IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

Sheila Cole, *et al.*,

Plaintiffs,

vs.

The Arkansas Department of Human Services, *et al.*,

Defendants,

Family Council Action Committee, *et al.*,

Intervenors.

Case No. CV 2008-14284

MEMORANDUM OF LAW IN SUPPORT OF INTERVENORS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

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INTRODUCTION

Intervenor-Defendant Family Council Action Committee (FCAC) is an Arkansas-registered nonprofit corporation dedicated to promoting, protecting, and strengthening the family through the political process. Intervenor Jerry Cox (Cox) is the President of FCAC. FCAC is comprised of voters who sponsored, and campaigned for passage of the Arkansas Adoption and Foster Care Act (Act 1), an initiated act which prevents adoptive and foster children from being placed in the home of an individual who is cohabiting in a sexual relationship outside of a valid marriage. Amendment 7 of the Arkansas Constitution, codified as Ark. Const. art. 5 § 1, recognizes that legislative power belongs to the people so that Arkansans may reject or accept laws through popular debate and vote.

The road to put Act 1 on the ballot was, to say the least, challenging. As the official sponsor of Act 1, FCAC had to conquer the labyrinth of Arkansas election law requirements, including: obtaining approval of the ballot title from the Attorney General's Office; obtaining approximately 95,000 signatures of registered voters to place the initiative on the ballot; and obtaining final certification by the Secretary of State. On November 4, 2008, Act 1 was approved by 57% of Arkansas voters and became law on January 1, 2009.

Plaintiffs are several individuals who allege that their rights under the Federal and Arkansas Constitutions may be violated by Act 1, including cohabitants who say they may wish to foster or adopt children, parents who wish to direct the adoption of their biological children with cohabitants, and the biological children of those parents. They brought suit under 42 U.S.C. § 1983 and Ar. Code Ann. § 16-123-101, *et seq.,* against the State of Arkansas, the Attorney General for the State of Arkansas, the Arkansas Department of Human Services, and the Child Welfare Agency Review Board to enjoin the enforcement of Act 1 and declare it

unconstitutional. On, March 17, 2009, this Court granted Intervenor-Defendants' (FCAC) motion to intervene to defend the Act.

FCAC moves for summary judgment because Plaintiffs have failed to state causes of action with respect to controlling who may foster or adopt children because no such liberty interests exist. With respect to equal protection, the undisputed material facts show that Act 1 is rationally related to the legitimate government interests in placing children in home environments where they are most likely to prosper and be protected, and in promoting the marital home where child development is most likely to reach its peak. Thus, on the merits, the case is ripe for summary judgment because the policy and purpose of Act 1 is supported by the undeniable social science that, on average, children perform lower on a variety of child welfare factors and are more likely to experience abuse when living in a cohabiting environment.

Discovery was completed on December 18, 2009.

STATEMENT OF KEY ISSUES

The court must uphold state laws when rationally related to a legitimate government interest. Act 1 does not allow adoptive or foster children to be placed with unmarried cohabitants. It is undisputed that, on average, children fare worse when reared in cohabiting environments compared to children reared in homes where the parents are married.

As a matter of law, is the welfare of children in need of foster and adoptive care a legitimate government interest?

As a matter of law, is protecting children from the relative risks of cohabiting environments rationally related to a legitimate government interest?

STATEMENT OF MATERIAL FACTS

Act 1 is placed before Arkansas voters

1. FCAC is a state-wide grassroots organization dedicated to promoting, protecting and strengthening the family. (FCAC MSJ Ex. 54, Cox MTI Aff. ¶ 7.)

2. In 2007, FCAC took steps to propose an initiative to Arkansas voters that would preserve the Department of Human Services policy of placing adoptive and foster care children with single adults or married couples and preventing their placement with adults cohabiting outside of marriage. (FCAC MSJ Ex. 54, Cox MTI Aff. ¶ 16.)

3. The ballot initiative is known as the Arkansas Adoption and Foster Care Act of 2008 or Act 1. (FCAC MSJ Ex. 54, Cox MTI Aff. ¶ 19.)

4. To place the proposed initiative on the ballot for the November 2008 election, FCAC was required to obtain approximately sixty-two thousand signatures from Arkansas voters. (FCAC MSJ Ex. 54, Cox MTI Aff. ¶ 19-20.)

5. FCAC timely secured approximately ninety-five thousand signatures, which were certified by the Secretary of State on August 25, 2008. (FCAC MSJ Ex. 54, Cox MTI Aff. Ex. E.)

A Majority of Arkansas Voters approve Act 1

6. On November 4, 2008, a majority of Arkansas voters approved Act 1, which became effective on January 1, 2009.

7. Act 1 reads in pertinent part:

BE IT ENACTED BY THE PEOPLE OF THE STATE OF ARKANSAS:

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.

Codified at Ark. Code Ann. §§ 9-8-301 - 9-8-306.

DHS placements are based on the best interests of children and not a prospective parent's alleged "rights."

8. When a child is removed from her home due to parental abuse or neglect, Arkansas Department of Human Services (DHS) places the child in the most suitable family

foster home available. (FCAC MSJ Ex. 15, Davis Dep. at 64:24-66:18, 17:2-18:6; FCAC MSJ Ex. 17, Young Dep. at 78:1-12.)

9. As a division of DHS, the Department of Children and Family Services (DCFS), through its family foster home program, seeks to provide an approved family foster home for children under its care and supervision. (FCAC MSJ Ex. 56, DCFS Standards of Approval for Family Foster Homes June 2009 at 4.)

10. Persons applying to become a foster or adoptive parent must meet all the requirements set forth in the Child Welfare Agency licensing standards, and DHS's policy requirements and regulations. (FCAC MSJ Ex. 14, Counts Dep. at 25:5-12; FCAC MSJ Ex. 56, DCFS Standards of Approval for Family Foster Homes June 2009 at 18; FCAC MSJ Ex. 26, Minimum Licensing Standards for Child Welfare Agencies at 23-32.)

11. Homes will not be approved if there are transient roomers or boarders. (FCAC MSJ Ex. 56, DCFS Standards of Approval for Family Foster Homes June 2009 at 9; FCAC MSJ Ex. 27, Dep. Ex. 11, Policy Directive; FCAC MSJ Ex. 29, Dep. Ex. 47, Policy Directive; FCAC MSJ Ex. 17, Young Dep. at 87:3-7, 89:3-91:21; FCAC MSJ Ex. 13, Blucker Dep. at 70:20-71:25, 78:11-17.)

Prior to Act 1, DHS policy precluded placement of children with cohabiting individuals.

12. As far back as 1986, DCFS has maintained a policy of not placing children in homes where there is a live-in boyfriend or girlfriend because it would create a high-risk and unstable home environment for children. (FCAC MSJ Ex. 15, Davis Dep. at 51:12-52:13, 55:23-56:16, 56:24-57:3; 57:21-58:19.)

13. Since 2005, DCFS has had a written policy, set forth in two executive directives, which prohibits children under the supervision of DCFS from being placed with cohabiting

individuals. (FCAC MSJ Ex. 13, Blucker Dep. at 78:1-15, 81:5-23; FCAC MSJ Ex. 29, Dep. Ex. 47, Policy Directive; FCAC MSJ Ex. 27, Dep. Ex. 11, Policy Directive.)

14. DCFS has never knowingly made an adoptive placement with unmarried cohabiting individuals. (FCAC MSJ Ex. 30, Dep. Ex. 53; FCAC MSJ Ex. 14, Counts Dep. at 135:11-19, 138:14-18; FCAC MSJ Ex. 13, Blucker Dep. at 81:24-82:4; 115:1-5.)

15. While DHS proposed rescinding the policy prohibiting cohabiting individuals from fostering or adopting children, it was withdrawn pending the November 2008 vote on Act 1. (FCAC MSJ Ex. 17, Young Depo. at 112:17-113:8, 134:12-17, 135:14-136:8; FCAC MSJ Ex. 28, Young Depo. Ex. 40.)

Act 1 protects children by favoring placements in more stable households for improved child welfare and development

16. The overarching goal of the child welfare professional is to protect the child from further harm, because it is presumed that every child who comes into that system has been a victim of either abuse or neglect. (FCAC MSJ Ex. 19, Faust Dep. at 42:3-7; 98:13-17.)

17. Sex abuse against children occurs more frequently in cohabiting households than in married households where both parents are biologically related to the child. (FCAC MSJ Ex. 24, Worley Dep. at 72:10-18, 81:16-82:13.)

18. On average children are more likely to experience physical abuse in a cohabiting home than they are in a married or a single parent home. (FCAC MSJ Ex. 23, Peplau Dep. at 88:17-89:9, 95:2-19; FCAC MSJ Ex. 19, Faust Dep. at 155:8-14, 156:23-157:5; FCAC MSJ Ex. 24, Worley Dep. at 72:10-18, 81:16-82:13; 88:6-11, 88:25-89:8; FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report at ¶ 19(d).)

19. The quality of a child's relationship with his parents is better if his parents are married than if his parents are cohabiting. (FCAC MSJ Ex. 20, Lamb Dep. at 105:9-21.)

20. On average, married people are more committed to their relationship than people in cohabiting hetero or homo sexual relationships. (FCAC MSJ Ex. 20, Lamb Dep. at 109:22-110:10, 123:1-124:2; FCAC MSJ Ex. 60, Lawrence A. Kurdek, *What do we know about gay and lesbian couples?*, 14 Current Directions in Psychological Science 251-254 (2005); FCAC MSJ Ex. 42, Expert Report 4 § II(B)(3); FCAC MSJ Ex. 23, Peplau Dep. at 37:25-38:22, 48:6-10, 50:3-7, 72:16-73:4, 114:21-115:3, 115:19-22, and 227:2-229:18; FCAC MSJ Ex. 19, Faust Dep. at 78:22-79:10; FCAC MSJ Ex. 22, Osborne Dep. at 105:12-24, 111:9-112:14, 144:3-10.)

