IN THE SUPREME COURT OF ARKANSAS

LARRY JEGLEY, in his official capacity, on behalf of himself and all others similarly situated

APPELLANT

vs.

No. 01-815

ELENA PICADO, et al.

APPELLEES

APPEAL FROM THE SIXTH DIVISION CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

HONORABLE DAVID B. BOGARD

APPELLEES' SUPPLEMENTAL ABSTRACT, BRIEF, AND SUPPLEMENTAL ADDENDUM

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APPELLEES' RESPONSE TO JURISDICTIONAL STATEMENT

1. In addition to the rulings described in appellant's Jurisdictional Statement, this Court's June 24, 1999, Order on appellant's earlier interlocutory appeal in this case also rejected appellant's claim that the case was not justiciable, and held that appellees' constitutional challenge could proceed without arrest or prosecution of an appellee for violation of Ark. Code Ann. § 5-14-122 (the "Act"). *See* Appellant's Addendum (hereafter "A") 3-4.

Appellees take further exception to appellant's characterization of the issues presented on appeal. The issues on appeal are: (1) whether the lower court properly found that this case is justiciable, (2) whether the Act violates the right to privacy under the Arkansas constitution, and (3) whether the Act violates the right to equal protection under the Arkansas constitution. Should the Court rule in appellant's favor on the Arkansas constitutional claims, the Court will then need to address appellees' additional claims, not reached but preserved below, based on the federal constitutional rights to privacy and equal protection. *See* A 287.

2. I express a belief, based on a reasoned and studied professional judgment, that the statements made by the appellant in the appellant's Jurisdictional Statement to which I have taken exception are material to understanding correctly the nature of this appeal and its disposition in this Court.

_____
Susan L. Sommer
Counsel for Appellees

POINTS ON APPEAL[1]

I. The lower court correctly held that appellees' claims are justiciable.

Babbitt v. United Farm Workers Nat. Un., 442 U.S. 289, 99 S. Ct. 2301 (1979)
Magruder v. Ark. Game and Fish Comm'n, 287 Ark. 343, 698 S.W.2d 299 (1985)

II. The Act is invalid as a violation of the rights to privacy and equal protection.

III. The lower court correctly held that the Arkansas Constitution guarantees a fundamental right of privacy shielding adults from government intrusion into private, noncommercial, consensual sexual intimacy, and that the Act violates that right.

Carroll v. Johnson, 263 Ark. 280, 565 S.W.2d 10 (1978)
Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992)

IV. The lower court correctly held that the Act impermissibly discriminates on the basis of sex in violation of Arkansas constitutional guarantees of equal protection.

United States v. Virginia, 518 U.S. 515, 116 S. Ct. 2264 (1996)
Hatcher v. Hatcher, 265 Ark. 681, 580 S.W.2d 475 (1979)

V. The lower court correctly held that moral disapproval of a disfavored group – gay and lesbian people – for engaging in conduct that is legal for the majority is an illegitimate basis for state action.

Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620 (1996)
Palmore v. Sidoti, 466 U.S. 429, 104 S. Ct. 1879 (1984)

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[1]To the extent possible, appellees have organized their Points on Appeal and Argument to correspond with the sequence of appellant's Points on Appeal. *See* Ark. Sup. Ct. R. 4-2(A)(3) & (6)(B). However, to present the contrary arguments in the most logical and brief fashion, appellees address appellant's Point on Appeal II ["assuming a justiciable controversy exists, whether the appellees can meet their heavy burden"] in sections II through V of their Argument.

VI. The lower court correctly held that the Act discriminates on the basis of sexual orientation and violates Arkansas guarantees of equal protection because it is not related even to a legitimate government interest.

Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620 (1996)
City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249 (1985)

VII. The Act violates a federal constitutional right to privacy which, properly interpreted, shields private, consensual sexual intimacy between adults.

Casey v. Population Services Int'l, 431 U.S. 678, 97 S. Ct. 2010 (1977)
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791 (1992)

VIII. The Act violates federal constitutional guarantees of equal protection by discriminating on the basis of sex and sexual orientation without a legitimate and sufficient government justification.

United States v. Virginia, 518 U.S. 515, 116 S. Ct. 2264 (1996)
Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620 (1996)

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SUPPLEMENTAL ABSTRACT

_____[Abstractor's Note: Appellant did not abstract any transcripts of hearings in this case. Appellees abstract the following material statement.]

Transcript of Hearing on
Parties' Cross-Motions for Summary Judgment
Before Hon. David B. Bogard
Circuit Court, Pulaski County
January 29, 2001
R-741 to R-787

Assistant Attorney General Timothy Gauger, on behalf of Appellant-Defendant: **I admit that if strict scrutiny applies, the state cannot meet that burden.** (R. 763; Supplemental Addendum 0000248)

STATEMENT OF THE CASE

Appellant Prosecuting Attorney Larry Jegley appeals the order of Circuit Court Judge David Bogard, filed March 23, 2001, declaring that Ark. Code Ann. § 5-14-122 (the "Act") violates appellees' rights to privacy and equal protection guaranteed under the Arkansas Constitution. (Appellant's Addendum ("A") 278-88) The Act criminalizes consensual sodomy only between people of the same sex, leaving the identical intimate conduct legal for heterosexual couples.

Appellees, seven gay and lesbian Arkansans, filed this declaratory judgment action in chancery court in January 1998 against Pulaski County Prosecuting Attorney Jegley and then Attorney General Winston Bryant, challenging the Act under the Arkansas and U.S. Constitutions. (Appellees' Supplemental Addendum ("SA") 000001-12 (hereafter initial zeroes omitted)) The chancery court denied defendants' motion to dismiss by order filed June 23, 1998. Defendants then filed an interlocutory appeal in the Arkansas Supreme Court.

In an opinion delivered on June 24, 1999, this Court rejected appellant's assertion that appellees did not present a justiciable controversy because one or more of them had not yet been arrested or prosecuted. Bryant v. Picado, 338 Ark. 227, 230-31, 996 S.W.2d 17, 18-19 (1999). The Court further ordered the action transferred from chancery court to circuit court, as the appropriate forum for resolution of the matter. *Id.* at 232, 996 S.W.2d at 19.

