' long-established procedures of entrusting courts and qualified child welfare professionals to make an individualized assessment of each prospective adoptive and foster parent to determine which placement serves the best interests of the child in question. If Act 1 is not enjoined, all individuals who cohabit in intimate relationships will be barred as per se unfit, regardless of their qualifications or the needs of children—even though under Arkansas law, individuals who have been convicted of serious crimes, including contributing to the delinquency of a minor and distribution of illegal substances to minors, will continue to be individually evaluated on their merits as prospective parents.

9. Act 1's categorical exclusion of individuals who cohabit in intimate relationships as foster or adoptive parents arbitrarily and needlessly will deprive Arkansas' neediest children of access to qualified foster and adoptive parents who could provide them with loving homes, exacerbating the critical shortage of families available to meet the needs of children in State custody. Act 1 also will deprive some children of placements with otherwise qualified relatives and other adults with whom they already have close and familial relationships.

10. In addition, Act 1 prevents parents from planning for the future of their children in the event of parental death or incapacity. Under Act 1, courts would have to reject a parent's testamentary wish that his or her child be adopted by a relative or other individual who is in a cohabiting intimate relationship. By way of just one of the many examples of the harmful effects of Act 1 on Arkansas families, an aunt would be categorically barred by Act 1 from adopting the child of her deceased sister if the aunt was involved in an intimate relationship outside of marriage, notwithstanding the facts that (1) the relationship was stable and loving, (2) the aunt had a close and loving

relationship with her niece, (3) it was the wish of the natural parents that the child be adopted by the child's relative and (4) there was no disagreement that it was in the best interest of the child to be adopted by her aunt. Categorically preventing such relationships and decisions that should be left to families is not a proper purpose for state legislation.

11. Act 1 not only works against the best interests of children and families, but is also abhorrent to the letter and spirit of the Arkansas Constitution of 1874 and the United States Constitution. Further, Act 1 is invalid because the ballot title used to inform the voters about the effects of the initiative was materially misleading. Act 1 should be enjoined and declared invalid.

JURISDICTION AND VENUE

12. This court has jurisdiction pursuant to Ark. Code Ann. § 16-13-201(a) ("Circuit courts shall have original jurisdiction of all justiciable matters not otherwise assigned pursuant to the Arkansas Constitution.").

13. Venue is proper in Pulaski County under Ark. Code Ann. § 16-60-103(3) ("All actions against the state and all actions against state boards, state commissioners, or state officers on account of their official acts, except that if an action could otherwise be brought in another county or counties under the venue laws of this state, as provided in § 16-60-101 *et. seq.*, then the action may be brought either in Pulaski County or the other county or counties . . .").

PARTIES

Plaintiffs

**SHEILA COLE, ON HER OWN BEHALF, AND BY, FOR AND
ON BEHALF OF HER GRANDDAUGHTER, W.H.**

14. Plaintiff Sheila Cole is a resident of Tulsa, Oklahoma. She has lived in a committed relationship with her same-sex partner there for nine years. Sheila is 39 years old and her partner is 38 years old. They are both registered nurses and together they are raising a 4-year old daughter born to Sheila's partner.

15. Sheila is a maternal grandparent of a 7 month old girl, W.H., who is currently in the protective custody of DHS. On information and belief, DHS removed W.H. from her parents, who reside in Arkansas, after the baby was taken to the emergency room in July 2008. On information and belief, at the hospital, the doctors and nurses discovered that W.H., who was about 2 months old at the time, had suffered multiple rib fractures and other serious injuries strongly indicating ongoing abuse. DHS now has initiated termination of parent rights proceedings against both of W.H.'s parents.

16. Sheila had met her granddaughter W.H. right after she was born, and upon learning of DHS's intention to seek termination of parental rights, Sheila immediately sought to have her granddaughter placed with her in Oklahoma. Pursuant to the Interstate Compact on the Placement of Children ("ICPC"), which governs interstate placement of children in foster and adoptive homes, Sheila urgently sought and obtained a home study in Oklahoma approving her as a qualified foster parent.

17. Sheila also immediately sought approval from DHS to have weekly visitation with W.H., who is currently in foster care. She has made the six-hour roundtrip drive from Tulsa, Oklahoma to Bentonville, Arkansas to be with her granddaughter for a two-hour visit every week since October 20, 2008. Sheila, whose application is now pending with DHS's ICPC administrative office, and W.H., will suffer real, immediate,

and irreparable harm if Act 1 is used to bar Sheila from taking care of her granddaughter and keeping the child within the family.

18. Act 1 is both invalid on its face and as applied to Sheila and her granddaughter, W.H.

STEPHANIE HUFFMAN AND WENDY RICKMAN

19. Plaintiffs Stephanie Huffman and Wendy Rickman are residents of Conway, Arkansas. They have lived together in a committed relationship for ten years. Stephanie is 39 years old and Wendy is 37 years old. They are both professors at the University of Central Arkansas in Conway. They are raising two children, Wendy's biological child and a seven-year old boy whom Stephanie adopted in 2003 through Arkansas' Division of Child and Family Services ("DCFS"), a division of DHS. DCFS approved Stephanie to be an adoptive parent after evaluating both Stephanie and Wendy and deeming them capable of providing a good home for this child in need of special care.

20. Stephanie subsequently sought to adopt another child, and she and Wendy were once again investigated and approved, but no adoption has yet occurred, and cannot occur now because of Act 1. Because Stephanie and Wendy, partners for ten years, are not married, and as a same-sex couple cannot marry under Arkansas law, they automatically are disqualified under the terms of Act 1 from adopting another child.

21. Act 1 is both invalid on its face and as applied to Stephanie and Wendy.

FRANK PENNISI AND MATT HARRISON

22. Plaintiffs Frank Pennisi and Matt Harrison are residents of Little Rock, Arkansas. They have lived together in a committed relationship for eight years. Frank is 29 years old. He works as a market researcher. Matt is 36 years old. He works as a data analyst for an insurance company.

23. Frank and Matt would like to serve as foster and adoptive parents, but because as a same-sex couple they are not and cannot be married under Arkansas law, they are automatically disqualified under the terms of Act 1.