21. Married families, on average, have more economic resources than cohabiting families. (FCAC MSJ Ex. 20, Lamb Dep. at 105:22-106:5; FCAC MSJ Ex. 22, Osborne Dep. at 70:4-12, 71:8-20; *see also* 104:3-5, and 143:13-24.)

22. On average, married couples receive more social support from their parents than cohabiting couples. (FCAC MSJ Ex. 20, Lamb Dep. at 196:17-25.)

23. Married fathers are more likely to support their children financially than cohabiting fathers. (FCAC MSJ Ex. 49, Deyoub Expert Report 8.)

24. The most recent research in the United Kingdom, based on Millennium Cohort Study data of 15,000 new mothers, confirms that marriage is the single biggest predictor of family stability. The study found that "60% of families remain intact until their children are fifteen. Of these, 97% are married." (FCAC MSJ Ex. 64, Harry Benson, *Married and Unmarried Family Breakdown: Key Statistics Explained*, Bristol Community Family Trust (2010); http://www.bcft.co.uk/2010%20Family%20policy,%20breakdown%20and%20structure.pdf.)

25. Children raised in cohabiting households are more likely to be exposed to family instability than are children raised in single-parent families. (FCAC MSJ Ex. 66, Shannon E.

Cavanaugh & Aletha C. Huston, *Family Instability and Children's Early Problem Behavior*, 85 Social Forces 551-581 (2006).)

26. Studies indicate that married heterosexuals have lower rates of depressive distress than cohabiting heterosexuals. (FCAC MSJ Ex. 45, Cochran Rebuttal Report 2 § II(A); FCAC MSJ Ex. 18, Cochran Dep. at 149:3-11, 150:7-11, and 152:4-7.)

27. Studies indicate the rate of partner domestic violence is higher for cohabiting heterosexual couples than for married heterosexual couples. (FCAC MSJ Ex. 42, Peplau Expert Report 5 § II(C); FCAC MSJ Ex. 23, Peplau Dep. at 79:6-19, 230:14-231:4; FCAC MSJ Ex. 22, Osborne Dep. at 104:20-105:1, 115:19-116:1.)

28. Children who live with both of their married biological parents have better outcomes on average than children raised by cohabiting parents. (FCAC MSJ Ex. 59, Lamb Expert Report ¶ 25; FCAC MSJ Ex. 20, Lamb Dep. at 100:3-102:2.)

29. Belonging to a married two biological parent family is associated with lower levels of school suspension and expulsion, lower levels of child delinquency, lower levels of school problems, and higher cognitive outcomes for children than belonging to a cohabiting stepfather family. (FCAC MSJ Ex. 22, Osborne Dep. at 145:15-25, 146:17-20, 148:12-24; FCAC MSJ Ex. 50, Dep. Ex. 154.)

30. Even after adjusting for socioeconomic factors, including associated demographic characteristics, family stability, and parenting measures, there is still a significant difference between married steps and cohabiting steps on the "delinquency" measurement. (FCAC MSJ Ex. 22, Osborne Dep. at 49:9-15, 50:12-20, 51:13-15.)

31. There is a significant association between marriage and improved child outcomes, and even more broadly, between family structure and child outcomes. (FCAC MSJ Ex. 22, Osborne Dep. at 146:17-20.)

32. Children in cohabiting families are significantly more likely to experience depression, difficulty sleeping, and feelings of worthlessness, nervousness, and tension, compared to children in intact, married households. (FCAC MSJ Ex. 48, Wilcox Expert Report ¶15(c).)

33. Children in cohabiting families are more likely to suffer from low grades, low levels of school engagement, and school suspension or expulsion than children in single-parent families. (FCAC MSJ Ex. 50, Dep. Ex. 154, Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 Journal of Marriage and Family 876-893 (2003).)

34. Children in single-parent families have better outcomes than children in cohabiting households. (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶19(b).)

ARGUMENT

The safety and well being of children is the sole purpose of placing children in foster and adoptive homes. Arkansas child welfare laws have never aimed to satisfy adult desires to parent children, much less create for non-biological parents, the right to parent foster and adoptive children. The Federal and Arkansas Constitutions should not now be construed to give adults, regardless of the nature of their living environment and relationships, a fundamental right to foster or adopt children. But that is what the Plaintiffs here are seeking from this Court; regardless of what it means for children.

We cannot ignore that lack of legal commitments in adult relationships tend to have negative consequences for children. During the Act 1 campaign, Arkansans carefully weighed

the contention that there should be no concern with placing children in cohabiting environments and found it wanting; and for good reason. Rather than focusing on adult interests and desires, a majority of Arkansas voters passed Act 1 on the imminently rational and even compelling basis that children are better off when not subjected to the greater risk of instability and dysfunction associated with cohabitation. 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. On these undisputed facts, Intervenor-Defendants move for summary judgment.

Summary judgment is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Ark. R. Civ. P. 56(c); *Hanks v. Sneed*, 366 Ark. 371, 235 S.W.3d 883 (2006). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* To determine whether the material facts are undisputed, the court focuses on the pleadings, affidavits and other documents filed by the parties. *Gallas v. Alexander,* 371 Ark. 106, 114, 263 S.W.3d 494, 501 (2007). The court must grant summary judgment if the evidentiary items presented by the moving party demonstrate that the material facts are undisputed. *Id.*

No genuine issues of material fact exist concerning the constitutionality of Act 1. The Due Process Clauses of the United States and Arkansas Constitution do not recognize fundamental rights or liberty interests to adopt or be adopted without regard to the adult relationships in the prospective home. The undisputed facts show that a rational basis exists for keeping children from being placed in cohabiting foster and adoptive environments. Plaintiffs cannot negate, since they agree that, on average, children fare better in non-cohabiting homes.

Therefore, as a matter of law, Act 1 does not violate the Due Process and Equal Protection Clauses of either the United States Constitution or the Arkansas Constitution. Intervenor-Defendants should be granted summary judgment as a matter of law on the merits.

As a threshold matter, and in the interests of avoiding a constitutional decision, the Court should dismiss the claims for lack of standing. The undisputed facts show that the Plaintiffs purported "injury" is nothing more than a generalized grievance. With the exception of Stephanie Huffman, Plaintiffs have not taken any concrete steps to adopt or foster children. But Huffman has withdrawn from the process twice because of personal concerns unrelated to Act 1. The Scroggins and Mitchell Plaintiffs lack standing to direct who will adopt their children because their claims are contingent on multiple future events that might never occur, such as the parents' death and incapacitation. The claims of Sheila Cole and her granddaughter W.H. that Act 1 prevents Cole from taking care of W.H. are moot because they are currently living together in Oklahoma. Accordingly, the Plaintiffs' Third Amended Complaint should be dismissed entirely because the Plaintiffs lack standing.

I. PLAINTIFFS LACK STANDING TO BRING A DUE PROCESS OR EQUAL PROTECTION CHALLENGE TO ACT 1

The Court need not address the merits of Plaintiffs' Due Process Clause or Equal Protection Clause because Plaintiffs lack standing to bring suit to enjoin the enforcement of Act 1. A litigant has standing to challenge the constitutionality of a statute if the law is unconstitutional as applied to that particular litigant. *Arkansas Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 363, 166 S.W.3d 550, 554 (2004). The general rule is that one must have suffered an injury as a member of a class affected to have standing to challenge the validity of a law. *Id.* Each plaintiff must show that the questioned act has a prejudicial impact on them personally. *Id.*

In *Estes v. Walters*, the Arkansas Supreme Court adopted the federal "case and controversy" requirement of Article III of the United States Constitution, holding that "only a claimant who has a personal stake in the outcome of a controversy has standing to invoke jurisdiction of the circuit court in order to seek remedial relief; his injury must be concrete, specific, real and immediate rather than conjectural or hypothetical." 269 Ark. 891, 894, 601 S.W.2d 252, 254 (Ark. App. 1980) (citing *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 714 (D.C. Cir. 1977)). Plaintiffs do not have standing to challenge the constitutionality of Act 1 because they have not suffered any concrete, specific, real or immediate injury and the passage of the Act has had no prejudicial impact on them.

A. Sheile Cole and W.H.'s claims are moot because Cole has custody of W.H. in Oklahoma

Sheila Cole and her granddaughter W.H. allege that Act 1 violates their right to family integrity and Cole's right to equal protection because it might prevent Cole from caring for W.H. since Cole is in a cohabiting relationship. (FCAC MSJ Ex. 2, Conf. Cole Dep. at 10:1-22; FCAC MSJ Ex. 52, Third Am. Compl. ¶¶ 95, 107-08, 129, 135, 146, 154.) But Cole and W.H. cannot show that Act 1 has prevented Cole from caring for W.H. because Cole, in fact, obtained custody of W.H. shortly after she commenced this lawsuit.

W.H. had been in DHS custody since August 2008 when she was removed from her natural parents' care for abuse and neglect. Her natural parental rights were ultimately terminated on June 16, 2009. (FCAC MSJ Ex. 38, Conf. Dep. Ex. 80 at 3.) W.H. was in foster care in the State of Arkansas until January 13, 2009, when Cole was appointed her legal guardian by an Arkansas state court. (FCAC MSJ Ex. 2, Conf. Cole Dep. at 19:25-20:4, 26:16-27:1, 30:4-31:7, 36:15-17; FCAC MSJ Ex. 58, Conf. PL 161-162.) Cole has had uninterrupted physical and

legal custody of W.H. since that time. (FCAC MSJ Ex. 2, Conf. Cole Dep. at 18:10-19:2; FCAC MSJ Ex. 37, Conf. Dep. Ex. 77.)

