IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

SHEILA COLE, et al.
v.
THE ARKANSAS DEPARTMENT   CASE NUMBER: 60CV-08-14284
OF HUMAN SERVICES, et al.
and
FAMILY COUNCIL ACTION
COMMITTEE, et al.

FILED 04/16/10 13:44:39
etPat O'Brien Pulaski Circuit Clerk
D12

ORDER

On November 4, 2008, Arkansas voters approved a ballot initiative titled "An Act Providing That an Individual Who is Cohabitating Outside of a Valid Marriage May Not Adopt or Be a Foster Parent of a Child Less Than Eighteen Years Old." The ballot initiative is known as the Arkansas Adoption and Foster Care Act of 2008 or Initiated Act I.

In pertinent part, the Act reads: "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." *Initiated Act I § 1 (a)*. "The prohibition of this section applies equally to cohabiting opposite-sex and same-sex individuals." *Initiated Act I § 1 (b)*.

Initiated Act I continues to declare : "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." *Initiated Act I § 4*. "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." ." *Initiated Act I §5*.

The Plaintiffs challenge the constitutionality of this act. All parties have submitted cross-motions for summary judgment, which will be addressed by this order.

Standard of Review for Summary Judgment

Summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Hall v. Tucker*, 336 Ark. 112 (1999).

Federal Claims

Under federal law, this case involves no fundamental right and no suspect class is implicated. Therefore, Initiated Act I will be upheld if it is rationally related to a legitimate governmental purpose. Rational basis review may be supported by a mere "reasonable conceivable state of facts" or "rational speculation." *FCC v. Beach*, 508 U.S. 307, 313 (1993).

The State has argued several legitimate governmental purposes including the 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. I find that this constitutes a legitimate governmental purpose.

Therefore, this court grants the State's Motion to Dismiss and grants Summary Judgment on all federal claims under the United States Constitution.

State Claims

A different question is posed by the Arkansas State Constitution. Justice Annabelle Clinton Imber wrote, "we have recognized protection of individual rights greater than the federal floor in a number of cases. *Jegley v. Picado*, 349 Ark. 600, 631 (2002). Our Arkansas Supreme Court has ruled that there is a fundamental right to privacy in the Arkansas Constitution that protects "all private consensual, non-commercial acts of sexual intimacy between adults." *Id.* at 632.

Initiated Act I prohibits cohabiting same-sex couples and heterosexual couples from becoming foster or adoptive parents. It does not prohibit them from becoming adoptive or foster parents if they do not cohabitate. However, the Act 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. This infringes upon the fundamental right to privacy guaranteed to all citizens of Arkansas.

When a law infringes upon a fundamental right, it cannot survive unless it is the "least restrictive method available" to carry out "a compelling state interest". *Id.* at 632 (*quoting Thompson v. Ark. Social Servs.*, 282 Ark. 369 (1984)). The parties do not dispute the State's interest in this matter—protecting our children. However, when viewed under a "heightened scrutiny" standard as required by *Jegley, supra*, Initiated Act I is facially invalid because it casts an unreasonably broad net over more people than is needed to serve the State's compelling interest. It is not narrowly tailored to the least restrictive means necessary to serve the State's interest in determining what is in the best interest of the child.

Initiated Act I was passed after the Arkansas Supreme Court ruled that a regulation by the Child Welfare Agency Review Board, which banned homosexuals from serving as foster parents, exceeded the Board's authority because the regulation was based upon morality and bias. *DHS v. Howard*, 367 Ark. 55, 62 (2006).

Heterosexual cohabiting couples can marry and, therefore, adopt or serve as a foster parent. Homosexual couples cannot. Although the Initiated Act Is supported by rational grounds, which are sufficient to resolve the federal claims in this matter, it is especially troubling that one politically unpopular group has been specifically targeted for exclusion by the Act. *See Id.* at 635 ("If the constitutional concept of equal protection of the law means anything, it must at the very least mean that a bare...desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.")

Due Process and Equal Protection are not hollow words without substance. They are rights enumerated in our constitution that must not be construed in such a way as to deny or disparage other rights retained by the people. *See ARK. CONST., art. 2, § 29.*

I find that Initiated Act I is unconstitutional.

Because I have found that Initiated Act I violates the Arkansas Constitution for the reasons stated above, it is not necessary to address the remaining claims.

IT IS SO ORDERED this 16th day of April, 2010.

Christopher C. Piazza
Pulaski County Circuit Judge
Sixth Judicial District, Second Division