24. Act 1 is both invalid on its face and as applied to Frank and Matt.

MEREDITH AND BENNY SCROGGIN, ON THEIR OWN BEHALVES, AND BY, FOR AND ON BEHALF OF THEIR TWO CHILDREN, N.S. AND L.S.

25. Plaintiff Matt Harrison's first cousin, Meredith, and her husband Benny Scroggin have two children, N.S. and L.S., ages 4 and 1, respectively. Meredith and Benny are residents of Little Rock, Arkansas. In the event of their deaths or incapacitation, Meredith and Benny have designated Plaintiffs Frank Pennisi and Matt Harrison to care for their two children, and would like Frank and Matt to adopt their two children to ensure that the children can remain in their care. Because Act 1 would bar Frank and Matt from adopting the children, Meredith and Benny must choose between uncertainty about whether their wishes regarding the adoption and care of their children will be honored, or an alternative, and in the parents' view inferior, designee who can adopt, to ensure that their children's future is secure.

26. Act 1 is both invalid on its face and as applied to Meredith and Benny, and their two children, N.S. and L.S.

SUSAN DUELL-MITCHELL AND CHRIS MITCHELL, ON THEIR OWN BEHALVES, AND BY, FOR AND ON BEHALF OF THEIR TWO CHILDREN, N.J.M. AND N.C.M.

27. Susan Duell-Mitchell and Chris Mitchell live in Fayetteville, Arkansas and have two children they adopted from Ukraine in 2005, N.J.M. and N.C.M., ages 9 and 11, respectively. If Susan and Chris die or become incapacitated, they want Chris Shields and Rick Shelton, a gay couple, to adopt N.J.M. and N.C.M.

28. Chris Shields and Rick have been in a committed relationship for over ten years. They have known Chris Mitchell and Susan for nearly as long.

29. Chris Shields and Rick have been loving "uncles" to the children since they were adopted by Chris Mitchell and Susan. Chris Shields and Susan's mother, along with Rick and other family friends, painted the children's rooms, purchased beds, and filled the rooms with clothing and toys as a surprise for Chris Mitchell and Susan when they returned home with the children. The two couples see each other at least weekly, especially during the summer, when the children love to swim in Chris Shields and Rick's pool.

30. Because Chris Shields and Rick are not married, and because as a same-sex couple they cannot marry under Arkansas law, they are automatically disqualified under the terms of Act 1 from adopting any children. Because Act 1 would bar Chris Shields and Rick from adopting the children, Chris Mitchell and Susan must choose between uncertainty about whether their wishes regarding the adoption and care of their children will be honored, or an alternative, and in the parents' view inferior, designee who can adopt, to ensure that their children's future is secure.

31. Act 1 is both invalid on its face and as applied to Chris Mitchell and Susan, and their two children N.J.M. and N.C.M.

CURTIS CHATHAM AND SHANE FRAZIER

32. Plaintiffs Curtis Chatham and Shane Frazier are residents of Little Rock, Arkansas. Curtis is 38 and works as a speech therapist. Shane is 35 and is a hospital administrator. Curtis and Shane have been in a committed relationship for seven years and have long discussed their desire to adopt children.

33. After a private child placement organization visited their church and talked to the congregation about the need for adoptive parents to provide good homes for the many needy children in Arkansas, Curtis and Shane visited the DHS website and found a child they were interested in adopting, a twelve-year-old boy whose four siblings had already been adopted. Because he was a little older, he hadn't been placed. Curtis and Shane made plans to start the adoption process for this child, but because as a same-sex couple they are not and cannot be married under Arkansas law, they are automatically disqualified under the terms of Act 1.

34. Act 1 is both invalid on its face and as applied to Curtis and Shane.

S.H., R.P., and E.P.

35. Plaintiffs S.H., R.P., and E.P. are minors in State custody, residing in a residential facility licensed by the State. S.H. is 16 years old and has lived at the residential facility for one year and three months. R.P. and E.P. are 17 years old and 15 years old, respectively, and are siblings. They have lived at the residential facility for three and a half years.

36. S.H. lived most of her life with her mother, who is addicted to methamphetamine and did not properly care for S.H. When S.H. was 14 years old, her school filed a FINS petition regarding her truancy, and the courts subsequently terminated S.H.'s mother's parental rights. S.H. was placed in a juvenile center, where she stayed twice as long due to a lack of available foster placements. Eventually DHS placed S.H. at the residential facility where she now resides. Even though she likes the facility, S.H. longs for a family and wants to be fostered or adopted. Act 1 makes it less likely that S.H. will be fostered or adopted because it unnecessarily restricts the pool of qualified foster and adoptive families.

37. R.P. and E.P.'s mother, who was addicted to methamphetamine, left R.P. and E.P. with their great-grandmother in Cleburne County, Arkansas when R.P. was 22 months old and E.P. was five months old. In December, 2005 their great-grandmother passed away and R.P. and E.P. entered DHS care. In the year following their great-grandmother's death, they were in four different placements: in a temporary shelter, with a foster family in Truman, Poinsett County, Arkansas, with their great-grandfather for a month, and then at the residential facility. They do not view the residential facility as a "forever home" because they could be removed at any time. R.P. and E.P. long for a permanent home and, if they cannot be reunited with their mother, they want to be fostered or adopted. Act 1 makes it less likely that R.P. and E.P. will be fostered or adopted because it unnecessarily restricts the pool of qualified foster and adoptive families.

38. This action is brought by S.H., R.P., and E.P. by and through their next friend, Oscar Jones, who is also seeking appointment as guardian.

Defendants

39. Defendant the State of Arkansas is responsible for enforcing and defending the laws of the State of Arkansas, the Arkansas Constitution and the United States Constitution, including through its courts.

40. Defendant Dustin McDaniel is the Attorney General for the State of Arkansas and is entrusted with the authority to carry out the laws of the State, including Act 1. He and his successors in office are sued in their official capacity only.

41. Defendant DHS oversees the DCFS, which has a foster care unit and adoption services unit. DHS has responsibility for making laws, policies and procedures

relating to foster care and adoption, and protecting the best interests of children under the care of DHS. DHS also administers placements through the ICPC, including the potential placement of W.H. with plaintiff Sheila Cole.