By order dated February 9, 2000, Circuit Court Judge Bogard resolved the remaining issues raised in appellant's motion to dismiss. (A 54-59) The court rejected appellant's defense of sovereign immunity and dismissed Attorney General Bryant as a party in the action, but held that appellant Jegley remained a proper party amenable to suit. The court also rejected

appellant's attempt to challenge justiciability again, holding that this Court had already ruled on the issue in appellees' favor. *See* A 54 n.1. By order dated June 12, 2000, Judge Bogard granted appellees' unopposed motion to certify appellant Jegley as representative of a class of all state prosecuting attorneys sued in their official capacities. (A 66-68)

The parties then cross-moved for summary judgment. The affidavits and supporting exhibits of the seven appellees and their experts – two psychologists and an award-winning historian – were unrefuted. (A 148-249; SA 13-245; *see also* A 279-80) In his March 23, 2001, order on the cross-motions, Judge Bogard held that appellees' proof on summary judgment established the justiciable controversy first alleged in the complaint. (A 278-81; SA 1-12) The court further held that the Act infringes a fundamental right of privacy under the Arkansas constitution that shields adults from government intrusion in the choice to engage in private, noncommercial, consensual sex. (A 281-85) Because, as appellant conceded, the government could not offer the requisite compelling state interest to justify such an intrusion, the court found the Act unconstitutional. (A 286; Supplemental Abstract at xi; SA 248). The court also held that the Act violates the state constitutional right to equal protection by criminalizing conduct solely on the basis of the sex of the participants, as well as on the basis of sexual orientation, without sufficient justification. (A 286-87) The court found that the state's purported purpose of expressing moral disapproval of gay and lesbian people for engaging in sodomy does not offer a compelling, or even valid, basis for the state's discriminatory action. (A 283-87) Appellant appeals from this order.

The appellees, long-time lesbian and gay residents of Arkansas, include a teacher, a minister, a nurse, a school guidance counselor, a small business owner, and computer industry

employees. (A 148, 158, 167, 176, 186, 194, 202) One is the mother of two children (A 149); several live with partners in long-term committed relationships (A 148, 158, 176). All have in the past engaged and intend in the future to engage in the conduct proscribed by the Act. (A 148-49, 158-59, 167-68, 176-77, 186-87, 194-95, 202-03)

Until 1975, Arkansas criminalized sodomy regardless of the sex of the participants. *See, e.g.,* Ark. Code Ann. § 41-813; Ark. Act of Dec. 17, 1838, § 4. That year, Arkansas repealed the evenhanded sodomy prohibition applying to all persons in the state. *See* 1975 Ark. Acts 928 (repealing Ark. Code Ann. § 41-813). With its 1977 adoption of the current Act, the Arkansas legislature singled out lesbian and gay sexual activity for criminal sanction. *See* Ark. Code. Ann. § 5-14-122. The challenged portion of the Act provides that a person commits criminal sodomy if he or she performs:

> any act of sexual gratification involving: (1) [t]he penetration, however slight, of the anus or mouth of . . . a person by the penis of a person of the same sex . . . ; or (2) [t]he penetration, however slight, of the vagina or anus of . . . a person by any body member of a person of the same sex . . . .

At the time the circuit court rendered its decision in this case, only 16 states maintained laws criminalizing adult consensual sodomy. (A 220) Since the court's March 2001 decision, two more states have joined the trend to eliminate sodomy prohibitions – Arizona (*see* 2001 Ariz. Sess. Laws 382, repealing Ariz. Rev. Stat. § 13-1411) and Minnesota (*see* Doe v. Ventura, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001)). Just three other states – Texas, Oklahoma and Kansas – out of the dwindling number that still have consensual sodomy offenses target same-sex couples only. (*See* A 119 at n. 5)

Repeated efforts to repeal the Act, in 1991, 1993 and 1995, all failed in the Arkansas

legislature. (SA 18-24) Arkansas thus stands out, first, in its 1970s move to free heterosexuals but continue to prohibit sodomy for same-sex couples only, and, second, in holding on to a consensual sodomy law into the twenty-first century.

Until the Act was declared unconstitutional in March 2001, all the appellees faced the real and ongoing threat that the Act would be enforced against them. Each is a member of the class targeted by the Act and engages in and intends in the future to engage in the conduct it criminalizes; far from moribund, the Act has withstood repeated repeal efforts; and the class of appellant prosecutors empowered with discretion to enforce it has steadfastly refused to disavow the Act and vigorously fights in this lawsuit to maintain it in the Arkansas law enforcement arsenal. It is undisputed that in criminalizing only same-sex couples for engaging in conduct legally practiced by their heterosexual neighbors (A 287, 238, 247), the Act brands appellees and other lesbian and gay Arkansans as criminals and singles them out for condemnation and stigma (A 150, 156, 159, 165-66, 168, 174-75, 177, 183-84, 187, 192-93, 195-96, 200-01, 203-04, 209, 226-28, 231-33, 238-41, 247-48). The Act has also been used to justify denying lesbians and gay men employment (*e.g.*, A 180, 208), custody of their children (*e.g.*, A 152-54; SA 141-49), the opportunity to serve as foster parents (A 152-54; SA 39-40, 61), and government protection from discrimination (*e.g.*, A 180-82; SA 43-47), and has fueled anti-gay verbal and physical harassment (*e.g.*, A 232, 238-39, 241-42, 247-49; *see also* 164-65, 174, 192, 199-200). The affidavits and exhibits of appellees and their experts lay out in detail the real threat of prosecution and the other injuries each appellee suffers while the Act is in force. (A 148-210, 217-249; SA 13-245)

Appellant concedes that the only government interest assertedly promoted by the Act is

the state's police power to criminalize "certain conduct that a majority of the citizens of the State believe to be morally inappropriate." (A 212) According to the language of the statute, however, certain *conduct* is *not* generally criminalized. Rather, only when the sexual conduct is engaged in by same-sex couples is it deemed inappropriate and criminal. The Act expresses moral disapproval towards a group of people – gay men and lesbians – for engaging in the same behavior permitted of heterosexuals.

ARGUMENT

I. The Lower Court Correctly Held That Appellees' Claims Are Justiciable

Appellees have abundantly demonstrated that they are faced under the Act with a "credible threat of prosecution," Babbitt v. United Farm Workers Nat. Un., 442 U.S. 289, 298, 99 S. Ct. 2301, 2309 (1979), and that the Act's unequal treatment alone, and the further stigma and collateral harms it triggers for lesbians and gay men, inflict ongoing, serious injuries, "long recognized as judicially cognizable." Heckler v. Mathews, 465 U.S. 728, 738, 104 S. Ct. 1387, 1394 (1984).

Appellant raises a red herring in contending that the court below improperly interpreted this Court's 1999 order on appellant's motion to dismiss to "foreclose[] inquiry" into justiciability on the present motion for summary judgment. Not only did this Court's 1999 order clearly hold appellees' claims justiciable as pleaded, Picado, 338 Ark. at 230-31, 996 S.W.2d at 18-19, but, in any event, at the summary judgment phase the lower court went on to consider appellees' compelling and undisputed affidavits and exhibits in finding their claims justiciable. *See* A 117, 148-249, 254-63, 278-81; SA 13-245.