To maintain an action in Arkansas courts, "there must exist a justiciable controversy that our decision will settle." *Richardson v. Arkansas Dep't of Human Services,* 86 Ark. App. 142, 143, 165 S.W.3d 127, 128 (2004). That is, "a case is moot when any decision rendered by th[e] court will have no practical legal effect on an existing legal controversy." *K.S. v. State,* 343 Ark. 59, 61, 31 S.W.3d 849, 850 (2000). In *Richardson,* an appeal of a daughter's removal from her mother's custody was moot when an agreement was reached to restore custody to the mother because a ruling on the merits would have had no legal effect on the controversy. 86 Ark. App. at 143, 165 S.W.3d at 128.

Here, Cole obtained custody of W.H. shortly after this lawsuit commenced, and they are living together in Oklahoma where Cole is pursuing adoption. (FCAC MSJ Ex. 2, Conf. Cole Dep. at 17:10-15, 17:25-18:7.) Arkansas law has no bearing on Cole's ability to care for W.H., and she is no longer in the protective custody of the Arkansas DHS. (FCAC MSJ Ex. 2, Conf. Cole Dep. at 23:13-24:2.) It should also be noted that while Cole sought and obtained custody of W.H., she never attempted to adopt W.H. in Arkansas. (FCAC MSJ Ex. 2, Conf. Cole Dep. at 39:8-12.)

The controversy is now moot because a decision by this court will have no practical legal effect on the issue of Cole's caring for W.H. This case does not fall within the exception to the mootness doctrine, because it is not "capable of repetition yet evading review." *Shipp v. Franklin*, 370 Ark. 262, 267, 258 S.W.3d 744, 748 (2007). Cole has never lived in Arkansas and has no intention of doing so in the future. (FCAC MSJ Ex. 2, Conf. Cole Dep. at 17:1-4; 23:1-11.) Thus, future litigation to determine Cole's claim that Act 1 prevents her from caring for

W.H. is unlikely. Because this court has no jurisdiction to provide the relief Cole and W.H. requested, their claims are moot and must be dismissed. *See, e.g.*, *Henson v. Wyatt*, 373 Ark. 315, 317, 283 S.W.3d 593, 595 (2008) (per curiam).

B. Stephanie Huffman lacks standing to challenge the constitutionality of Act 1 because she voluntarily withdrew her adoption application

Stephanie Huffman claims that Act 1 burdens her alleged due process right to an intimate relationship and her equal protection right to adopt because she is living with her cohabiting partner. (FCAC MSJ Ex. 52, Third Am. Compl. ¶¶ 129, 131, 135, 146, 154.) She cannot, however, show that she has incurred an injury attributable to Act 1. *Arkansas Tobacco Control Bd.*, 357 Ark. at 363, 166 S.W.3d at 554. Huffman adopted a son in 2004 through the Arkansas DHS. (FCAC MSJ Ex. 6, Huffman Dep. at 8:5-10.) In the spring of 2005, a second home study was performed because Huffman expressed an interest in adopting a second child. (*Id.* at 13:5-14:7.) However, on January 10, 2006, Huffman informed DHS social worker Monica Cauthen that she had "decided to withdrawal from the adoption process totally," because of concerns with the son she had already adopted. She instructed Monica Cauthen to "pull my application," adding that "[i]f in a few years things have changed, I will contact DHS and begin the process again." (FCAC MSJ Ex. 57, STATE 12516.) In May 2008, Huffman spoke with DHS employee Jennifer Wunstel and informed her that she would be moving out of state because she had accepted a new job working for Sam Houston State University in Texas. Wunstel communicated this information by email to DCFS caseworker, Monica Cauthen. (*Id.* at STATE 12517-12518.) Huffman cannot demonstrate that Act 1 has had a prejudicial impact on her inability to adopt a second child because she voluntarily withdrew from the adoption process on two separate occasions prior to the enactment of Act 1. (*Id.* at STATE 12516-12518.)

C. Plaintiffs Wendy Rickman, Shane Frazier, Curtis Chatham, Frank Pennisi and Matt Harrison lack standing because none of them have ever sought to adopt or foster a child in the State of Arkansas

Plaintiffs Rickman, Frazier, Chatham, Pennisi and Harrison also claim that Act 1 infringes their alleged due process right to an intimate relationship and equal protection rights to adopt because each is living with their cohabiting partner. (FCAC MSJ Ex. 52, Third Am. Compl. ¶¶ 129, 131, 135, 146, 154.) For several reasons, Plaintiffs cannot establish standing because their injuries are not "concrete, specific, real and immediate rather than conjectural or hypothetical." *Estes*, 269 Ark. at 894, 601 S.W.2d at 254. First, while anyone may attend an orientation meeting or file an application with DHS regarding foster care and adoption, none of these Plaintiffs have ever contacted DHS to initiate the process. (FCAC MSJ Ex. 4, Frazier Dep. at 20:3-14; 22:4-8, 24:17-19; FCAC MSJ Ex. 1, Chatham Dep. at 18:1-9, 19:8-13; FCAC MSJ Ex. 8, Pennisi Dep. at 12:14-24, 31:15-17; FCAC MSJ Ex. 5, Harrison Dep. at 15:11-16.) Plaintiffs' alleged injuries at the hands of the state are not real and immediate where they have had no contact with the State.

Second, it is not known if Plaintiffs would meet all the requirements of the Child Welfare Agency Review Board's minimum licensing standards for foster or adoptive parents. (FCAC MSJ Ex. 12, Appler Dep. at 31:23-32:7, 33:15-17, 39:214:-40:22, 88:13-22; FCAC MSJ Ex. 26, Minimum Licensing Standards.) These are set forth in the Child Welfare Agency licensing standards, and DHS's policy requirements and regulations if the child is under the supervision of DCFS. (FCAC MSJ Ex. 14, Counts Dep. at 25: 8-12.) Only applicants meeting these standards will be selected for placement of children in foster care, and only when the child's individual needs can be met by a particular family. (FCAC MSJ Ex. 56, DCFS Standards of Approval for Family Foster Homes June 2009 at 18.) It is not known that Act 1 would be the reason they are

unable to foster or adopt when they might be denied for numerous other reasons under the applicable regulations.

While Frazier and Chatham have alleged an interest in adopting a child through DHS, both admit having no knowledge of the multitude of state requirements to become adoptive parents. (FCAC MSJ Ex. 4, Frazier Dep. at 24:20-25:6; FCAC MSJ Ex. 1, Chatham Dep. at 28:16-21.) Harrison and Pennisi have merely expressed an intention to apply "sometime in this near future," when the time is right for them. (FCAC MSJ Ex. 8, Pennisi Dep. at 17:17-18:11, 30:1-16.) Pennisi could not even say that he would currently be applying to adopt had Act 1 not passed. (*Id.* at 17:23-25.) These Plaintiffs' interest in fostering and adopting is truly speculative as they have not taken a single meaningful step toward fostering or adopting; and it is unknown whether they would meet the many other licensing requirements unrelated to their cohabiting.

Similarly, Rickman's only contact with DHS has been in the context of Stephanie Huffman's single-parent adoption. (FCAC MSJ Ex. 6, Huffman Dep. at 75:20-25; FCAC MSJ Ex. 9, Rickman Dep. at 15:2-7, 17:15-19:5, 23:8-24:12.) Like the other Plaintiffs, Rickman has never personally sought to adopt or foster a child herself. She has merely complied with the "other members of the household" requirement relating to Stephanie Huffman's withdrawn application. Rickman has not suffered a cognizable injury attributable to Act 1 where she has failed to take any step to foster or adopt on her own behalf.

Rickman, Frazier, Chatham, Pennisi and Harrison's alleged injuries are not "concrete, specific, real and immediate" but only "conjectural or hypothetical." *Estes*, 269 Ark. at 894, 601 S.W.2d at 254. Each of these Plaintiffs lacks standing to challenge the constitutionality of Act 1 because, having never in fact engaged the state about fostering or adopting a child, they cannot establish that they have incurred any injury attributable to Act 1.

D. The Scroggin and Mitchell Plaintiffs' claims that Act 1 prevents them from designating adoptive parents for their children are not ripe because they are contingent on events which may never occur

The Scroggin and Mitchell Plaintiffs allege that their due process rights to parental autonomy and equal protection are violated because Act 1 would not allow a court to honor their testamentary wishes that certain cohabiting persons adopt their minor children. (FCAC MSJ Ex. 52, Third Am. Compl. ¶¶ 114, 118, 121, 125.) But who may or might adopt their minor children are hypothetical questions because the parents are alive and well. A case is ripe only if the issues are not speculative or hypothetical. *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996). Several events, in fact, must take place before Act 1 would impact the parents' testamentary wishes regarding the adoption of their minor children. The uncertainly of these events means that Plaintiffs have not, and may never, suffer any injury attributable to Act 1 and a ruling now would be advisory. Since Arkansas courts cannot issue advisory rulings, the claims are not ripe for adjudication. *See, eg.*, *Quapaw Care & Rehabilitation v. Arkansas Health Services Permit Comm'n*, 2009 Ark. 356, --- S.W.3d ---- (2009).

Each of these parents' claims are contingent on the occurrence of at least *all* of the following events which, individually or in combination, may never occur: 1) both of the minor Plaintiffs' natural parents (the Parent Plaintiffs) must die or become incapacitated while they are still minors; 2) the intended adoptive parents must still be willing and otherwise qualified to adopt the minor Plaintiffs at the time of their parents' death or incapacity; 3) the intended adoptive parents must still be cohabiting at the time of the Parent Plaintiffs' death or incapacity; 4) the intended adoptive parent must obtain certification by meeting every other requirement set forth by a licensed placement agency to adopt a child in the State of Arkansas, and 5) a court must find that it is in the best interest of each child to be adopted by the intended adoptive parents.