42. Defendant Child Welfare Board is responsible for licensing child welfare agencies that place children in foster care and for adoption in the State of Arkansas. The Child Welfare Board has the authority to enact foster and adoptive parent eligibility requirements, and has enacted such regulations, which are contained in the Minimum Licensing Standards for Child Welfare Agencies ("Minimum Licensing Standards" or "MLS"). *See* MS §§ 100-300 *et. seq.* 43.

43. The Child Welfare Board licenses private adoption agencies.

44. Defendants DHS and the Child Welfare Board and their agents perform and are otherwise responsible for the public functions of recruiting, training, and certifying foster and adoptive parents, and providing foster and adoptive placements, care, and services for children who are dependents of the State of Arkansas. These defendants perform these public functions using federal and state funds.

45. Defendants' actions constitute actions under color of law.

STATEMENT OF FACTS

ACT 1

46. The ballot title of Act 1 is as follows:

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.

47. Act 1 provides as follows:

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.

**STATUTORY AND REGULATORY PROVISIONS RELATING
TO THE SELECTION OF FOSTER AND ADOPTIVE PARENTS**

48. Prior to Act 1, the Arkansas legislature and Child Welfare Board developed statutory and regulatory rules that are directed at ensuring that foster and adoptive parents are selected in accordance with an individualized assessment of the abilities of each applicant and the best interests of each child.

49. Arkansas laws, regulations, and standards are drafted in an effort 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.

50. The "General Assembly [has] acknowledge[d] that society has a responsibility, along with foster parents and the Department of Human Services, for the well-being of children in foster care." Ark. Code Ann. §§ 9-28-1002. As part of this responsibility, a child in foster care in this State is entitled to certain rights, including, among other things: "(1) To be cherished by a family of his or her own; (2) To be nurtured by foster parents who have been selected to meet his or her *individual* needs; . . . (9) To have *individualized* care and attention; . . . (16) To receive quality child welfare services; . . . (19)

To be placed in the custody or foster home of relatives, if appropriate, provided the relative caregiver meets all relevant child protection standards." Ark. Code Ann. § 9-28-1003 (emphasis added).

51. The Minimum Licensing Standards applicable in Arkansas are structured similarly in an attempt to provide that foster and adoptive parents are selected based on individual assessments of each child's needs. Those standards provide that "[t]he agency shall select the [foster or adoptive] 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. The placement decision shall be based on an individual assessment of the child's needs." MLS §§ 200.1, 300.1.

52. Similar individualized determinations and protections are made by the courts of this State in adoption proceedings. Before any adoption petition may be granted, the law provides that the court shall hold an individualized hearing to determine "that the adoption is in the best interest of the individual to be adopted." Ark. Code Ann. § 9-9-214(c).

53. The provisions of Act 1 categorically ban cohabiting adults in an intimate relationship from becoming adoptive or foster parents, carving this group out from Arkansas's system of evaluating each foster and adoptive applicant individually to determine whether he or she can meet the needs of a particular child.

54. Act 1 will prevent courts and child welfare professionals from making placement decisions based on the best interests of children on a case-by-case basis, when the best placement would otherwise be with an individual cohabitating in an intimate relationship.

55. Neither the terms of Act 1 nor any other provision of Arkansas law excludes single adults living alone from consideration as adoptive or foster parents.

56. On information and belief, the State has approved adoptive and foster placements with singles who live alone.

57. Neither the terms of Act 1 nor any other provision of Arkansas law excludes single lesbians and gay men from consideration as adoptive parents.

58. On information and belief, the State has approved adoptive and foster placements with individuals known to the State to be gay.

59. Neither the terms of Act 1 nor any other provision of Arkansas law prohibits unmarried adults who are in intimate relationships from serving as foster or adoptive parents; only those who live with the person with whom they have an intimate relationship are excluded.

60. Likewise, neither the terms of Act 1 nor any other provision of Arkansas law prohibits unmarried people who live together from serving as foster or adoptive parents unless they have a sexual relationship.

HOWARD AND THE ROOTS OF ACT 1

61. In 2006, in *Howard v. Child Welfare Agency Review Board*, the Arkansas Supreme Court affirmed this Court's ruling that the Arkansas Constitution does not permit the Child Welfare Board to exclude categorically lesbians and gay men, including same-sex couples, from serving as foster parents.

62. In *Howard*, several plaintiffs, including gay people cohabiting in intimate relationships, brought a challenge against a regulation enacted by the Child Welfare Board that prohibited a person from "serv[ing] as a foster parent if any adult member of that

person's household is a homosexual." MLS § 200.3.2. Both the Child Welfare Board and DHS were defendants in *Howard*.

63. In 2004, the Honorable Timothy Fox presided over a trial on the merits in *Howard*. In connection with the trial, the Child Welfare Board and DHS stipulated to several facts, relevant here, including the following:

a. DCFS has a foster care unit. DCFS is licensed by the Child Welfare Board and although it also has its own foster care eligibility standards, it is required to comply with the Child Welfare Board's Minimum Licensing Standards when evaluating prospective foster parents.

b. The DCFS Licensing Unit, with the input of community providers and experts, created a draft that was approved and promulgated by the Child Welfare Board. DCFS did not include a provision in the foster parent eligibility requirements excluding lesbians and gay men or others who live with gay people, seeing no need for such an exclusion.

c. In 1999, the Board enacted section 200.3.2 of the Minimum Licensing Standards, which provides: "No person may serve as a foster parent if any adult member of that person's household is a homosexual. Homosexual, for purposes of this rule, shall mean any person who voluntarily and knowingly engages in or submits to any sexual contact involving the genitals of one person and the mouth or anus of another person of the same gender, and who has engaged in such activity after the foster home is approved or at a point in time that is reasonably close in time to the filing of the application to be a foster parent."

d. Lesbians and gay men are not excluded from adopting children in Arkansas. *See* A.C.A. 9-9-204; MLS § 300, *et. seq.*

e. DCFS does not question the sexual orientation of persons wishing to be approved for adoption.

f. Lesbian and gay applicants seeking to adopt are subjected to the same screening process as every other applicant.