As the evidence shows, appellees have faced a real and ongoing threat that the Act will be enforced against them. They belong to the class specifically targeted by the Act, and each engages in and intends in the future to engage in the intimate behavior it criminalizes. *See supra* at xiii-xiv. In the past decade three different attempts to repeal the Act in the Arkansas legislature failed, sending a potent signal of its continuing vitality in state prosecutors' criminal law arsenal. *Id.* at xiv-xv. Far from moribund, the Act has been enforced by prosecutors in Arkansas for public conduct, and there is no reason to believe it would not be used to prosecute

private intimacy as well – the statute draws no public/private distinction. *See, e.g.* Young v. State, 296 Ark. 394, 757 S.W.2d 544 (1988). *See also* United States v. Lemons, 697 F.2d 832 (8th Cir. 1983); Kindlinger v. Arkansas, 1991 WL 104051 (Ark. Ct. App. 1991). Appellant and the class of prosecutors he represents are before this Court vigorously defending their authority to bring prosecutions under the Act, and, significantly, even in the nearly four years since this action was commenced, have steadfastly declined to disavow enforcing it in the future. Indeed, appellant even emphasizes in his brief the broad discretion to bring prosecutions under the Act enjoyed by prosecutors throughout the state. (Appellant's Brief at 5) The Act hangs like the Sword of Damocles over appellees' heads.

Given the history of anti-gay actions by government, anti-gay pronouncements by political leaders, anti-gay sentiments persisting among some Arkansans, and the staunch refusal of the state's prosecutors to disavow enforcement, the threat to appellees of a prosecution is palpable. *See* A 149-56, 159-65, 168-74, 177-84, 187-93, 195-201, 228-33; SA 3-245. For example, some Arkansas police officers, empowered to work with prosecutors to enforce the Act, have demonstrated their inclination to harass and arrest gay people. Since the complaint was filed, an appellee was taunted at gun point by police demanding to know if he was a "drag queen" (A 189), and another appellee's parishioner was threatened by a police officer boasting that he would like to "arrest all of you homos" (A 161-62). A lesbian was brutalized and arrested, for dancing with another woman in a night club, by a police officer who claimed "it's against the law to be a lesbian in Arkansas" (A 231 & SA 79) *See also* A 170, 217-33 & SA 28-38. In recent years a candidate in an Arkansas mayoral race publicly vowed, to applause, to "do everything I can to keep" lesbians and gay men out of his city, "including enforcing the sodomy law." (A

230; SA 48)

Appellees' affidavits and exhibits supporting summary judgment give a compelling and detailed picture of the very live criminal law and controversy before the Court. (A 148-249; SA 13-245) Numerous federal and Arkansas cases have concluded that similar, and even less compelling, evidence of the enforcement threat posed by a criminal law satisfies the requirements for justiciability. In Babbitt, the U.S. Supreme Court found the criminal penalty provision of a farm labor statute subject to constitutional review, despite the state's claim that the provision had not yet been and may never be applied. The Court held that the plaintiffs were "not without some reason in fearing prosecution," given that the terms of the statute could apply to their intended conduct and that "the State has not disavowed any intention of invoking" the provision. 442 U.S. at 302, 99 S. Ct. at 2311. In Epperson, a challenge to an Arkansas criminal statute that bluntly invaded constitutional rights but that had not triggered an actual prosecution during its forty-year history, both the Arkansas and U.S. Supreme Courts assumed, without even discussion, the presence of a justiciable controversy. *See* Epperson v. Arkansas, 393 U.S. 97, 101-02, 89 S. Ct. 266, 269 (1968); State v. Epperson, 242 Ark. 922, 416 S.W.2d 322 (1967), *rev'd*, 393 U.S. 97, 89 S. Ct. 266 (1968). *See also* Doe v. Bolton, 410 U.S. 179, 188, 93 S. Ct. 739, 745 (1973) (when a plaintiff is "one against whom these criminal statutes directly operate . . . a sufficiently direct threat of personal detriment" is alleged); Magruder v. Ark. Game and Fish Comm'n, 287 Ark. 343, 344, 698 S.W.2d 299, 300 (1985) (fisherman, whose rights to take fish from a particular lake were affected by fish-size restriction, had standing to challenge the regulation); Bennett v. NAACP, 236 Ark. 750, 751-52, 370 S.W.2d 79, 80 (1963); United Food & Commercial Workers Internat'l Union v. I.B.P., 857 F.2d 422, 427-28 (8th Cir. 1988);

Presbytery of N.J. v. Florio, 40 F.3d 1454, 1468 (3d Cir. 1994) ("state has had ample opportunity to indicate that it will not prosecute . . . . [and] has elected not to do so"); Adult Video Ass'n v. Barr, 960 F.2d 781, 785 (9th Cir. 1992) (although DOJ had never conducted pre-trial seizures before, RICO "authorizes such seizures, . . . no formal policy . . . prohibits its prosecutors or officers from pursuing pre-trial seizures, and enforcement practices may change at any time in any case"), *vacated on other grounds by* Reno v. Adult Video Ass'n, 509 U.S. 917, 113 S. Ct. 3028 (1993); KVUE, Inc. v. Moore, 709 F.2d 922, 929, 930 (5th Cir. 1983) (even though prosecutor did not "anticipate" charging plaintiff under unenforced criminal statute, prosecutor did "not rule out prosecution").

The cases on which appellant relies do not bear on the justiciability of appellees' claims. Poe v. Ullman, 367 U.S. 497, 81 S. Ct. 1752 (1961), declined jurisdiction to hear a challenge to a Connecticut law unenforced for over eighty years that prohibited the use of contraceptives openly and notoriously sold in drugstores throughout the state. Not only do appellees here demonstrate that the Arkansas Act has been far from moribund, but the aftermath of Poe itself demonstrates that enforcement practices do indeed change at any time: the very statute characterized as "harmless" in Poe, *id.* at 508, 81 S. Ct. at 1758, was struck down just four years later, in Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965), after the state prosecuted two people for violating it. Notably, the Supreme Court did not even cite Poe in Babbitt, and distinguished it in Bolton, discussed *supra*, underscoring its weak precedential value. *See* Bolton, 410 U.S. at 188, 93 S. Ct. at 745.

Cummings v. City of Fayetteville, 294 Ark. 151, 741 S.W.2d 638 (1987), challenged a statute governing recall of city directors without any threshold factual allegation that anyone was

even interested in seeking such a recall. Jessup v. Carmichael, 224 Ark. 230, 272 S.W.2d 438 (1954), sought a declaratory judgment that the private defendants could not sue their plaintiff neighbor should she make improvements to her land and should those improvements affect water drainage off their property, without any evidence that there would even be a drainage problem or resulting litigation. In contrast, here no further development of the factual record by a prosecution would inform the court's analysis. *See* Abbott Lab. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 1516 (1967) (declaratory judgment presented purely legal issues fit for resolution even before prosecution instituted), *overruled on other grounds by* Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980 (1977). Other cases cited by appellant if anything *support* justiciability. *See* Donovan v. Priest, 326 Ark. 353, 931 S.W.2d 119 (1996) (challenge to proposed constitutional amendment *was* justiciable, and proposed amendment held unconstitutional); *see also* Arkansas Intercollegiate Conf. v. Parnham, 309 Ark. 170, 828 S.W.2d 828 (1992) (no need for declaratory judgment on AIC's unquestioned authority to promulgate and enforce rules).