The Scroggins' claim is contingent on the additional future occurrence that Jared Butler, Meredith's Scroggin's brother, is unwilling or unable to serve as guardian of their minor children. He is named as the primary guardian and prospective adoptive parent in the Scroggins' wills and he is not in a cohabiting relationship. Matt Harrison, also a party to this suit, is currently cohabiting, but has been named only as an alternate to Butler. (FCAC MSJ Ex. 35, Dep. Ex. 73 at PL-363; FCAC MSJ Ex. 36, Dep. Ex. 74 at PL-350; FCAC MSJ Ex. 5, Harrison Dep. at 21:17-22:7; FCAC MSJ Ex. 10, B. Scroggin Dep. at 19:12-20:1, 31:9-32:3; FCAC MSJ Ex. 11, M. Scroggin Dep. at 14:14-15:14, 22:4-12, 23:4-20.)

Before filing this lawsuit, none of these Plaintiffs had designated a cohabiting individual to adopt their children. Only the Scroggins had designated a cohabiting individual to serve as guardian of their children, and only as an alternate. (FCAC MSJ Ex. 35, Dep. Ex. 73 at PL-363; FCAC MSJ Ex. 36, Dep. Ex. 74 at PL-350; FCAC MSJ Ex. 39, Dep. Ex. 81 at PL-324; FCAC MSJ Ex. 40, Dep. Ex. 82 at PL-336; FCAC MSJ Ex. 10, B. Scroggin Dep. at 19:12-18, 26:6-17, 26:21-27:22; FCAC MSJ Ex. 11, M. Scroggin Dep. at 16:18-20:2; FCAC MSJ Ex. 3, Duell-Mitchell Dep. at 20:1-13, 21:15-22:8, 28:1-6; FCAC MSJ Ex. 7, Mitchell Dep. at 13:5-16, 13:24-14:1.) But after the lawsuit was filed, they all executed new wills naming cohabiting individuals as guardians and expressing the desire that those guardians take steps to adopt their children. (FCAC MSJ Exs. 35, 36, 39, 40.)

Under Act 1, these individuals could serve as guardians, but it is certainly premature for this court to decide whether they will be a guardian or an adoptive parent because it is not known if the need will ever arise. It is not known if the Scroggin and Mitchell parents will die or become incapacitated before their children reach majority. If that did occur, it is not known if the named caretakers would still be available or willing to care for the children. If then, it is not

known if they would meet the litany of other licensing standards. And finally, these claims are further contingent on the discretion of the court that the placement would serve the best interest of the children at that future time. *Quapaw Care & Rehabilitation*, 2009 Ark. 356. The alleged injuries are not real and immediate, but rather "conjectural or hypothetical." *Estes*, 269 Ark. at 894, 601 S.W.2d at 254. Therefore, the Plaintiffs' challenge to the constitutionality of Act 1 must be dismissed because it is not ripe for adjudication.

E. Plaintiffs cannot state or sustain a cause of action that Act 1 is an illegal exaction of taxpayer dollars because Act 1 is not a tax, or an expenditure

Plaintiffs' claim that Act 1 constitutes a misapplication or illegal expenditure of funds cannot be sustained because it does not authorize the taxing or expenditure of any money, and Plaintiffs cannot identify any funds that have been misapplied. A cause of action for the misapplication of funds under Arkansas Constitution Art. 16, section 13 "must be based upon a complaint or petition that states a cause of action." *Jones v. Capers*, 231 Ark. 870, 872-873, 333 S.W.2d 242, 244 (1960). The Complaint here does not state a cause of action because the Plaintiffs have failed to allege what funds were allegedly misapplied. Even taking the Plaintiffs allegations as true, they have failed to state a cause of action because the alleged misapplication of funds is a mere conclusion. "Our rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief." *Bright v. Zega*, 358 Ark. 82, 87, 186 S.W.3d 201, 204 (2004) (citing Ark. R. Civ. P. 8(a)(1)).

If the court considers the claim sufficiently pleaded, it must enter summary judgment dismissing the claim because no facts on the record can transform Act 1 into a tax or expenditure, or identify any misapplied funds. Moreover, even if Act 1 authorized a tax or the appropriation of funds, Plaintiffs would have no remedy because state officials may presume that an appropriations statute is valid until such time that a court declares it otherwise. *White v.*

Arkansas Capital Corporation/Diamond State Ventures, 365 Ark. 200, 208-209, 226 S.W.3d 825, 831-32 (2006). This claim must be dismissed because Plaintiffs have failed to state a cause of action upon which relief can be granted.

II. ACT 1 DOES NOT INFRINGE ANY FUNDAMENTAL RIGHT OR LIBERTY INTEREST PROTECTED BY DUE PROCESS

Plaintiffs' claims that Act 1 violates the due process provisions of the United Sates and Arkansas Constitutions are gravely unsubstantiated: Plaintiffs Cole and W.H. have no unqualified "family integrity" right to enter a custodial or adoptive relationship just because Cole is W.H.'s granddaughter. The Scroggins and Mitchells have no liberty interest to mandate through testamentary designation who will adopt their surviving children. And the remaining adult Plaintiffs' liberty interest to engage in private consensual sex does not translate into a fundamental right to foster and adopt children while cohabiting. (Third Am. Compl. ¶¶ 108, 114, 115.) No text of the Arkansas or Federal Constitutions recognizes these alleged rights in any sense. Since there is no express textual mooring for these claimed rights, Plaintiffs must rely on court opinions carefully defining these rights as substantive manifestations of Due Process. But there are none.

Under controlling United States Supreme Court precedent, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations and quotation marks omitted).[1] The identification of such

[1] The "strict scrutiny test" applies only when an interest claimed has been recognized by the courts as a fundamental liberty interest or right. *Id.* In that case, the government must show that its regulation is narrowly tailed to serve a compelling government interest. But if the regulation implicates a protected liberty or property interest that has not been deemed "fundamental," the state's regulation is judged under the extremely deferential "rational basis test," and the state

rights requires a "careful description of the asserted fundamental liberty interest." *Id.* at 721. All Plaintiffs' claims fail as a matter of law because no constitutional text or court has carefully described a fundamental right or any liberty interest in fostering or adopting children. Rather the Arkansas and United States Supreme Courts have carefully rejected such a right.

A. Act 1 does not infringe a liberty interest because there is no liberty interest to foster or adopt children

The Plaintiffs cannot prevail on their substantive due process challenge to Act 1 because there is no fundamental right to adopt or to be adopted in any context. *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995) ("[W]hatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest."); *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989) ("Because the adoption process is entirely conditioned upon the combination of so many variables, we are constrained to conclude that there is no fundamental right to adopt."); *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 811 (11th Cir. 2004). Cole's claim that as a grandmother she have unqualified custody of W.H., and the Scroggins and Mitchells claim that they mandate particular persons to adopt their children are not rights found in the United States or Arkansas Constitutions.

Like the Federal Constitution, the Arkansas Constitution does not even mention adoption. *Swaffar v. Swaffar*, 309 Ark. 73, 78, 827 S.W.2d 140, 143 (1992). And unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) (noting that, unlike the natural family, which has "its origins entirely apart from the power of the State," the foster parent-child relationship "has its source in state law and

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may infringe upon the interest so long as there is a "reasonable fit" between the governmental purpose and the means chosen to advance the purpose. *Reno v. Flores*, 507 U.S. 292, 305 (1993).

contractual arrangements"); *Lindley*, 889 F.2d at 131 ("Because of its statutory basis, adoption differs from natural procreation in a most important and striking way."). Because adoption proceedings are in derogation of common law, they are governed entirely by statute. *Swaffar,* 309 Ark. at 78, 827 S.W.2d at 143.

A parent's liberty interest in making decisions concerning the care, custody, and control of her children has never been interpreted as allowing parents to bypass statutory adoption proceedings through testamentary designations. *Linder v. Linder*, 348 Ark. 322, 342-43, 72 S.W.3d 841, 851-52 (2002); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). The Scroggins and Mitchells' liberty interest under Due Process includes the right of parents to "establish a home and bring up children," the right "to control the education of their own," *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), and the right "to direct the upbringing and education of children under their control," *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). *See also, Wisconsin v. Yoder*, 406 U.S. 205 (1972) (State cannot require Amish children to attend public school against parents' wishes). Adoption, however, which is wholly a creature of the state and governed entirely by statute, does not implicate this well-defined fundamental liberty interest. *Smith*, 431 U.S. at 845.

With respect to grandparents like Cole, the Arkansas Supreme Court has expressly refused to recognize that grandparents have a liberty interest under due process to custody or adoption of their related grandchildren. *Cox v. Stayton,* 273 Ark. 298, 304-305, 619 S.W.2d 617, 620-21 (1981). Adopting a grandchild is not a liberty interest, objectively, deeply rooted in the nation's history or essential to ordered liberty where "at common law grandparents have no presumptive right to custody or adoption of their grandchildren, nor even a right of visitation,

absent an order of the chancery court." *Id.* "We are drawn to the conclusion that any rights existing in grandparents must be derived from statutes." *Id.*

The liberty interests above center on the parents' ability to exercise control over their children. But when a child is up for adoption, the natural parents, for one reason or another, are no longer are able to personally exercise control. The State of Arkansas acts *in loco parentis* for children whose parents cannot care for them due to disqualification, incapacity, or death. Deceased parents do not retain, and relatives do not automatically obtain, legal control over whether or who will adopt the children. In such cases, only the State has the right and responsibility to determine what adoptive home environments will best serve all aspects of each child's growth and development. *Lofton*, 358 F.3d at 809-10. The best interest of the child is the primary concern in all adoption proceedings and that is determined by the state's intervention. *Bush v. Dietz*, 284 Ark. 191, 680 S.W.2d 704 (1984); *In re Adoption of A.M.C.*, 368 Ark. 369, 246 S.W.3d 426 (2007) ("Before an adoption petition can be granted, the circuit court must further find from clear and convincing evidence that the adoption is in the best interest of the child.").