g. Prior to 1999, neither the Minimum Licensing Standards nor any other Arkansas law or regulation excluded lesbians or gay men or those who live with them from becoming foster parents.

h. The Child Welfare Board and DCFS are aware of homosexuals who have served as foster parents in Arkansas.

i. Neither DCFS nor any of its agents is aware of any child or children whose health, safety and/or welfare has been endangered by the fact that his or her

legal parent, foster parent or other adult household member was a "homosexual" as defined by section 200.3.2 of the Minimum Licensing Standards ("section 200.3.2").

j. Neither DCFS nor any of its agents is aware of any child or children having been removed from a legal parent's home or foster home because the child's health, safety and/or welfare was endangered by the fact that his or her legal parent or foster parent was a "homosexual" as defined by section 200.3.2.

k. The State has no statistics regarding the number of child abusers who are gay or lesbian or indicating that gays are more prone to violence than heterosexuals, or that their households are more often unhealthy.

l. Based on its foster care statistics, DCFS does not know of any reason lesbians and gay men would be unsuitable to be foster parents.

m. Prior to the Child Welfare Board's enactment of the "homosexual" exclusion, DCFS had no statistics which raised concerns about placing children in foster care with lesbians and gay men.

n. The Minimum Licensing Standards in place prior to the enactment of the "homosexual" exclusion ensured that only those individuals capable of providing stable, nurturing, safe, healthy homes would be approved to be foster parents. These regulations also served to screen out applicants who posed a danger of violence, including sexual abuse; applicants who had diseases that made them unable to parent or created a risk for a child; and applicants who had others in the home who were deemed to expose the children to some risk.

64. Each of these facts set forth in Paragraph 63, which defendants DHS and the Child Welfare Board stipulated to as true in *Howard*, is presently true and accurate.

65. On December 29, 2004, this Court also issued Findings of Fact and Conclusions of Law in *Howard*, including the following findings of fact:

- a. Arkansas needs more qualified foster parents.
- b. Categorical exclusions eliminate from consideration people who would otherwise be good foster parents.
- c. The child welfare system struggles with having a large enough pool of well-qualified foster parents to make good reasonable matches.
- d. When the system does not have enough well-qualified foster parents, less than ideal matches occur, which might result in multiple foster home placements which are not good for the children.

e. The blanket exclusion may be harmful to promoting children's healthy adjustment because it excludes a pool of effective foster parents.

f. Determination of the foster home that is most appropriate for each child should be based on a careful and thorough assessment of each individual child, his or her circumstances and conditions, strengths and needs, at the time of placement.

g. The Child Welfare League of America has a standard that says that applicants for foster parenting should not be denied solely on the basis of age, marital status, income, sexual orientation, race, physical condition, handicap, or location.

h. The National Association of Social Workers has policy statements regarding best practices in the field of social work. One of the policy statements states that barriers to foster parenting that are unsupported by evidence need to be removed, the three examples of unsupported barriers being fostering by single parents, fostering by parents who want to adopt, and fostering by non-traditional families, including gay and lesbian parents.

i. There are four well known 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.

j. The traditional family form is now the minority family form in this country.

k. Being raised by gay parents does not increase the risk of problems in adjustment for children.

l. Being raised by gay parents does not increase the risk of psychological problems for children.

m. Being raised by gay parents does not increase the risk of behavioral problems.

n. Being raised by gay parents does not prevent children from forming healthy relationships with their peers and others.

o. Being raised by gay parents does not cause academic problems.

p. Being raised by gay parents does not cause gender identity problems.

q. Both men and women have the capacity to be good parents and there is nothing about gender, per se, that affects one's ability to be a good parent.

r. There are benefits to children's adjustment in having two parents as opposed to one parent and children in single parent families are more likely to have adjustment difficulties than children in two parent families.

s. Children of lesbian or gay parents are equivalently adjusted to children of heterosexual parents.

t. There is no factual basis for making the statement that heterosexual parents might be better able to guide their children through adolescence than gay parents.

u. There is no factual basis for making the statement that the sexual orientation of a parent or foster parent can predict children's adjustment.

v. There is no factual basis for making the statement that being raised by lesbian or gay parents has a negative effect on children's adjustment.

w. There is no reason in which the health, safety, or welfare of a foster child might be negatively impacted by being placed with a heterosexual foster parent who has an adult gay family member residing in that home.

x. Homosexuality is not a mental disorder.

y. There is no evidence that gay people, as a group, are more likely to engage in domestic violence than heterosexuals.

z. There is no evidence that gay people, as a group, are more likely to sexually abuse children than heterosexuals.

aa. The best predictors for whether a person will meet the criteria for drug or alcohol abuse and/or dependency are age, gender, and employment status.

bb. The determination of relationship durability requires a multi-variable approach, a prediction about relationship stability can't be made using only sexual orientation.

66. Each of the facts set forth in Paragraph 65, which the Court found to be true in *Howard*, is presently true and accurate.

67. This Court's December 29, 2004, Findings of Fact and Conclusions of Law in *Howard* also included the following conclusions of law:

a. The State of Arkansas stands in *loco parentis* to foster children in Arkansas.

b. The General Assembly legislatively delegated to the Child Welfare Board the authority to promulgate rules and regulations to "promote the health, safety, and welfare of children."

c. The health, safety, and welfare of foster children are legitimate state interests.

d. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the Child Welfare Board is not rationally related to the legitimate state interest of protecting the health of foster children.

e. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the Child Welfare Board is not rationally related to the legitimate state interest of protecting the welfare of foster children.

f. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the Child Welfare Board is not rationally related to the legitimate state interest of protecting the safety of foster children.

g. The blanket exclusion contained in Section 200.3.2 of the Minimum Licensing Standards promulgated by the Child Welfare Board is contrary to the statutory obligation of the Child Welfare Board set forth in A.C.A. 9-28-405(c).

68. Each of this Court's conclusions of law set forth in Paragraph 67 remains correct.

69. Act 1 was proposed after the *Howard* decision.

70. While the wording of Act 1 will prohibit fostering and adopting not just by gay couples but by all unmarried couples cohabiting in intimate relationships, it is clear that Act 1 was aimed by its proponents at reversing the result of *Howard*.