In addition, appellant ignores the distinct equal protection injury – the subjection to an unequal rule – and the stigma and collateral harms that here come with it, which separately give rise to a justiciable controversy. The Act uniquely targets appellees, and the class of gay and lesbian Arkansans to which they belong, for criminal status because they engage with members of the same sex in the identical conduct heterosexuals are free to enjoy. The U.S. Supreme Court has held that the very subjection to such an unequal law creates a justiciable equal protection injury – the injury "is the denial of equal treatment resulting from the imposition of" a discriminatory rule. Northeastern Florida Chap. of Assoc'd Gen. Contractors of America v. Jacksonville, 508 U.S. 656, 666, 113 S. Ct. 2297, 2303 (1993). As the Court has "repeatedly

emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy . . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." Heckler, 465 U.S. at 739-40, 104 S. Ct. at 1395. In Smith v. City of Cleveland Heights, 760 F.2d 720 (6th Cir. 1985), the Court of Appeals held that a black resident had standing to challenge the city's racial steering to exclude additional new black residents. Although the plaintiff had not himself been subject to steering practices at the time he purchased his home, the City's policy created "a favored class based solely on race," and forced the plaintiff to "live on a daily basis with a sense of disrespect officially established as law." *Id.* at 723-24. So too has the Act caused appellees to suffer daily stigma and official disrespect from being branded criminals for engaging in the identical conduct permitted their heterosexual neighbors. And, as described in detail in the undisputed affidavits, the Act also puts appellees at risk of such additional harms as denial of custody of their children, denial of the opportunity to serve as foster parents, loss of housing, loss of employment, and anti-gay verbal and physical abuse. *See supra* at xv; A 173-74; SA 109-32. *See also* Able v. U.S., 88 F.3d 1280, 1291 (2d Cir. 1996).

Hardwick v. Bowers, 760 F.2d 1202 (11th Cir. 1985), *rev'd* Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841 (1986), relied on by appellant, in fact *supports* appellees' standing in this case. In Hardwick a gay man who averred, as have appellees, that he engaged and intended in the future to engage in sodomy had standing to bring a federal declaratory judgment action challenging Georgia's general sodomy prohibition, while heterosexual plaintiffs who claimed only to be "chilled" by the statute from engaging in the conduct were held to lack standing. The

Eleventh Circuit observed that the heterosexual plaintiffs, unlike the gay plaintiff, "never claimed membership in a group especially likely to be prosecuted." 760 F.2d at 1206.

Indeed, on its face, the Arkansas Act makes crystal clear the sole group targeted for prosecution: not heterosexual couples, who are exempted from criminal sanction, but same-sex couples only. As Judge Bogard held, "Each [appellee] has a distinct interest in the constitutionality of the Sodomy Statute, not shared by the general public, such that they are entitled to maintain a declaratory judgment action . . ." (A 4) And, as Judge Bogard earlier held in a decision from which appellant took no appeal, under the Ex parte Young doctrine, such an action against the state officials who have "a sufficient nexus with the enforcement of the statute" – in this case, appellant prosecuting attorneys – is precisely the mechanism appellees must use to strike down the offending law. (A 56-57) *See also* Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908); Pitcock v. State, 91 Ark. 527, 121 S.W. 742, 746 (1909).

Contrary to appellant's suggestion, appellees here suffer far more than the mere "psychological consequence presumably produced by observation of conduct with which one disagrees." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 485,102 S. Ct. 752, 765 (1982)(denying general taxpayer standing to challenge federal regulation; did not address cognizable equal protection injury when a distinct group is singled out for disfavor under the law); San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121 (9th Cir. 1996) (allegation that statute would only "chill" potential conduct, absent allegation of concrete intent to violate statute – unlike undisputed facts of this case – held insufficient to establish justiciability).

Finally, Gryczan v. State, 942 P.2d 112 (Mont. 1997), and Campbell v. Sundquist, 926

S.W.2d 250 (Tenn. Ct. App. 1996), persuasively found similar declaratory judgment challenges to the Montana and Tennessee same-sex sodomy prohibitions to be justiciable, even though there was no proof that the laws had been enforced against consenting adults in private or that prosecutors had made literal threats of prosecution. *See* Gryczan, 942 P.2d at 118-20 ("[b]ecause the legislature does not regard the statute as moribund and because enforcement has not been foresworn by the Attorney General, we agree that [plaintiffs] suffer a legitimate and realistic fear of criminal prosecution along with other psychological harms"); Campbell, 926 S.W.2d at 255. *See also* Doe v. Ventura, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001).

II. The Lower Court Correctly Held That The Arkansas Constitution Guarantees A Fundamental Right Of Privacy Shielding Adults From Government Intrusion Into Private, Noncommercial, Consensual Sexual Intimacy

The lower court properly found "that the citizens of Arkansas' fundamental right to privacy encompasses the right of the [appellees] to engage in consensual, private, non-commercial, sexual conduct, because that activity involves intimate questions of personal concern." (A 285) Arkansas's constitution is thus like that of numerous other states, whose constitutions have also been held to provide their citizens with greater privacy rights than the federal constitution and to protect private, consensual, sexual intimacy between adults.

The Arkansas Declaration of Rights protects rights not only made explicit therein, but also "inherent and inalienable rights." Ark. Const. art. II, § 2; *see also* Ark. Const. art. II, § 29 ("[t]his enumeration of rights shall not be construed to deny or disparage others retained by the people"); Ex parte Martin, 13 Ark. 198 (1853) (finding implicit right to just compensation for property taken for public use); Coker v. City of Ft. Smith, 162 Ark. 567, 258 S.W. 388 (1924) (finding right to walk along the public streets and associate for lawful purposes, on behalf of

prostitutes and others); Carroll v. Johnson, 263 Ark. 280, 290-91, 565 S.W.2d 10, 17 (1978) ("[a]mong the inherent and inalienable rights protected" by the Arkansas Constitution "is the right to establish and maintain a home and family relations;" protecting due process right of non-custodial, non-supporting father to challenge change of his children's surnames).

Although a right to privacy is not explicit in the Declaration of Rights, a number of sections assert the importance of individual liberty and happiness, free from unjustified government interference, as well as the sanctity of the home. Section 2, titled "Freedom and Independence," provides:

> All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those *of enjoying and defending life and liberty*; of acquiring, possessing and protecting property and reputation; and *of pursuing their own happiness*. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

Ark. Const. art. II, § 2 (emphasis added). No such provision appears in the federal Bill of Rights. The Arkansas Declaration has *two* sections that protect "life, liberty or property" against deprivation by the state contrary to the due process of law. *See* Ark. Const. art. II, § 8 ("nor shall any person . . . be deprived of life, liberty or property, without due process of law"); Ark. Const. art. II, § 21 ("or in any manner destroyed or deprived of his life, liberty or property, except by . . . the law of the land"). In addition, Section 15 sets forth "[t]he right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . ." Ark. Const. art. II, § 15. *See also* Ark. Const. art. II, § 27. All these provisions support the vital concern of Arkansans with constitutionally protecting their individual autonomy and their seclusion, away from government, in the home. "[D]istrust of government was the [Constitution of 1874's] theme . . . ." Kay Collett Goss, The Arkansas State Constitution: A Reference Guide 8

(1993). To have meaning, these concepts must include the principle that each resident of Arkansas has a significant zone of privacy that the government typically cannot enter or regulate.