Under the Arkansas Revised Uniform Adoption Act, the courts alone possess jurisdiction over the adoption of a minor. Ark. Code Ann. § 9-9-205(a)(1). Only upon submission of a petition to adopt, and upon review and approval of the requisite home study, will an individual qualify to adopt. Ark. Code Ann. §§ 9-9-212(b)(1)(A), 9-9-214(c). Any individual the Plaintiffs might designate to adopt their children would have to successfully complete a home study addressing the suitability of their home, and would have to obtain approval to serve as an adoptive parent from an approved licensing agency. Ark. Code Ann. § 9-9-212(b)(4)(A)-(C). For this reason, the Child Welfare Agency Review Board (CWARB) provides minimum

licensing standards for would be parents consistent with the Arkansas Code. Ark. Code Ann. § 9-28-401, *et seq.* In addition, a foster or adoptive parent must also meet DHS's requirements if the child is under the supervision of DCFS. (FCAC MSJ Ex. 14, Counts Dep. at 25:8-12.) If the child is a ward of the state, the consent of the relevant social services agency would also be required before the court could enter an adoption decree. *See Fablo v. Howard*, 271 Ark. 100, 607 S.W.2d 369 (1980). As part of the State's adoption plan, the people of Arkansas determined that "it is in the best interest of children in need of adoption of foster care to be reared in homes in which adoptive or foster parents are not cohabiting." Ark. Code Ann. § 9-8-301. Plaintiffs do not have a right to short-circuit this statutory scheme by testamentary designation, as they have no constitutionally protected liberty interest in controlling who, if anyone, might adopt their children in the event of their death.

B. The Plaintiffs' concern for the care of minor children is amply provided for through guardianship

Notwithstanding Plaintiffs' lack of a liberty interest in determining the adoptive custody of minor children whose parents might become deceased or incapacitated, Act 1 in conjunction with other Arkansas statutes allow cohabiting individuals to serve as guardians Ark. Code. Ann. § 9-8-305. Upon the death of both of a child's natural parents, any person may file a petition for guardianship of the minor child. Ark. Code Ann. §§ 28-65-104, 28-65-203 – 28-65-205. The court will make a determination of the petitioner's suitability for appointment as legal guardian based on what would serve the best interests of the child. Ark. Code Ann. §§ 28-65-105, 28-65-201, 28-65-210. This would allow, for example, parents to place children with relatives or persons who have a special bond with the child, while allowing the state to more easily intervene if the welfare of the child became an issue.

Act 1 strikes the proper balance between the parents' desires and the state's interest in the child's welfare. Since cohabiting environments are a higher risk for children, the state has an interest in the child's welfare should it become jeopardized during the guardianship. While the same can be said if the child were adopted into a cohabiting environment, the state would face the imposing hurdle of terminating parental rights should the child need to be removed. Thus, by allowing guardianship exceptions to cohabiting placements, the state strikes a balance between satisfying parental designations of caregivers and the state's interest in the well-being of the child. *Smith v. Thomas,* 373 Ark. 427, 433, 284 S.W.3d 476, 480 (2008) ("[I]n both custody and guardianship situations, the child's best interest is of paramount consideration, and the statutory natural-parent preference is one factor. However, that preference is ultimately subservient to what is in the best interest of the child.")

As such, Act 1 does not prevent Cole from caring for her granddaughter or prevent the Scroggins and Mitchells from making arrangements for the care of their children with certain individuals if they should become unable, because Act 1 does not apply to guardianships. Since Act 1 does not affect the guardianship of minors, Plaintiffs have no basis for their contention that Act 1 interferes with their ability to plan for their children's future or to designate people of their choosing to care for their children. (FCAC MSJ Ex. 52, Third Am. Compl. ¶¶ 114, 115, and 118.)

As a final note, relatives frequently serve as legal guardians; most do not subsequently take steps to adopt the minors, as if this were crucial to providing for their needs. The pervasive and preferred use of guardianships in cases of parental death and incapacity shows that it is not imperative that a child be legally adopted, or that the legal bond with the deceased biological parents be permanently severed. In fact, severance of the bond with a natural parent might prove

financially detrimental to a child if the deceased parent's estate is still being probated. Even beyond the settlement of the parental estate, it might not be in the best interest of a child to be cut off from his original family given Arkansas' intestacy laws and the extended family's inheritance scheme.

Plaintiffs' due process claims fail as a matter of law because Act 1 does not violate the Plaintiffs' alleged right to family integrity and parental autonomy, because biological relatives and parents have no constitutionally protected liberty interest in mandating who will adopt their child in the event of their death or incapacity. And with respect to relative custody and testamentary interests regarding the placement of minor children; Act 1 does not prevent guardianships with cohabitants.

C. Act 1 does not violate Plaintiffs' rights to engage in private, consensual, non-commercial acts of sexual intimacy

Plaintiffs' claim that Act 1 burdens their due process rights to form and maintain private sexual relationships misconstrues the effect of Act 1. (FCAC MSJ Ex. 52, Third Am. Compl. ¶ 129.) Act 1 does not prevent individuals from engaging in acts of sexual intimacy, but instead limits the privilege of adopting or fostering a child based on the relative stability of cohabiting relationships and what that means for children. The real question raised by this claim is not whether the state can proscribe Plaintiffs' private sex, because Act 1 does not do that, but whether due process mandates that the state place children with individuals who are cohabiting outside of marriage.

Plaintiffs' complaint that Act 1 violates their fundamental right to engage in private intimate sex presumably refers to the Arkansas Supreme Court decision in *Jegley v. Picado,* 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002) and the United States Supreme Court decision in *Lawrence v. Texas,* 539 U.S. 558, 578 (2003). Both cases invalidated state statutes making

sodomy a crime for violating the right of adults to engage in private consensual sex. Neither of these cases, however, implies that there is a right to adopt a child where the prospective parents are not legally committed in marriage or where one of the adults may not even be a legal parent of the adoptive child. In defining the scope of its decision, the *Lawrence* court took care to say that the case "does not involve minors" and "it does not involve whether the government must give formal recognition to any relationship." *Lawrence*, 539 U.S. at 578.

Unlike the statutes in *Jegley* and *Lawrence*, Act 1 does not proscribe any sexual conduct, much less make anyone's private sexual conduct a crime. But this case does, in fact, involve minor foster and adoptive children and whether the government must formally recognize and even establish foster and adoptive relationships in cohabiting environments. The right recognized in *Jegley* and *Lawrence* is narrow and cannot be read so broadly as to prevent Arkansas from making child placement decisions based on the legal commitment between the adults and between the adults and children living in the home.

Moreover, none of the Plaintiffs are prevented from ever becoming eligible to adopt or foster a child. (FCAC MSJ Ex. 52, Third Am. Compl. ¶¶ 130, 135.) Plaintiffs are free to choose whether to comply or not to comply with the wide range of requirements essential to becoming an adoptive parent. This includes those requirements like Act 1 which are rationally designed to secure safe and optimum environments for children. Intervenor-Defendants should be granted summary judgment because the right to engage in private consensual sex does not translate to a right to adopt children into cohabiting environments, which are associated with greater risks of abuse and poorer child welfare outcomes. *See* discussion *infra* Part IV, C.

D. The State is not required to perform an individualized assessment of every individual who is interested in adopting or fostering children

1. The State has discretion to regulate the pool of applicants whenever it serves the best interests of the children under its supervision

Plaintiffs' claim that Act 1 harms children by narrowing the pool of qualified applicants stems from the mistaken notion that the State must perform individualized assessments of every individual who expresses an interest in adopting or fostering a child. Limiting the number of people who are eligible to take the first step in the expensive and time-consuming investigation of their household is by no means a novel or irrational idea.

The licensing of adoptive and foster homes is subject to a complex discretionary process. Ark. Code Ann. §§ 9-28-401, *et seq.* Individuals and their homes are subject to a time-consuming and costly assessment, in which they must satisfy the Child Welfare Agency Review Board's (CWARB) Minimum Licensing Standards for Child Welfare Agencies in Arkansas. (*See* FCAC MSJ Ex. 26, Dep. Ex. 10, Minimum Licensing Standards; FCAC MSJ Ex. 56, DCFS Standards of Approval for Family Foster Homes June 2009 at 6; and FCAC MSJ Ex. 12, Appler Dep. at 31:23-32:7, 33:15-17, 39:24-40:22, 88:18-22.) If the child is under the supervision of DCFS the DHS's policy requirements and regulations must also be satisfied. (FCAC MSJ Ex. 14, Counts Dep. at 25:8-12.)

The state establishes threshold requirements for the lengthy process of approval and licensing. For example, an applicant must be at least 21 years, must be free of certain criminal convictions, and must show sufficient income to assure the family's stability and security. (FCAC MSJ Ex. 56, DCFS Standards of Approval for Family Foster Homes June 2009 at 8, 10-11); Ark. Code Ann. § 9-28-409 (e)-(h). These requirements are to limit the pool of applicants to those best suited to raise children and to concentrate DCFS efforts on selecting from that pool. By establishing that it is the state's public policy "to favor marriage as defined by the

constitution and laws of this state over unmarried cohabitation with regard to adoption and foster care," Ark. Code Ann. § 9-8-302, and 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," Ark. Code Ann. § 9-8-301, Arkansas voters provided an additional tool to expend resources efficiently by focusing evaluation efforts on married individuals because they are more likely to provide a stable environment for children. This frees case workers from expending energy evaluating individuals more likely to provide unstable environments, and lowers the risk to children who will be placed. (FCAC MSJ Ex. 19, Faust Dep. at 35:18-36:22, 38:6-17, 39:9-40:4.)

DHS has already determined that foster families should contain two parents, a mother and a father, because "[b]oth parents are needed in order to provide maximum opportunities for personality development of children in foster care." (FCAC MSJ Ex. 56, DCFS Standards of Approval for Family Foster Homes June 2009 at 9.) Exceptions are made for single-parent households on the basis of the applicant's special qualifications to fulfill the needs of a particular child in foster care. (*Id.*) DHS has determined that single applicants with professional training, such as nurses, may be desirable for special needs children. Allowing single individuals enlarges the pool for special needs, without subjecting children to the risks of cohabiting environments.