71. The sponsors of Act 1 have admitted that a primary purpose of Act 1 was to exclude same-sex couples from becoming foster or adoptive parents, regardless of their individual qualifications, the wishes of children's natural parents, or the best interests of the child at issue. The attached flyer in support of Act 1, by way of example, states that "Act One is Clear and Simple . . . it will ban homosexual couples from adopting children or serving as foster parents."

**DHS REJECTS THE EXCLUSION OF COHABITING ADULTS
AS FOSTER PARENTS**

72. After the trial court decision in *Howard*, DHS adopted a policy banning individuals living in unmarried cohabiting relationships from fostering children.

73. DHS held a public hearing on that policy on October 2, 2008.

74. During that hearing, numerous witnesses, including many professionals in the field of foster care and adoptions, testified that a categorical ban on unmarried cohabiting adults fostering children, such as that now included in Act 1, was inconsistent with the best practices for the placement of children, and was contrary to the best interests of children in state care.

75. Following the hearing, and consistent with the advice of these professionals and other witnesses with experience with the foster care system, DHS determined that categorically banning unmarried cohabiting adults from serving as foster parents did not serve the best interests of children in state care. DHS rescinded the policy on October 9, 2008.

ACT 1 WILL HARM CHILDREN BY UNNECESSARILY RESTRICTING THE POOL OF QUALIFIED FOSTER AND ADOPTIVE FAMILIES

76. Prior to the enactment of Act 1, cohabiting adults in intimate relationships were eligible for the same individualized screening process as every other adoption applicant desiring to give a home to a child in need.

77. Since October 2008 when DHS rescinded the regulation barring cohabiting individuals from fostering, cohabiting adults in intimate relationships were eligible for the same individualized screening process as every other foster applicant desiring to give a home to a child in need.

78. On information and belief, the State is aware of cohabiting adults in intimate relationships who are unmarried and who have served as foster parents in this State.

79. On information and belief, the State is aware of cohabiting adults in intimate relationships who are unmarried and who have served as adoptive parents in this State.

80. On information and belief, the Defendants have approved cohabiting adults in intimate relationships who are unmarried to serve as foster parents in this State.

81. On information and belief, the Defendants have approved cohabiting adults in intimate relationships who are unmarried to adopt children in this State.

82. On information and belief, none of the Defendants nor any of their agents is aware of any child or children whose health, safety or welfare has been endangered by the fact that his or her legal parent or foster parent is cohabiting in an intimate relationship with an unmarried partner.

83. On information and belief, none of the Defendants nor any of their agents is aware of any child or children having been removed from a legal or foster parent's home because the child's health, safety or welfare was endangered by the fact that his or her legal or foster parent was cohabiting in an intimate relationship with an unmarried partner.

84. On information and belief, Defendants believe that regulations, policies and practices, other than Act 1, are in place to address foster care or adoption situations—including those involving unmarried cohabiting adults in an intimate relationship—that may threaten the health, safety or welfare of the child at issue.

85. On information and belief, Defendants do not believe that Act 1 is necessary or adds to the protection of the health, safety or welfare of children in foster care or who have been adopted.

86. There are individuals who are cohabiting in an intimate relationship with an unmarried partner who can provide safe, stable, and appropriate homes for children that are in the best interests of those children.

87. The statement in Act 1 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" is unsupported by and contrary to scientific evidence.

88. There is a shortage of eligible foster and adoptive families in Arkansas.

89. As a result of that shortage, some children in state custody have and may continue to have multiple temporary placements before a suitable permanent home is found; other children have been and may continue to be separated from their siblings; still other children have been and may continue to be placed in group homes; and still other children have been and may continue to be unable to be adopted at all and have and will instead reach the age of majority without ever getting a permanent family.

90. As a direct result of Act 1, if it is applied, the State of Arkansas will spend more money to care for children in state custody, who could otherwise be adopted, and to care for children in group homes or other institutional settings, who could otherwise have been placed with foster families at a reduced cost to the state.

91. On information and belief, Defendants intend to remove children from foster families with individuals who will be disqualified by Act 1, even though those families were previously identified by Defendants as suitable families who could serve the best interests of children.

FIRST CLAIM FOR RELIEF BY W.H., S.H., R.P., E.P. AND TAXPAYER PLAINTIFFS
(Children's Rights Under the Due Process Clause of the United States Constitution, 42
U.S.C. § 1983)

92. Plaintiffs W.H., S.H., R.P. and E.P. and taxpayer Plaintiffs Stephanie Huffman, Wendy Rickman, Frank Pennisi, Matt Harrison, Meredith and Benny Scroggin, Susan Duell-Mitchell and Chris Mitchell, Curtis Chatham and Shane Frazier repeat and reallege paragraphs 1 to 91 as if set forth in full.

93. Defendants' enforcement of Act 1 will harm children in State care by categorically prohibiting cohabiting adults in an intimate relationship from serving as foster or adoptive parents.

94. The State has a duty to act in the best interest of—and certainly not to harm—children in its custody.

95. By categorically excluding all cohabiting adults in an intimate relationship from serving as foster or adoptive parents, some of whom (like Plaintiffs Sheila Cole, Stephanie Huffman and Wendy Rickman, Frank Pennisi and Matt Harrison, and Curtis Chatham and Shane Frazier) would otherwise apply and meet the qualifications to serve as foster and adoptive parents, Act 1 is contrary to the best interests of children and, in fact, significantly harms certain dependent children in State custody.

96. Act 1 reduces the pool of available qualified parents, which results in more children being deprived of appropriate foster and adoptive placements, being separated from siblings, being placed in group homes and aging out of the system without ever being adopted and benefiting from the support of a loving permanent family.

97. Even if Arkansas had a surplus of available adoptive and foster parents, the exclusion would still prevent some children from being placed with the family that is best suited to meet their needs.

98. Act 1 is void and unenforceable because it violates the Due Process Clause of the United States Constitution by depriving children of access to available suitable and appropriate adoptive and foster families, and limiting the ability of the executive and judicial branches to fulfill their constitutional obligations to act in the best interests of children, where the exclusion is not narrowly tailored to further any compelling government interest and, in fact, not even rationally related to the furtherance of any legitimate government interest.