Thus, this Court should affirm that the Declaration of Rights includes an implicit, fundamental right to privacy, broader than the federal right has been interpreted, just as very similar state constitutions in Kentucky and Pennsylvania have been found to incorporate such a right. *See* Wasson, 842 S.W.2d at 491-98; In re B., 394 A.2d 419, 425 (Pa. 1978); Stenger v. Lehigh Valley Hospital Center, 609 A.2d 796, 802 (Pa. 1992). Indeed, Kentucky and Pennsylvania provided the models for Arkansas's Declaration of Rights. *See* Southwestern Bell Telephone Co. v. Wilks, 269 Ark. 399, 402, 601 S.W.2d 855, 856 (1980) (noting that Kentucky is "a state from whence much of our basic law was derived" and adopting the Kentucky Supreme Court's "interpretation of a similarly worded constitutional provision"); Wasson, 842 S.W.2d at 492 (Kentucky's Bill of Rights was "'borrowed almost verbatim from the Pennsylvania Constitution of 1790'").

The Kentucky Supreme Court relied in Wasson on the explicit protection of inherent and inalienable rights, of enjoying and defending life and liberty, and of pursuing individual happiness in concluding that the Kentucky Bill of Rights shields privacy. 842 S.W.2d at 494. Judge Bogard observed, "Such constitutional provisions in Kentucky, which are parallel to those in this state, make clear that '[I]t is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which *will not directly injure society.*'" (Emphasis in original) (A 283, *quoting* Wasson, 842 S.W.2d at 494-95). *See also* In re B., 394 A.2d at 425 (identifying right to privacy in similar Pennsylvania constitutional provisions). Many other states

have also identified an inherent right to privacy that protects their citizens and that is more inclusive than the federal right. *See, e.g.,* Powell v. State, 510 S.E.2d 18, 21, 22 & n.3 (Ga. 1998); Gryczan, 942 P.2d at 121; Campbell, 926 S.W.2d at 259, 261; State v. Saunders, 381 A.2d 333, 339, 341 (N.J. 1977); Ventura, 2001 WL 543734 *5.

As Judge Bogard found, Arkansas's protection of privacy is similarly vigorous, and unbounded by the federal floor. *See* Oregon v. Hass, 420 U.S. 714, 719, 95 S. Ct. 1215, 1219 (1975); Arkansas v. Sullivan, 121 S. Ct. 1876, 1878 (2001)("a State is free *as a matter of its own law* to impose greater restrictions on police activity than . . . necessary upon federal constitutional standards") (quotations omitted)(emphasis in original); DuPree v. Alma Sch. Dist., 279 Ark. 340, 651 S.W.2d 90 (1983) (system to fund public schools relying in part on local property wealth violates Arkansas right to equal protection, contrary to U.S. Supreme Court's decision in similar federal equal protection case); Byrd v. Arkansas, 317 Ark. 609, 879 S.W.2d 435 (1994) (state right to jury trial requires 12 jurors; rejecting U.S. Supreme Court interpretation of federal right that less than 12 suffice).

Sexual intimacy falls at the very center of this constitutionally protected zone of privacy. The Montana Supreme Court captured what Arkansans as well as Montanans surely depend upon when it said, "[A]dults . . . fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation. Quite simply, consenting adults expect that neither the state nor their neighbors will be co-habitants of their bedrooms." Gryczan, 942 P.2d at 122. Other states have also held that private, consensual, adult sexual activity lies at the core of the protected zone of privacy. *See also* Powell, 510 S.E.2d at 24; Wasson, 842 S.W.2d at 491-99; Saunders, 381 A.2d at 341; Campbell, 926 S.W.2d

at 262; Ventura, 2001 WL 543734 *6.

Contrary to appellant's disingenuous characterization of the court's decision as a ruling on the "right to engage in homosexual sodomy" (Appellant's Brief at 10), the lower court firmly identified the protected constitutional right of *all* adults to be free from government intrusion, in their own bedrooms, into their consensual sexual intimacy. (A 283) *See also* Gryczan, 942 P.2d at 122. This case is no more about a fundamental right "to engage in homosexual sodomy" than Coker v. City of Ft. Smith, 162 Ark. 567, 258 S.W. 388, was about a fundamental right to take a prostitute home at night, or Carroll v. Johnson, 263 Ark. 280, 565 S.W.2d 10, was about a fundamental right to be a "deadbeat" father. Rather, as the lower court recognized, the people of Arkansas share an inherent right to be shielded from government intrusion into their most intimate adult conduct, a right that does not depend on a person's sex or sexual orientation:

> [A]n adult's right to engage in consensual and noncommercial sexual activities in the privacy of that adult's home is a matter of intimate personal concern which is at the heart of [the] right to privacy in Arkansas, and this right should not be diminished or afforded less constitutional protection when the adults engaging in that private activity are of the same gender. (A 283)

Appellant also contends that because the conduct criminalized by the Act was historically outlawed, no constitutional protection should now be found to shield it from government intrusion. But this Court has embraced the view that core concepts of individual liberty like due process and fundamental rights – which include a right to privacy –

> do not become petrified as of any one time . . . It is of the very nature of a free society to advance in its standards . . . Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.
>
> To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for

certainty but ignores the movements of a free society.

Carroll v. Johnson, 263 Ark. at 288, 565 S.W.2d at 15 (quotations omitted). *See generally* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 848, 112 S. Ct. 2791, 2805 (1992).

In Loving v. Virginia, the U.S. Supreme Court likewise rejected the view appellant urges here in holding that anti-miscegenation laws violated both the fundamental right to marry and the equal protection guarantee, notwithstanding that such laws had been in force since colonial days. 388 U.S. 1, 6, 9-10, 12, 87 S. Ct. 1817,1820-22,1824 (1967). Neither history nor tradition saves a law prohibiting miscegenation – or consensual sexual activity – from constitutional attack. Similarly, in Powell, the Georgia Supreme Court rejected the "tidy formula" proposed here by appellant, and found that the same sodomy statute earlier upheld in Bowers violated the right to privacy implicit in the state's constitution, notwithstanding that Georgia had criminalized sodomy since before its first constitution was adopted. Powell, 510 S.E.2d at 28 (Carley, J., dissenting). *See also* Bowers, 478 U.S. at 190, 106 S. Ct. at 2843 (the case "raises no question about the right or propriety . . . of state-court decisions invalidating [sodomy] laws on state constitutional grounds").[2] *Cf.* State v. Smith, 766 So. 2d 501 (La. 2000)(taking narrow view of constitutional protections as petrified in prior centuries, in conflict with Arkansas's principles of constitutional interpretation)(cited by appellant).

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[2]Appellees continue to press and preserve their federal constitutional claims, not reached by the court below, that the Act also violates federal rights (1) to privacy, and that Bowers was wrongly decided, and (2) to equal protection, by impermissibly discriminating on the basis of sex and sexual orientation. *See* A 287, 121-32, 139-41, 254 n.2, 263-67.