DHS is not required to undertake a lengthy individualized assessment of individuals who do not meet minimum licensing standards absent a constitutional right to include them. But where foster care and adoption is not a constitutional right, *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 845 (1977); *Lofton v. Secretary of Department of Children and Family Services*, 358 F.3d 804, 811 (11th Cir. 2004); *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995); *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989), the state may

rationally exclude individuals to efficiently allocate resources. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 854-59 (1984).

2. Act 1 did not decrease the number of applicants to foster or adopt children because DHS already had the practice and policy of not making placements with cohabiting individuals

The question of whether it is in the best interest of children to be placed in homes where the adults residing in the home are neither legally nor biologically related to each other is not new to Arkansas. As far back as 1986, DCFS has maintained a policy of not placing children in homes where there is a live-in boyfriend or girlfriend. (FCAC MSJ Ex. 15, Davis Dep. at 51:12-52:13, 55:23-56:16, 56:24-57:3.) DCFS case workers would have removed a child from a single-parent foster home if the foster parent began cohabiting because cohabitation would create a high-risk and unstable home environment not in the best interest of the child. (*Id.* at 57:21-58:19.)

It is undisputed that since 2005, DCFS has maintained a written policy, set forth in two separate executive directives, that prohibits children under the supervision of DCFS from being placed with cohabiting individuals. (FCAC MSJ Ex. 13, Blucker Dep. at 78:1-15, 81:5-23; FCAC MSJ Ex. 27, Dep. Ex. 11, Policy Directive; FCAC MSJ Ex. 29, Dep. Ex. 47, Policy Directive.) An executive directive is a clear directive issued by the Director of DCFS which supersedes any prior policy or practice. (FCAC MSJ Ex. 13, Blucker Dep. at 76:19-77:8.) Staff is expected to adhere to all executive directives. (*Id.* at 77:1-20.) DHS has long been concerned with the stability and safety of cohabiting households.

DHS has not knowingly placed a child in a foster or adoptive home where individuals are cohabiting in a sexual relationship outside of a valid marriage. (FCAC MSJ Ex. 13, Blucker Dep. at 81:24-82:4; 115:1-5; FCAC MSJ Ex. 30, Dep. Ex. 53; FCAC MSJ Ex. 14, Counts Dep. at 135:11-19, 138:11-18.) Therefore, with the passage of Act 1, the voters of Arkansas did not

reduce the pool of prospective applicants, but rather signaled their approval of an existing policy of the Department of Human Services, and their intent that such policy stay in effect.

Intervenor-Defendants should be granted summary judgment on Plaintiffs' claim that Act 1 harms children by narrowing the pool of qualified applicants because not only has it never been DHS' policy to perform an individualized assessment for cohabitants, but neither the United States Constitution, nor the Arkansas Constitution require the State to do so.

Plaintiffs' claims should be dismissed because there are no facts that Plaintiffs can allege or prove that would demonstrate that Act 1 infringes on any fundamental right or liberty interest.

III. ACT 1 DOES NOT VIOLATE EQUAL PROTECTION

Plaintiffs contend that Act 1 violates their rights under the Equal Protection Clause of the United States Constitution, and under Article 2, Sections 3 and 18 of the Arkansas Constitution. Plaintiffs argue that Act 1 is void and unenforceable because it is not narrowly tailored to further a compelling government interest, erroneously implying that the "strict scrutiny" standard might attach to the initiated act. (FCAC MSJ Ex. 52, Third Am. Compl. ¶ 131.) "Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification, such as race." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983). Because Act 1 does not infringe on a fundamental right or discriminate against a suspect class, the law is not subject to strict scrutiny review.

The Arkansas Supreme Court has long held that state statutes are presumed constitutional and that the burden is on the challenging party to prove a statute's unconstitutionality. *Hamilton v. Hamilton*, 317 Ark. 572, 575, 879 S.W.2d 416, 418 (1994); *Rose v. Arkansas State Plant Bd.*, 363 Ark. 281, 293, 213 S.W.3d 607, 618 (2005). Equal protection does not preclude statutory

classifications that have a rational basis and are reasonably related to the purpose of statute. *Id.* Because no fundamental right or suspect class is at issue, Act 1 must be upheld in the face of this equal protection allegation if there is any basis for the classification. *McFarland v. McFarland*, 318 Ark. 446, 885 S.W.2d 897 (1994).

A. Act 1 does not discriminate against a suspect class

Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right, such as the right to vote, the right of interstate travel, the right to free speech, or when the classification operates to the peculiar disadvantage of a protected class, such as alienage, race or ancestry. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

Act 1, as codified, provides in relevant part:

> (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 that is valid under the Arkansas Constitution and the laws of this state.
> (b) The prohibition of this section applies equally to cohabiting opposite-sex and same-sex individuals.

Ark. Code Ann. § 9-8-304.

Only individuals "cohabiting with a sexual partner outside of a marriage that is valid under the Arkansas Constitution and the laws of this state" are prohibited from adopting or fostering children under the Act. Ark. Code Ann. § 9-8-304(a). No court has ever identified individuals who are cohabiting outside of a valid marriage as members of a suspect class.

Act 1 specifically provides that the prohibition contained in § 9-8-304(a) "applies equally to cohabiting opposite-sex and same-sex individuals." Ark. Code Ann. § 9-8-304(b). While Plaintiffs assert that Act 1 "will pose a unique disability on lesbians and gay men," the language of the Act expressly refutes that foster and adoption placements depend on an applicant's sexual

orientation. Heterosexuals and homosexuals of any gender are eligible to apply to become foster or adoptive parents under Act 1. Rather than drawing a classification on sexual preference, Act 1 turns only on an individual's *cohabiting* status. Plaintiffs admit that "[n]either the terms of Act 1 nor any other provision of Arkansas law excludes single lesbians and gay men from consideration as adoptive parents." (FCAC MSJ Ex. 52, Third Am. Compl. ¶ 53.) Furthermore, even though sexual orientation is not implicated by the Act, "the Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes. The Court's general standard is that rational-basis review applies 'where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement.'" *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006) (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985)).

Neither does the Act discriminate on the basis of marital status. Both married and unmarried individuals are eligible to become foster or adoptive parents under Act 1. (*See* FCAC MSJ Ex. 52, Third Am. Compl. ¶ 51.) And both married and unmarried individuals *who are cohabiting outside of a valid marriage* are prohibited from adopting or fostering children under Act 1. To illustrate, a married man who is living with his mistress instead of his wife, will be excluded from adopting or fostering a child, while a single male residing with his mother, or a divorced single mother living only with her children, could apply to become an adoptive or foster parent.

B. Act 1 does not treat similarly situated persons differently

"The Fourteenth Amendment requires that all persons subjected to legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to

assure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and conditions. Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a rational basis for the difference in treatment." *Engquist v. Oregon Dep't of Agriculture*, 128 S. Ct. 2146, 2153 (2008) (citations and quotation marks omitted).

Contrary to Plaintiffs' assertion, Act 1 does not treat the minor Plaintiffs, or their parents who wish to make plans for them in the event of their death or incapacity, any differently than any other children or parents. Since parents and children have no statutory right, cognizable liberty or property interest in directing who, if anyone, will adopt the children upon the parents' death or incapacity, all children and parents are equally reliant on their testamentary designations of legal guardians. *See supra* II, A, 1-2.

Additionally, Act 1 explicitly states that it does not treat homosexual individuals differently than heterosexual individuals. Ark. Code Ann. § 9-8-304(b). The homosexual Plaintiffs' contention that Act 1 "will pose a unique disability" on them (FCAC MSJ Ex. 52, Third Am. Compl. ¶ 130) because they cannot marry a same-sex partner is attributable to Arkansas law defining marriage as between one man and one woman, not Act 1, Ark. Code Ann. § 9-11-107(b) (codifying Act 144 of 1997, § 2); Ark. Code Ann. § 9-11-109 (codifying Act 144 of 1997, § 1); Ark. Const. amend. 83, §§ 1-2. Plaintiffs, however, have not challenged the constitutionality of the marriage laws and have therefore failed to state an equal protection claim for their inability to adopt as a married individual.

To the extent Act 1 discriminates at all, it discriminates only against cohabiting individuals, a group not previously identified as a suspect class, and to which only rational basis review should be applied. "Equal protection does not require that persons be dealt with

identically; it only requires that classification rest on real and not feigned differences, that the distinctions have some relevance to the purpose for which the classification is made, and that their treatment be not so disparate as to be arbitrary." *Rose*, 363 Ark. at 293, 213 S.W.3d at 617.

Intervenor-Defendants are entitled to summary judgment on Plaintiffs' equal protection claims as a matter of law because Act 1 does not discriminate against a suspect class or interfere with the exercise of a fundamental right. Because the only classification drawn under the Act is an individual's status as a cohabiting individual, not belonging to any suspect class, Act 1 must be upheld if there is any rational basis for the classification.

IV. ACT 1 IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST

It is not the role of the Court to discover the actual basis for the legislation but "merely to consider whether any rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives, so that the legislation is not the product of utterly arbitrary and capricious government purpose and void of any hint of deliberate and lawful purpose." *Hamilton*, 317 Ark. at 576, 879 S.W.2d at 418. Moreover, the Plaintiffs alone carry the burden of proving that Act 1 is not rationally related to achieving *any* legitimate objective of state government under any reasonably conceivable state of facts. *Id.* On summary judgment, Plaintiffs must convince the court that they have a realistic shot at trial of negating every basis for the Act 1 so that it would be utterly irrational. Legislative classifications are not subject to a trial just because the opponents disagree over the policy or whether there are better means to effectuate the policy.