99. Defendants' enforcement of Act 1 under the color of law will deprive children in State care, such as Plaintiffs W.H., S.H., R.P. and E.P. of their constitutional right to due process of the laws under the Fourteenth Amendment to the United States Constitution. Defendants' deprivation of Plaintiffs' constitutional rights violates the Civil Rights Act, 42 U.S.C. § 1983.

100. Stephanie and Wendy, Frank and Matt, Meredith and Benny, Susan and Chris, and Curtis and Shane are all taxpayers in Arkansas. Defendants' enforcement of Act 1 will result in public funds generated from Arkansas tax dollars being misapplied and illegally used in support of Act 1 in violation of article 16, section 13, of the Arkansas constitution.

101. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and cause the application of Act 1.

SECOND CLAIM FOR RELIEF BY W.H., S.H., R.P., E.P. AND TAXPAYER PLAINTIFFS
(Children's Rights Under the Due Process Clause of the Arkansas Constitution, Ark. Code
Ann. § 16-123-101, et. seq.)

102. Plaintiffs W.H., S.H., R.P., E.P. and taxpayer Plaintiffs Stephanie Huffman, Wendy Rickman, Frank Pennisi, Matt Harrison, Meredith and Benny Scroggin,

Susan Duell-Mitchell, Chris Mitchell, Curtis Chatham, and Shane Frazier repeat and reallege paragraphs 1 to 101 as if set forth in full.

103. For the same reasons alleged in paragraphs 92 to 101, Act 1 fails to serve the best interests of and in fact harms children in State custody and thus violates Plaintiffs W.H., S.H., R.P. and E.P.'s right to due process guaranteed by Article 2, Sections 8 and 21, of the Arkansas Constitution and Ark. Code Ann. § 16-123-101, *et. seq.*

104. Further, Defendants' enforcement of Act 1 will result in public funds generated from Arkansas tax dollars being misapplied and illegally used in support of Act 1 in violation of Article 16, Section 13, of the Arkansas Constitution.

105. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and cause the application of Act 1.

THIRD CLAIM FOR RELIEF BY PLAINTIFFS SHEILA COLE AND W.H.
(Due Process Clause of the United States Constitution, 42 U.S.C. § 1983)
(Burden on Family Integrity)

106. Plaintiffs Sheila Cole and W.H. repeat and reallege paragraphs 1 to 105 as if set forth in full.

107. Sheila is the grandmother of W.H.

108. On information and belief, the State removed W.H. from her parents' care because of evidence consistent with abuse. The State has placed W.H. with a foster family.

109. Sheila is willing—indeed, eager—and able to care for her granddaughter.

110. Sheila is the only relative of W.H. considered by DCFS to be a possible suitable placement.

111. Because Sheila cohabits in an intimate relationship with her partner, the terms of Act 1—were they to be applied to Sheila—would bar Sheila from adopting or fostering her own granddaughter, regardless of Sheila’s suitability as a parent and the needs of W.H., instead requiring W.H. to remain outside of the family in foster care.

112. The government’s separation of a child from her family without any compelling interest to justify it violates Sheila’s and W.H.’s right to family integrity protected by the Due Process Clause of the United States Constitution.

113. Plaintiffs Sheila and W.H. have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and cause to be applied Act 1.

FOURTH CLAIM FOR RELIEF BY PLAINTIFF SHEILA COLE AND W.H.
(Due Process Clause of the Arkansas Constitution,
Ark. Code Ann. § 16-123-101, *et. seq.*)
(Burden on Family Integrity)

114. Plaintiffs Sheila Cole and W.H. repeat and reallege paragraphs 1 to 113 as if set forth in full.

115. For the same reasons alleged in paragraphs 106 to 113, Act 1 will violate Plaintiffs Sheila’s and W.H.’s right to family integrity under the Due Process Clause of Article 2, Sections 8 and 21, of the Arkansas Constitution and Ark. Code Ann. 16-123-101, *et. seq.*

116. Plaintiffs Sheila and W.H. have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and cause to be applied Act 1.

FIFTH CLAIM FOR RELIEF BY PLAINTIFFS MEREDITH AND
BENNY SCROGGIN AND SUSAN DUELL-MITCHELL AND CHRIS MITCHELL
(Right to Parental Autonomy Under the Due Process Clause of the United States
Constitution, 42 U.S.C. § 1983)

117. Plaintiffs Meredith and Benny Scroggin and Susan Duell-Mitchell and Chris Mitchell repeat and reallege paragraphs 1 to 116 as if set forth in full.

118. Act 1 will interfere with the ability of Plaintiffs Meredith and Benny and Susan and Chris Mitchell to plan for their children's future. Act 1 would prevent these parents from having their children adopted by a relative or other individual of these parents' choosing in the event they could no longer care for their children because the individuals these Plaintiffs have designated are in unmarried cohabiting intimate relationships. If Act 1 is applied, judges would be barred from honoring such testamentary wishes. These parents therefore will suffer imminent harm once Act 1 becomes effective because these Plaintiffs will be unable to designate people of their choosing to adopt and care for their children, they will lose the peace of mind of knowing that their wishes for the care of their children will be honored, and they will have to choose between knowing that their children will be adopted by their chosen caregiver or making alternative, and inferior, directives against their wishes as parents to provide for the future care of their children.

119. Act 1 is void and unenforceable because it violates the Due Process Clause of the United States Constitution by depriving parents of their fundamental right to parental autonomy by improperly limiting their ability to make decisions concerning the care, custody, and control of their children. Defendants' enforcement of Act 1 under the color of law therefore will deprive Plaintiffs of their constitutional right to due process of the laws under the Fourteenth Amendment to the United States Constitution. Defendants' deprivation of Plaintiffs' constitutional rights violates the Civil Rights Act, 42 U.S.C. § 1983.

120. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and cause to be applied Act 1.

SIXTH CLAIM FOR RELIEF BY PLAINTIFFS MEREDITH AND BENNY SCROGGIN AND SUSAN DUELL-MITCHELL AND CHRIS MITCHELL
(Right to Parental Autonomy Under the Due Process Clause of the Arkansas Constitution, Ark. Code Ann. § 16-123-101, *et. seq.*)

121. Plaintiffs Meredith and Benny Scroggin and Susan Duell-Mitchell and Chris Mitchell repeat and reallege paragraphs 1 to 120 as if set forth in full.