When a statute infringes a fundamental right to privacy, it cannot survive unless the government proves that "a compelling state interest is advanced by the statute and [that] the statute is the least restrictive method available to carry out this state interest." *See* Thompson v. Ark. Soc. Serv., 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984); Bowers, 478 U.S. at 189, 106 S. Ct. at 2843. Appellant correctly concedes that the state can offer no compelling interest to justify the Act. (A 286; Supplemental Abstract at xi; SA 248) The state's sole justification for the Act, that it expresses moral disapproval under the state's police power, without more, is insufficient justification for the violation of a fundamental personal liberty. *See* Casey, 505 US. at 850, 112 S. Ct. at 2806; A 284. As the lower court held, "'the police power should be properly exercised to protect each individual's right to be free from interference in defining and pursuing his own morality *but not to enforce a majority morality on persons whose conduct does not harm others.*'" (A 285)(quoting Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980). *See also* Gryczan, 942 P.2d at 125-26 ("absent an interest more compelling than a legislative distaste of what is perceived to be offensive and immoral sexual practices on the part of homosexuals, state regulation, much less criminalization, of this most intimate social relationship will not withstand constitutional scrutiny"); Powell, 510 S.E.2d at 26; Post v. State, 715 P.2d 1105, 1109 (Okla. Crim. App.1986); Saunders, 381 A.2d at 342; Campbell, 926 S.W.2d at 264-65; Wasson, 842 S.W.2d at 496.

This Court has also stressed that the police power is properly invoked only where public welfare is truly at issue. *See* Ports Petroleum Company, Inc. v. Tucker, 916 S.W.2d 749, 753-54 (Ark. 1996). "'[T]he police power can only be exercised to suppress, restrain, or regulate the liberty of individual action, when such action is injurious to the public welfare.'" Hand v. H & R

Block, Inc., 258 Ark. 774, 782, 528 S.W.2d 916, 921 (1975) (quoting State v. Hurlock, 185 Ark. 807, 49 S.W.2d 611, 612 (1932)); *see also* Gibson v. County of Pulaski, 2 Ark. 309 (1840). As the lower court's opinion in essence says, and the Arkansas constitution mandates, what you do in your bedroom with another consenting adult is none of the government's business.

III. The Lower Court Correctly Held That The Act Impermissibly Discriminates On The Basis Of Sex In Violation Of Arkansas Constitutional Guarantees Of Equal Protection

The lower court properly found that the Act also violates state constitutional guarantees of equal protection because it classifies on the basis of sex and cannot satisfy the required exacting judicial scrutiny.

Any Arkansas law that draws a differential classification must satisfy the guarantees of equal protection of the Arkansas constitution, which contains four separate sources of protection. *See* Ark. Const. art. II, § 18; *see also* Ark. Const. art. II, §§ 2, 3, and Amendment 14. Sex-based classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives." Hatcher v. Hatcher, 265 Ark. 681, 685, 580 S.W.2d 475, 476 (1979)(in banc); Sweeney v. Sweeney, 267 Ark. 595, 593 S.W.2d 21 (1980); A 281, 287. Furthermore, "[t]he burden of justification is demanding and it rests entirely on the State." United States v. Virginia, 518 U.S. 515, 533, 116 S. Ct. 2264, 2275 (1996); A 287.

As the lower court found, the Act triggers this exacting judicial scrutiny because it expressly criminalizes conduct based on the sex of the actors. *See* Ark. Code Ann. § 5-14-122. Only because of appellee Elena Picado's sex does she commit a crime when she engages with her female partner in the proscribed conduct; if she were a man, the same conduct with the same

partner would be perfectly legal. *See* A 286.

Appellant argues that because men and women are equally penalized for engaging in sexual conduct with a same-sex partner, the Act does not discriminate on the basis of sex. But this very form of argument was rejected by the U.S. Supreme Court in Loving, 388 U.S. at 9, 87 S. Ct. at 1822. Even though the anti-miscegenation law at issue there applied equally to whites and blacks, it made the legality of certain behavior – marriage – turn on race. That law functioned to keep blacks and whites in their traditional, separate and unequal spheres. *Id.* at 3-12, 87 S. Ct. at 1819-23. The Act's requirement that women play one sex role and men play another similarly perpetuates the notion that the proper roles of women and men are distinct and limited by tradition. A 226-27.

The requirement that women and men play only traditionally-prescribed sex roles in their intimate behavior is premised on "overbroad generalizations about the different . . . preferences of males and females" that cannot justify sex-based classifications. Virginia, 518 U.S. at 533, 116 S. Ct. at 2275. Equal protection guarantees call for heightened scrutiny of sex-based classifications imposed by the state in the bedroom as much as elsewhere. The view, given force in the Act's proscriptions based on sex, that social policy should funnel males and females into stereotyped roles, has been roundly rejected by both the U.S. and this Supreme Court as a constitutional matter. *See* Virginia, 518 U.S.at 533, 116 S. Ct. at 2275; Mississippi University for Women v. Hogan, 458 U.S. 723, 724-25, 102 S. Ct. 3331, 3336 (1982)(condemning government objectives based on "archaic and stereotypic notions" about the "roles and abilities of males and females."); Conser v. Biddy, 274 Ark. 367, 369, 625 S.W.2d 457, 458 (1981) (traditional gender assumptions are an impermissible basis for classifying according to sex);

Hatcher v. Hatcher, 265 Ark. at 685, 580 S.W.2d at 477 ("sexual stereotypes" cannot justify gender-based line-drawing).

This scrutiny the Act cannot survive. Indeed, appellant attempts only to justify it under the lower rational basis standard, which is simply inapplicable to sex-based classifications. Moreover, as discussed in the next section, the bare majoritarian moral disapproval that is the Act's only justification cannot form even a *legitimate* basis for this discriminatory rule and certainly cannot amount to the *important* government objective required to rescue this sex-based classification. *See* A 284-85, 287.

IV. The Lower Court Correctly Held That The Act Discriminates On The Basis Of Sexual Orientation And Violates Equal Protection Because It Is Not Related To Even A Legitimate Government Interest

In addition to impermissibly discriminating on the basis of sex, the Act also violates the right to equal protection by discriminating on the basis of sexual orientation: the Act singles out gay men and lesbians for criminal condemnation for engaging in the very same conduct freely permitted heterosexuals. As the lower court found,

> the [appellant] argues the state legislature was permitted to enact laws chronicling the majority opinion of disfavor, if that is the case, with homosexuals. Research has shown that many homosexuals engage in oral and anal sex, as do heterosexuals, yet [the Act] only criminalizes the acts of the homosexuals, but not the very same acts of heterosexuals. The [Act] simply does not have equal application, it unjustifiably discriminates, and thus is unconstitutional under Ark. Const. Art. 2, Sec. 18. (A 287)

By punishing solely those whose romantic partners are of the same sex, the law by definition discriminates against and targets lesbians and gay men. A gay sexual orientation is defined by sexual attraction to those of the same sex. A 236, 244-45; Webster's Ninth New Collegiate Dictionary 579 (1983) ("homosexual" is one who "direct[s] sexual desire toward

another of the same sex"). In striking down a statute that, like Arkansas's, criminalized sexual conduct only "with another person of the same sex," the Kentucky Supreme Court recognized the statute's classification on the basis of sexual orientation: "Sexual preference, and not the act committed, determines criminality, and is being punished." Commonwealth v. Wasson, 842 S.W.2d at 488. The Arkansas Act's punishment of common conduct only when engaged in by same-sex couples likewise classifies according to sexual orientation.