The voters of Arkansas have a constitutional right to enact legislation which serves the best interests of children in need of adoption or foster care. *Roberts v. Priest*, 334 Ark. 503, 510, 975 S.W.2d 850, 852 (1998).

The relevant portion of Amendment 7 to the Arkansas Constitution provides:

> The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly.

Ark. Const. amend. 7, codified as Ark. Const. art. 5, § 1

On November 4, 2008, a majority of Arkansas voters approved Act 1 with its explicit public policy "to favor marriage, as defined by the constitution and laws of this state, over unmarried cohabitation with regard to adoption and foster care," Ark. Code. Ann. § 9-8-302, and its finding and declaration section regarding 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," Ark. Code. Ann. § 9-8-301 (codifying Act 1). Because the Amendment's reservation to the people of the initiative power lies at the heart of our democratic institutions, in order to uphold the integrity of the initiative process, every reasonable presumption, both of law and fact, should be indulged in favor of the validity of the Initiated Act.

A. The constitutionality of Initiated Act 1 must be judged by standards applicable to acts of the legislature

The Arkansas Supreme Court has held that cases involving the constitutionality of legislative acts are applicable to initiated acts. "[A]n Initiated Act, as regards constitutionality, is to be determined just as though it were an Act of the Legislature, because in adopting an Initiated Act the People become the Legislature, and must legislate within constitutional limits." *Jeffery v. Trevathan*, 215 Ark. 311, 319, 220 S.W.2d 412, 416 (1949). Under the rational-basis test, legislation is presumed constitutional and rationally related to achieving a legitimate governmental objective. *Rose*, 363 Ark. at 293, 213 S.W.3d at 618. "Indeed, a legislative choice ... may be based on rational speculation unsupported by evidence or empirical data.'" *Carter v.*

Arkansas, 392 F.3d 965, 968 (8th Cir. 2004) (quoting *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993)) (internal citations omitted).

Act 1 passes rational basis review without resort to empirical data because Arkansas voters could consult their own experiences, observations, and knowledge to reasonably conclude that cohabiting households are less stable and less safe for children. But even though it would not be necessary to uphold Act 1, it is also firmly justified on the large body of scientific opinion, literature and statistics addressing the matter. The expert reports of Drs.' Wilcox, Morse and Deyoub and the studies they rely on certainly put the question of Act 1's rationality on solid ground.

Contrary opinions and evidence, however, are not relevant on a motion for summary judgment to determine the rationality of a statute. The Eighth Circuit has repeatedly said that the fact there may be some evidence that seems to contradict the rational basis articulated by the government is irrelevant to the rational basis inquiry. "When all that must be shown is 'any reasonably conceivable state of facts that could provide a rational basis for the classification,' it is not necessary to wait for further factual development." *Knapp v. Hanson*, 183 F.3d 786, 789 (8th Cir. 1999). *See also Arnold v. City of Columbia*, 197 F.3d 1217, 1221 (8th Cir. 1999) (same). The Eighth Circuit's analysis in *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 21 F.3d 237 (8th Cir. 1994), is particularly instructive. Utility customers challenged a state agency's rate structure which distinguished between customers with and without gas-fired boilers and offered an affidavit that contradicted the agency's rational for the classification. The Court held that the affidavit testimony questioning the wisdom of the classification was not relevant to whether the agency had established a rational basis and that it "does not create a genuine issue of material fact." *Id.* at 240.

Citing *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Third Circuit in *Hancock Industries v. Schaeffer*, 811 F.2d 225, 228 (3d Cir. 1987), puts this rule plainly:

> [I]t is not enough for one challenging a statute on equal protection grounds to introduce evidence tending to support a conclusion contrary to that reached by the legislature. *If the legislative determination that its action will tend to serve a legitimate public purpose "is at least debatable", the challenge to that action must fail as a matter of law.*

Id. (emphasis added). That said, far from contradicting the rationality of Act 1, the Plaintiffs' expert opinions put the Act's rationality beyond all question, since they confirm that, on average, children do best in homes where the adults caring for them are not cohabiting in a sexual relationship.

It must be kept in mind that legislative rationality is not lost because the classification is based upon averages or generalities. In this case, Act 1 is not legally irrational even if some married persons would do poorly raising children, while some cohabitants might do well. Under rational-basis review, "[e]ven if the classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn . . . imperfect, it is nevertheless the rule that . . . perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (citations omitted). Legislatures are permitted to use generalizations so long as "the question is at least debatable." *Heller v. Doe by Doe*, 509 U.S. 312, 326 (1993). The common wisdom of Arkansans and the scientific literature that, on average, cohabiting environments tend to be less safe and less stable for children is certainly more than debatable and must be upheld as a matter of law. Moreover, the question has been rigorously debated by the electorate during the initiative campaign, and should not be now subject to veto by trial.

B. Act 1 is rationally related to protecting child welfare

There is strong scientific consensus that family structure matters for the social, psychological, and educational welfare of children and that children fare less well in cohabiting environments.

1. Act 1 protects children by favoring placements in safer homes

It is undisputed that, on average, children in cohabiting households are significantly more likely to experience physical and sexual abuse than are children in married households. While this has always been known, it was again recently affirmed in January 2010, when the United States Department of Health and Human Services released the Fourth National Incidence Study of Child Abuse and Neglect (NIS-4). The study reports that children living with their married biological parents universally have the lowest rate of child abuse and neglect, whereas those living with a parent who had a cohabiting partner in the household have the highest rate in all maltreatment categories. (Andrea J. Sedlak, et al., *Fourth National Incidence Study of Child Abuse and Neglect (NIS–4): Report to Congress*, Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families (2010), http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl_incid/nis4_report_congress_full_pdf_jan2010.pdf.) "Compared to children living with married biological parents, those whose single parent had a live-in partner had more than 8 times the rate of maltreatment overall, over 10 times the rate of abuse, and nearly 8 times the rate of neglect." (*Id.* at Executive Summary 12, and *generally* 5-18–5-39.)

Plaintiffs' experts recognize that the overarching goal of the child welfare professional is to protect the child from further harm, because it is presumed that every child who comes into that system has been a victim of either abuse or neglect. (FCAC MSJ Ex. 19, Faust Dep. at 42:1-7; 98:13-17.) There is wide agreement that it is not in the best interest of children to place them

with people who have committed acts of child abuse or violent crimes, or with people who live with people who have done so. (FCAC MSJ Ex. 19, Faust Dep. at 94:19-100:2; FCAC MSJ Ex. 41, Dep. Ex. 108, Faust Expert Report ¶ 22.) This categorical exclusion is generally favored in the child welfare field and does not reduce the field of qualified parents because the exclusion speaks directly to matters that affect whether or not a prospective parent is qualified or not. (FCAC MSJ Ex. 19, Faust Dep. at 18:25-19:9.) Faust does not necessarily believe that every person who has been convicted of a violent criminal offense is sure to abuse a child, but still favors the categorical exclusion of all individuals who have committed violent crimes, and of people who live with people who have done so. (FCAC MSJ Ex. 19, Faust Dep. at 18:1-24.)

Similarly, Intervenors realize that not all children living in cohabiting households will experience physical and sexual abuse. However, just as Plaintiffs' experts agree with even the categorical exclusion of people who *live* with people who have been convicted of child abuse out of concern that they are more likely to repeat the offense, so Act 1's exclusion of cohabitants from eligibility to adopt or foster a child is rationally based on a number of studies which indicate that children in cohabiting households are *significantly more likely* to experience physical and sexual abuse than are children in intact, married households. (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶ 15(d) (*citing* FCAC MSJ Ex. 72, Leslie Margolin & J. L. Craft, *Child Sex Abuse by Caretakers,* 38 Family Relations 450-455 (1989); FCAC MSJ Ex. 75, Aruna Radhakrishna *et al., Are Father Surrogates a Risk Factor for Child Maltreatment?*, 6 Child Maltreatment 281-289 (2001); and FCAC MSJ Ex. 68, David Finkelhor *et al., Sexually Abused Children in a National Survey of Parents: Methodological Issues,* 21 Child Abuse and Neglect 1-9 (1997)).) One study focusing on fatal child abuse in Missouri found that preschool children were 47.6 times more likely to die in a cohabiting household, compared to preschool

children living in an intact, married household. (FCAC MSJ Ex. 76, Patricia G. Schnitzer & Bernard G. Ewigman, *Child Deaths Resulting from Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 116 Pediatrics e687, e690 (2005).) In a 2001 article entitled *Male Roles in Families at Risk, the Ecology of Child Maltreatment*, Plaintiffs' expert Dr. Michael Lamb wrote that the presence of an unrelated male in the home was a source of risk for maltreatment to children living in the home. (FCAC MSJ Ex. 20, Lamb Dep. at 140:5-22; FCAC MSJ Ex. 61, Michael E. Lamb, *Male Roles in Families "at Risk"; The Ecology of Child Maltreatment*, 6 Child Maltreatment 310-313 (Nov. 2001).)

Plaintiffs' expert Dr. Worley also testified that sex abuse against children occurs more frequently in cohabiting households than in married households where both parents are biologically related to the child. (FCAC MSJ Ex. 24, Worley Dep. at 72:10-18, 81:16-82:13.) One of the studies on which Plaintiffs' expert Dr. Peplau relied in preparing her expert opinion found that "the highest rate of assault is among the cohabiting couples" as compared to both married and dating couples. (FCAC MSJ Ex. 62, Jan E. Stets & Murray A. Straus, *The Marriage License as a Hitting License: Comparison of Assaults in Dating, Cohabiting, and Married Couples*, 4 Journal of Family Violence 161, 176 (1989).) Furthermore, the study revealed that "violence is the most severe in cohabiting couples," compared to both married and dating couples. (*Id.*) These findings persisted after controls for age and socioeconomic status were introduced. (*Id.*)

It is undisputed that the rates of serious child abuse are lowest in intact married families. Abuse is six times higher in stepfamilies, 14 times higher with a single mother, 20 times higher in cohabiting families, in which both parents are biological but not married, and 33 times higher

when the mother is cohabiting with a boyfriend, who is not the father of her children. (*Id.*; FCAC MSJ Ex. 55, Resp. to Pls.' Third Set of Interrog. to Defs., Answer No. 15.)