122. For the same reasons alleged in paragraphs 117 to 120, Act 1 will violate these Plaintiffs' fundamental right to parental autonomy under the Due Process Clause of Article 2, Sections 8 and 21, of the Arkansas Constitution and Ark. Code Ann. § 16-123-101, *et. seq.*

123. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and cause to be applied Act 1.

SEVENTH CLAIM FOR RELIEF BY PLAINTIFFS N.S., L.S., N.J.M., AND N.C.M.
(Equal Protection Clause of the United States Constitution, 42 U.S.C. § 1983)

124. Plaintiffs N.S., L.S., N.J.M., and N.C.M. repeat and reallege paragraphs 1 to 123 as if set forth in full.

125. Unlike other children whose designated caregivers are not in cohabiting intimate relationships, these Plaintiffs are denied the security and stability of knowing that they will be adopted by the people chosen by their parents in the event that something happens to their parents. The exclusion of cohabiting individuals is not rationally related

to the furtherance of a legitimate government interest, let alone narrowly tailored to achieve a compelling government interest.

126. Act 1 is therefore void and unenforceable because it violates the Equal Protection Clause of the United States Constitution. Defendants' enforcement of Act 1 under the color of law will result in a deprivation of Plaintiffs' constitutional rights and violates the Civil Rights Act, 42 U.S.C. § 1983.

127. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and cause to be applied Act 1.

EIGHTH CLAIM FOR RELIEF BY PLAINTIFFS N.S., L.S., N.J.M., AND N.C.M.
(Equal Protection Clause of the Arkansas Constitution,
Ark. Code Ann. § 16-123-101, *et. seq.*)

128. Plaintiffs N.S., L.S., N.J.M., and N.C.M. repeat and reallege paragraphs 1 to 127 as if set forth in full.

129. For the same reasons alleged in paragraphs 124 to 127, Act 1 will violate N.S., L.S., N.J.M., and N.C.M.'s rights as protected by the Equal Protection Clause of Article 2, Sections 3 and 18, of the Arkansas Constitution, and Ark. Code Ann. § 16-123-101, *et. seq.*

130. These Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and will cause to be applied Act 1.

NINTH CLAIM FOR RELIEF BY PLAINTIFFS SHEILA COLE, STEPHANIE HUFFMAN AND WENDY RICKMAN, FRANK PENNISI AND MATT HARRISON, AND CURTIS CHATHAM AND SHANE FRAZIER
(Equal Protection and Due Process Clauses of the United States Constitution, 42 U.S.C. § 1983)

131. Plaintiffs Sheila Cole, Stephanie Huffman and Wendy Rickman, Frank Pennisi and Matt Harrison, and Curtis Chatham and Shane Frazier repeat and reallege paragraphs 1 to 130 as if set forth in full.

132. Under Arkansas law, all prospective adoptive and foster parents are subjected to an individualized evaluation to determine their suitability to adopt or foster and their ability to meet the needs of a particular child. Individuals who cohabit with partners to whom they are not married, however, are categorically excluded from the screening process and automatically deemed ineligible to adopt or foster regardless of their qualifications or the needs of the children they seek to care for because such individuals are in an unmarried cohabitating intimate relationship.

133. This categorical exclusion burdens private, consensual, non-commercial acts of sexual intimacy between adults and the fundamental right to form and maintain intimate relationships protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

134. Act 1 will disqualify from adopting and fostering both heterosexual and gay individuals who have made the personal decision to cohabit with intimate partners to whom they are not married. But, by categorically excluding individuals who live in an intimate relationship with an unmarried partner when Arkansas law bars same-sex couples from marrying, Act 1 will pose a unique disability on lesbians and gay men like plaintiffs Sheila, Stephanie, Wendy, Frank, Matt, Curtis and Shane. To be eligible to adopt, these individuals must cease living together and sharing a home and intimate family life with their partners. For example, Plaintiff Sheila, in order to foster or adopt her own

granddaughter or any other child, would have to break apart her family; she and her partner of ten years and the four-year-old child they have been raising together since the child's birth could not live together under one roof if Sheila and her partner continued to have an intimate relationship. Lesbians and gay men cannot ever become eligible under Act 1 to foster or adopt by marrying their partners.

135. Because Act 1 will categorically exclude individuals in cohabiting intimate relationships from fostering and adopting when the exclusion is not rationally related to the furtherance of any legitimate government interest, let alone narrowly tailored to further a compelling government interest, it is void and unenforceable as a violation of the Equal Protection Clause of the United States Constitution.

136. Defendants' enforcement of Act 1 under the color of law therefore will deprive Plaintiffs of their constitutional right to equal protection and due process under the Fourteenth Amendment to the United States Constitution. Defendants' deprivation of Plaintiffs' constitutional rights violates the Civil Rights Act, 42 U.S.C. 1983.

137. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and cause the application of Act 1.

TENTH CLAIM FOR RELIEF BY PLAINTIFFS SHEILA COLE, STEPHANIE HUFFMAN AND WENDY RICKMAN, FRANK PENNISI AND MATT HARRISON, AND CURTIS CHATHAM AND SHANE FRAZIER
(Right to Equal Protection, Due Process, and Privacy under the Arkansas Constitution and Ark. Code Ann. § 16-123-101, et. seq.)

138. Plaintiffs Sheila Cole, Stephanie Huffman and Wendy Rickman, Frank Pennisi and Matt Harrison, and Curtis Chatham and Shane Frazier repeat and reallege paragraphs 1 to 137 as if set forth in full.