While labeling conduct as immoral might justify a law that punished the conduct for everyone (provided no other constitutional protections applied), it cannot as a matter of equal protection justify imposing different rules depending on who engages in the particular behavior – regardless of the level of scrutiny used. The Act embodies the belief that certain *people*, gay men and lesbians, should be condemned for the same acts that are acceptable for others. In so doing, the Act legislates impermissible animosity toward gay people. As a matter of law, this animosity cannot justify a criminal statute targeting gay men and women for unique punishment. *See* Romer v. Evans, 517 U.S. 620, 634, 116 S. Ct. 1620, 1628 (1996).

Under well-settled equal protection principles, any "legislation that distinguishes between [two groups of people] must be rationally related to a legitimate governmental purpose," and "mere negative attitudes" about the disadvantaged group are an illegitimate government interest. Cleburne, 473 U.S. at 446, 448, 105 S. Ct. at 3258, 3259.[3] The United States Supreme Court has

[3]The Court need not rule on whether sexual orientation classifications merit heightened scrutiny because the Act cannot satisfy even rational-basis review. However, should the Court disagree, at least intermediate scrutiny is appropriate. *See* A 125 n.9, 264 n.7. Appellant's cases involving special judicial deference for regulations bearing on national security are of little

repeatedly rejected bare disapproval – no matter how deeply rooted in or consistent with social, moral, or religious norms – as a basis for the disadvantageous government treatment of one group. *See, e.g.,* Romer, 517 U.S. at 632, 116 S. Ct. at 1628; Cleburne, 473 U.S. at 448, 105 S. Ct. at 3259. Equal protection's limits mean that, while moral judgments or majoritarian sentiment can support evenhanded criminal or other laws that uniformly condemn certain behavior, such views cannot support a law that makes a disfavored group unequal to everyone else. *See* Romer, 517 U.S. at 635, 116 S. Ct. at 1629.

For example, in U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 529, 93 S. Ct. 2821, 2823 (1973), the Court examined a federal law that barred households containing unrelated individuals from obtaining food stamps. The history of the enactment indicated that it "was intended to prevent so called 'hippies' and 'hippie communes' from participating in the food stamp program." *Id.* at 534, 93 S. Ct. at 2826. Rejecting that aim, despite its grounding in strong American values that condemned hippies and communal living, the Court firmly stated that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group" by treating them less advantageously under the law "cannot constitute a legitimate governmental interest." *Id.*

Similarly, in Palmore v. Sidoti, 466 U.S. 429, 104 S. Ct. 1879 (1984), the Court examined a court order removing child custody from a white mother because she had married an African-American man. In reversing the change in custody, the Supreme Court recognized that deep-rooted, long-standing social mores against interracial marriage not only existed but also

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relevance here. *See, e.g.*, Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1133 (9th Cir. 1997).

might manifest in a way that would affect the child. *See id.* at 433, 104 S. Ct. at 1882. Still, the Court emphatically ruled that "the law cannot, directly or indirectly, give . . . effect" to "private biases." *Id.*

Indeed, in Romer, Justice Scalia urged in dissent that "traditional sexual mores," in particular "moral disapproval of homosexual conduct," provided a legitimate justification for the State's different treatment of gay and non-gay people. 517 U.S. at 636, 644, 116 S. Ct. at 1629, 1633 (Scalia, J., dissenting). But the Court disagreed, because – regardless of the source or characterization of the disapproval – Colorado's discriminatory amendment reflected only the illegitimate purpose of "animosity toward the class of persons affected." *Id.* at 634, 116 S. Ct. at 1628. As with the Arkansas Act, the legislative object was to make gay men and lesbians "unequal to everyone else. This [a state] cannot do." *Id.* at 635, 116 S. Ct. at 1629. *See also* Stemler v. City of Florence, 126 F.3d 856, 874 (6th Cir. 1997) (Romer simply reinforced the "venerable rule under the Equal Protection Clause" that the state may not base different treatment on the desire to condemn one group).

Bowers, 478 U.S. 186, 106 S. Ct. 2841, was irrelevant to the issue posed in Romer, just as it is to the issue here. Bowers upheld an evenhanded law that criminalized oral and anal sex for everyone in the state based on the presumed moral belief of Georgians, and the court did so in the context of due process, not equal protection. *Id.* at 188 n.1, 196 & n.8, 106 S. Ct. at 2842 n.1, 2846-47 & n.8. The two constitutional inquiries have "an entirely different set of purposes," and a decision in a due process case cannot be imported into an equal protection analysis. Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1174 (1988). The Due Process Clause

"protects a range of basic rights; it does not speak to the constitutionality of classifications." *Id.* at 1170. In contrast, the Equal Protection Clause "protect[s] disadvantaged groups" and guards against discriminatory rules. *Id.* at 1163, 1174. Its requirement that laws burden people generally, rather than solely burdening those who are unpopular, "operates as a political safeguard, ensuring that if the heterosexual majority is to burden gays and lesbians, it must burden itself as well." *Id.* at 1178. *See* Stemler, 126 F.3d at 873 ("It is inconceivable that Bowers stands for the proposition that the state may discriminate against individuals on the basis of their sexual orientation solely out of animus to that orientation"); D. Don Welch, Legitimate Government Purposes and State Enforcement of Morality, 1993 U. Ill. L. Rev. 67, 92 ("societal moral beliefs cannot justify denying citizens equal protection of the law"). *Cf.* Carter v. State, 255 Ark. 225, 500 S.W.2d 368 (1973)(challenge to prosecution for public conduct violating Arkansas's pre-1975 evenhanded, general sodomy law did not pose equal protection claim and cannot support proposition that moral disapproval is legitimate basis for criminalizing conduct only for one group).

That the Arkansas Act is the result of legislative choice or that it may indeed be supported by a majority of Arkansans does not alter the illegitimacy of its different rule based on dislike or moral disapproval. Government "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." Cleburne, 473 U.S. at 448, 105 S. Ct. at 3259; *see* Palmore, 466 U.S. at 433, 104 S. Ct. at 1882 (that discriminatory beliefs are "'widely and deeply held'" cannot save government action that lacks legitimate purpose); Weaver v. Nebo School Dist., 29 F. Supp. 2d 1279, 1289 (D. Utah 1998) ("a community's animus towards homosexuals can never serve as a legitimate basis for state

action"). *See generally* Robert D. Holloway, Inc. v. Pine Ridge Addn. Resd. Prop., 332 Ark. 450, 453, 966 S.W.2d 241, 243 (1998)(fulfilling judiciary's responsibility to strike unconstitutional state law, notwithstanding presumption that in enacting it General Assembly had "full knowledge of the constitutional scope of its powers"); Urrey Ceramic Tile Co. v. Mosley, 304 Ark. 711, 805 S.W.2d 54 (1991) (equal protection violated because there was no rational basis for statutory classification); DuPree, 279 Ark. at 351, 651 S.W.2d at 96 (Hickman, J., concurring); Ark. Commerce Comm'n v. Ark. & Ozarks Railway Co., 235 Ark. 89, 93-96, 357 S.W.2d 295, 298-300 (1962); Rebsamen Motor Co. v. Phillips, 226 Ark. 146, 152-4, 289 S.W.2d 170, 173-4 (1956) (violation of equal protection to impose fee on only one class of auto dealers for engaging in the identical conduct in which other dealers were free to engage); City of Springdale v. Chandler, 222 Ark. 167, 257 S.W.2d 934 (1953) (city ordinance permitting discrimination against those residents whose neighbors protested the identical conduct permitted of other residents violated equal protection); Lewis v. State, 110 Ark. 204, 161 S.W.154, 155 (1913) (enjoyment of hunting and fishing "cannot be made by the law the exclusive privilege of the people of a certain class . . . upon terms and conditions that do not apply to the whole people alike").

Likewise, that negative views about a group of people may be long-standing does not transform them into a legitimate justification for differential treatment. Illegitimate disapproval, biases, and stereotypes, no matter how ingrained, must fall to constitutional requirements once an equal protection challenge is mounted. *See, e.g.,* Loving, 388 U.S. at 3, 11, 87 S. Ct. at 1819, 1823(notwithstanding the "moral" and old origins of the belief, rejecting as constitutionally impermissible trial court's reasoning that "[t]he fact that [God] separated the races [on different

continents] shows that he did not intend for the races to mix"); Cleburne, 473 U.S. at 448-49, 105 S. Ct. at 3258-59 (fear of mentally retarded, though undoubtedly common, rejected as illegitimate concern of government).

The Kentucky Supreme Court rejected in Wasson precisely the contention that a same-sex sodomy prohibition is justified by long-standing moral disapproval: "Certainly the practice of [oral or anal sex] violates traditional morality. But so does the same act between heterosexuals, which activity is decriminalized." 842 S.W.2d at 499. As the Kentucky Court underscored, "homosexuals do not become 'fair game' for discrimination simply because their sexual practices are not considered part of our mainstream traditions." *Id.* (citation omitted). *See also* Bonadio, 415 A.2d at 50 (Pa. 1980) ("enforc[ing] a majority morality on persons whose conduct does not harm others" is an improper exercise of the state's police power).

Where, as here, the state asserts disapproval or antipathy as the basis for a classification, the courts' role in preserving the rights of the affected group is most crucial. *See* Romer, 517 U.S. at 634-35, 116 S. Ct. at 1628-29. In Arkansas, "[e]quality is always the rule in constitutional law, not the exception." DuPree, 279 Ark. at 351, 651 S.W.2d at 96 (Hickman, J., concurring). When legislative action violates that rule, it is the courts' role to enforce the constitutional guarantees so vital to the people of Arkansas. *See, e.g.*, *id.*; Golden v. Westmark Cmty. Coll., 333 Ark. 41, 969 S.W.2d 154 (1998).

V. The Act Is Invalid On Its Face, Not Only As Applied, As A Violation Of The Rights To Privacy And Equal Protection

Appellant erroneously claims that the federal *First Amendment* doctrine of facial overbreadth governs appellees' privacy and equal protection claims. (Appellant's Brief at 9)

See, e.g., Bailey v. State, 334 Ark. 43, 972 S.W.2d 239 (1998). Instead, First Amendment "[o]verbreadth challenges are only one type of facial attack," New York v. Ferber, 458 U.S. 747, 768 n.21, 102 S. Ct. 3348, 3360 n.21 (1982), and have no bearing on appellees' privacy and equal protection challenge. Statutory invasions of the right to privacy need not be unconstitutional in all their applications to be declared invalid on their face. For example, a blanket ban on abortions, though clearly facially invalid, could constitutionally be applied to prohibit most post-viability abortions. *See* Roe v. Wade, 410 U.S. 113, 120, 164-65, 93 S. Ct. 705, 710, 732 (1973); Casey, 505 U.S. at 894-95, 112 S. Ct. at 2829-30 (in facial challenge, striking statutory provision that did not hinder "the vast majority of women seeking abortions" but did impose substantial obstacle for "a large fraction" of the small group of married women who did not wish to inform their husbands of their abortion).

Likewise, as underscored in the very treatise cited in the First Amendment cases mistakenly relied on by appellant, an equal protection challenge to a statute that "by its own terms classifies persons for different treatment" calls for a "determin[ation] whether the law is valid *'on its face*.'" 4 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law §§ 18.4, 18.2 (emphasis added)(treatise relied on by this Court in, *inter alia*, Bailey, *supra*). "The equal protection guarantee has nothing to do with the determination whether a specific individual is properly placed within a classification. Equal protection tests whether the classification is properly drawn." *Id.* at § 18.2. The whole law rises or falls, depending on whether the line drawn can be justified under the applicable equal protection standard. *See, e.g.,* Romer v. Evans, 517 U.S. at 635-36, 116 S. Ct. at 1629 (in declaratory judgment action, finding that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to

everyone else" and affirming injunction against any enforcement of that enactment); Golden, 333 Ark. at 52, 969 S.W.2d at 160 ("[T]he age-based classification [in Ark. Code Ann. § 11-9-522(f)] is not rationally related to a legitimate government purpose. Accordingly, § 11-9-522(f) is void on its face and of no effect."). *See also* City of Chicago v. Morales, 527 U.S. 41, 55 n.22, 119 S. Ct. 1849, 1858 n.22 (1999) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the Salerno formulation [cited by appellant], which has never been the decisive factor in any decision of this Court, including Salerno itself . . . ."); Michael C. Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 236, 238 (1994).

Appellees urge this Court to affirm the decision striking down the Act, not because of "political movements or trends," (Appellant's Brief at 15), but because of the Act's gross invasion of fundamental constitutional rights. Contrary to appellant's assertions, "courts *are* . . . the appropriate forum for reviewing the justification of a legislative act." *Cf. id.* Where that justification fails constitutional standards, the courts must step in to safeguard our most treasured legal principles.

CONCLUSION

For the foregoing reasons, appellees respectfully request that the Court affirm the decision of the lower court and declare the Act in violation of Arkansas constitutional rights to privacy and equal protection.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I, David Ivers, certify that on October 29, 2001, I caused the foregoing document, APPELLEES' SUPPLEMENTAL ABSTRACT, BRIEF AND SUPPLEMENTAL ADDENDUM, to be served by hand on the following persons at the addresses indicated:

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