139. For the same reasons alleged in paragraphs 131 to 137, Act 1 will violate the rights of these Plaintiffs to equal protection under Article 2, Sections 3 and 18, due process under Article 2, Sections 8 and 21, and right to privacy or intimate association under Article 2, Sections 2, 15, and 29 of the Arkansas Constitution, and Ark. Code Ann. § 16-123-101, *et. seq.*

140. These Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and cause to be applied Act 1.

ELEVENTH CLAIM FOR RELIEF BY ALL PLAINTIFFS
(Amendment 7 of the Arkansas Constitution)
(Materially Misleading)

141. Plaintiffs repeat and reallege paragraphs 1 to 140 as if set forth in full.

142. Section 9-28-903 (3) of the Arkansas Foster Parent Support Act, Ark. Code Ann. § 9-28-903 (3) ("Section 903") provides that foster parents should be "free from discrimination based on . . . marital status." Therefore, Section 903 prohibits discrimination against would-be foster parents on the basis of marital status.

143. On November 7, 2007, proponents of Act 1 received approval to place the initiative on the November 2008 ballot as a ballot initiative pursuant to Amendment 7 of the Arkansas Constitution.

144. The ballot title of Act 1 never referenced Section 903. There was nothing in the text of the ballot box to indicate that Act 1 would have the effect of repealing or abrogating this anti-discrimination statute.

145. Act 1 nevertheless expressly will discriminate against would-be foster parents on the basis of marital status because Act 1 will prohibit unmarried individuals

who cohabit in intimate relationships from fostering children. Act 1 and Section 903 therefore are incompatible, and thus the former has the effect of repealing the latter.

146. In violation of Amendment 7 of the Arkansas Constitution of 1874, the ballot title of Act 1 contained no language indicating that Section 903 would be repealed. In fact, the ballot of Act 1 contained no reference to Section 903 whatsoever.

147. Knowledge that Act 1 would repeal a statute forbidding discrimination on the basis of marital status against potential foster parents was material information to voters and could have affected how a voter cast his or her ballot. This omission makes Act 1 materially misleading. The Act is therefore fatally flawed under Amendment 7 of the Arkansas Constitution of 1874.

148. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and cause to be applied Act 1.

TWELFTH CLAIM FOR RELIEF BY TAXPAYER PLAINTIFFS
**(Vagueness in Violation of the Due Process Clause of the United States Constitution,
42 U.S.C. § 1983)**

149. Taxpayer Plaintiffs Stephanie Huffman, Wendy Rickman, Frank Pennisi, Matt Harrison, Meredith and Benny Scroggin, Susan Duell-Mitchell, Chris Mitchell, Curtis Chatham, and Shane Frazier repeat and reallege paragraphs 1 to 148 as if set forth in full.

150. Act 1, by its express terms, deprives children of the possibility of being fostered or adopted by an individual who is "cohabiting" with a "sexual partner". However, Act 1 and the regulations promulgated in connection with Act 1 do not define what living arrangements qualify as "cohabiting" or what it means to be a "sexual partner". The terms "cohabiting" and "sexual partner" alone are so vague that individuals of

common intelligence must necessarily guess at their meaning and differ as to their application. Indeed, as Plaintiffs will show at trial, there is no common understanding among DHS and DCFS case workers as to when a potential foster or adoptive parent will be categorically barred for violating the "cohabitation" or "sexual partner" components of Act 1.

151. Accordingly, those willing to apply to provide a home as an adoptive or foster parent will, as a result of the vagueness of Act 1, be unable to reasonably determine whether they are barred by Act 1 and, therefore, whether the substantial effort and cost of applying to foster or adopt a child will be futile. Moreover, because of the vagueness of Act 1, persons who otherwise would apply to provide a home as adoptive or foster parent for a child in state care will not do so, believing they are barred by Act 1 when the Act may be construed to not apply to such applicant.

152. Qualified individuals who want to foster or adopt are not provided with any guidance as to whether Act 1 bars their application. The vagueness of Act 1, and its arbitrary application, harm children by preventing qualified individuals from fostering or adopting, thereby restricting the pool of potential foster and adoptive parents.

153. Defendants' enforcement of Act 1 is under the color of law.

154. By arbitrarily and unlawfully restricting the pool of potential foster and adoptive parents, Defendants' enforcement of Act 1 will result in public funds generated from Arkansas tax dollars being misapplied and illegally used in support of Act 1 in violation of Article 16, Section 13, of the Arkansas Constitution.

155. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and will cause to be applied Act 1.

THIRTEENTH CLAIM FOR RELIEF BY TAXPAYER PLAINTIFFS
**(Vagueness in Violation of the Due Process Clause of the Arkansas Constitution,
Ark. Code Ann. § 16-123-101, et. seq.)**

156. Taxpayer Plaintiffs Stephanie Huffman, Wendy Rickman, Frank Pennisi, Matt Harrison, Meredith and Benny Scroggin, Susan Duell-Mitchell, Chris Mitchell, Curtis Chatham, and Shane Frazier repeat and reallege paragraphs 1 to 155 as if set forth in full.

157. For the same reasons alleged in paragraphs 149 to 155, Act 1 will violate the rights to due process under Article 2, Sections 8 and 21 of the Arkansas Constitution, and Ark. Code Ann. § 16-123-101, et. seq.

158. By arbitrarily and unlawfully restricting the pool of potential foster and adoptive parents, Defendants' enforcement of Act 1 will result in public funds generated from Arkansas tax dollars being misapplied and illegally used in support of Act 1 in violation of Article 16, Section 13, of the Arkansas Constitution.

159. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm. Unless enjoined, Defendants will apply and will cause to be applied Act 1.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for:

- (a) A declaration that Act 1: (1) violates Plaintiffs' rights to due process and equal protection under the United States Constitution and 42 U.S.C. 1983; (2) violates Plaintiffs' rights to due process and equal protection, and right to privacy under the Arkansas Constitution and Ark. Code Ann. § 16-123-101, et. seq.; and (3) is void and unenforceable.

(b) An order enjoining (1) Defendants and those acting in concert with them from enforcing and/or applying Act 1 now or at any time in the future; and (2) Defendants and those acting in concert with them from rejecting now or at any time in the future otherwise suitable foster/adoptive parent applications on the basis that the applicant is an unmarried adult cohabiting with a sexual partner.

(c) An order awarding Plaintiffs their costs, including their reasonable attorney's fees pursuant to 42 U.S.C. § 1988, and to the extent permitted by law pursuant to the Arkansas Civil Rights Act, § 16-123-101, *et. seq.*

(d) An order awarding such other and further relief as the Court deems just and proper.

Respectfully submitted,

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