A number of studies also indicate that children are more likely to be physically or sexually abused in cohabiting households than in single-mother households. (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶ 19(d); FCAC MSJ Ex. 73, Leslie Margolin, *Child Abuse by Mother's Boyfriends: Why the Overrepresentation?,* 16 Child Abuse and Neglect 541-551 (1992); FCAC MSJ Ex. 72, Margolin & Craft, *Child Sexual Abuse by Caretakers*, *supra*; and FCAC MSJ Ex. 75, Aruna Radhakrishna *et al., Are Father Surrogates a Risk Factor for Child Maltreatment?*, 6 Child Maltreatment 281-289 (2001).) The Schnitzer and Ewigman study of fatal child abuse in Missouri found that preschoolers who were living in a cohabiting household were nearly 50 times more likely to be killed than preschoolers who were living with a single mother. (FCAC MSJ Ex. 76, Schnitzer & Ewigman, *supra*, at e690.) Dr. Deyoub's review of the literature also lead him to conclude that children are at much greater risk of abuse in a cohabiting family, compared to a single-parent family. (FCAC MSJ Ex. 49, Dep. Ex. 144, Deyoub Expert Report 7 § III(6); FCAC MSJ Ex. 55, Resp. to Pls.' Third Set of Interrog. to Defs., Answer No. 16.) Plaintiffs' experts have not disputed the accuracy of these studies, but acknowledged their awareness that on average children are more likely to be physically abused in a cohabiting home than they are in a married or a single parent home. (FCAC MSJ Ex. 23, Peplau Dep. at 88:17-89:9, 95:2-19; FCAC MSJ Ex. 19, Faust Dep. at 155:8-14, 156:23-157:5.)

In summary, it is undisputed between the parties that, on average, children in cohabiting households are significantly more likely to experience physical and sexual abuse than are children in married households, and that alone is a rational basis for precluding placement of already vulnerable children with individuals cohabiting outside of a valid marriage.

2. Act 1 protects children by favoring placements in the most stable households

The stability of an adoptive or foster parent's intimate relationship is an important and legitimate government interest. Act 1 is rationally related to this important government interest because it encourages the placement of foster and adoptive children into marital home environments where the children are more likely to enjoy the benefits of a stable home environment and two legal parents.

a. Cohabiting parents are less likely to provide a high quality, stable home environment for the rearing of children than are married parents

i. Relationship quality

The association between family structure and the quality of family life is important because the scientific literature indicates that children are more likely to thrive when their parents enjoy a high-quality and longer lasting relationship. Plaintiffs' expert Judith Faust testified that "[g]ood foster and adoptive parents are emotionally stable in their relationships." (FCAC MSJ Ex. 41, Dep. Ex. 108, Faust Expert Report ¶ 19.) Intervenors-Defendants' expert Dr. Wilcox agrees: "The Department of Human Services' stress on high-quality and stable relationships is eminently reasonable, given the large body of scientific evidence that has accumulated indicating that children are more likely to thrive and survive in homes marked by affection, involvement, and stability." (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶ 31.)

Plaintiffs' experts acknowledge that cohabitors as a group have lower relationship quality than married couples (FCAC MSJ Ex. 22, Osborne Dep. at 243:4-19), and that on average cohabitors score lower on measures of relationship satisfaction. (FCAC MSJ Ex. 23, Peplau Dep. at 206:22-207:2.) Plaintiffs' expert Dr. Michael Lamb admits that there is evidence that

relationship quality between cohabiting adults is lower than among married couples (FCAC MSJ Ex. 20, Lamb Dep. at 94:14-19, 102:24-103:11), and that there is a correlation between the quality of the parental relationship and stability in the family: "individuals who have high-quality relationships are more likely to stay together" (FCAC MSJ Ex. 20, Lamb Dep. at 121:24-122:8). He also concedes that the higher quality of the relationships among married couples compared to cohabiting couples is more likely to have a positive impact on child outcomes. (*Id.* at 100:24-102:2.) Dr. Lamb also admits that, on average, the quality of a child's relationship with his parents is better if his parents are married than if his parents are cohabiting. (*Id.* at 105:9-21.) This is true even where the father is unrelated to the child -- data suggests that married stepfathers are more involved in the care of their children than are cohabiting stepfathers. (*Id.* at 142:10-13, 142:25-143:4.)

Intervenors' experts agree that studies show cohabiting parents are less likely to engage in high-quality parenting with their children when compared to married parents. (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶¶ 21, 24.) Even after controlling for socioeconomic factors, one study found that married biological fathers were more affectionate and involved than cohabiting biological fathers, and that married stepfathers were more affectionate and involved than cohabiting stepfathers. (FCAC MSJ Ex. 70, Sandra Hofferth & Kermyt Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Involvement*, 65 Journal of Marriage and Family 213-232 (2003).) And undisputed is Intervenor-Defendants' expert, Dr. Paul Deyoub's opinion that "[t]hose who live together prior to marriage score lower on tests rating satisfaction in marriage than couples who did not cohabitate." (FCAC MSJ Ex. 49, Deyoub Expert Report 5 § III(3).)

Act 1 is rationally related to a legitimate government interest because it is undisputed that cohabitation is associated with more relationship instability and poorer relationship quality than marriage.

ii. Commitment & dissolution rates

Furthermore, Plaintiffs' expert Dr. Lamb concedes that, on average, married people are more committed to their relationship than people in cohabiting relationships regardless of their sexual orientation. (FCAC MSJ Ex. 20, Lamb Dep. at 109:22-110:10.) Dr. Lamb agreed with the findings in Larry Kurdek's 2005 study, a review of the research on homosexual couples and a reference on which Dr. Peplau relied in preparing her expert report, which states: "With controls for demographic variables, the dissolution rate for heterosexual couples was significantly lower than that for either gay or lesbian couples. . . . [A]lthough rates of dissolution did not differ for either gay couples versus lesbian couples or for gay and lesbian couples [versus] cohabiting heterosexual couples, both gay and lesbian couples were more likely to dissolve their relationships than married heterosexual couples were." (*Id.* at 123:1-124:2; FCAC MSJ Ex. 60, Lawrence A. Kurdek, *What Do We Know About Gay and Lesbian Couples?* 14 Current Directions in Psychological Science 251, 253 (2005).)

Plaintiffs' expert Dr. Osborne admits that as a group cohabitors are less committed to their partners than married individuals are to their spouses; cohabitation is selective of people with lower levels of commitment. (FCAC MSJ Ex. 22, Osborne Dep. at 105:12-24, 144:3-10.) She also acknowledges that marriage relationships on average last longer that cohabiting relationships. (*Id.* at 111:9-112:14.) She testified that cohabitation has increased, and there is an increase in the proportion of cohabiting couples who separate and a decrease in the proportion of cohabiting couples who transition to marriage. (*Id.* at 150:1-12.) Lastly, Dr. Osborne testified that a married biological family is the most stable family structure. (*Id.* at 203:2-15.)

Plaintiffs' experts Dr. Peplau and Judith Faust both concede that the relationship dissolution rate for heterosexual cohabitors is higher than the relationship dissolution rate for married heterosexual couples. (FCAC MSJ Ex. 42, Dep. Ex. 111, Peplau Expert Report 4 § II(B)(3); FCAC MSJ Ex. 23, Peplau Dep. at 37:25-38:22, 48:6-10, 50:3-7, 72:16-73:4, and 227:2-229:18; FCAC MSJ Ex. 19, Faust Dep. at 78:22-79:10.) Dr. Peplau also states in her report that the relationship dissolution rate for cohabiting same-sex couples is higher than the relationship dissolution rates for married heterosexual couples. (FCAC MSJ Ex. 42, Dep. Ex. 111, Peplau Expert Report 4 § II(B)(2).) She admits that the lack of studies specifically dealing with cohabiting couples who adopt children makes it impossible to draw the conclusion that even "long-term" cohabiting couples are as stable as married couples: "[D]o long-term cohabiting heterosexual couples who have decided to adopt a child break up at higher rates or at lesser rates than married couples? We don't know." (FCAC MSJ Ex. 23, Peplau Dep. at 65:8-11.) Finally, Dr. Peplau acknowledges that on average cohabiting relationships are less stable than marriages. (*Id.* at 114:21-115:3, 115:19-22.)

Intervenors-Defendants' expert Dr. W. Bradford Wilcox agrees that cohabiting families are markedly less stable than married families. (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶ 25.) In fact, one study shows that children born to cohabiting parents are 119% more likely to see their parents break up, compared to children born to married parents. (FCAC MSJ Ex. 71, Wendy D. Manning, Pamela J. Smock, & Debarun Majumdar, *The Relative Stability of Cohabiting and Marital Unions for Children,* Population Research and Policy Review 135, 147 (2004).) Another study of children around the U.S. (including Arkansas) shows that 63.4% of children born to cohabiting parents, versus 16.6% of children born to married couples, experienced some type of instability in the first six years of their lives. (FCAC

MSJ Ex. 66, Shannon E. Cavanaugh & Aletha C. Huston, *Family Instability and Children's Early Problem Behavior*, 85 Social Forces 551-581 (2006).)

In addition, Dr. Deyoub's review of the literature and 31 years of experience as a clinical psychologist show that "cohabitants with children are even more likely to break up than childless cohabitants. Introducing foster and adopted children to cohabiting couples increases the likelihood that they will break up." (FCAC MSJ Ex. 49, Dep. Ex. 144, Deyoub Expert Report 6 § III(5).) He points out that approximately 40 percent of cohabiting unions in the United States break up without the couple ever marrying, and that unions begun by cohabitation are almost twice as likely to dissolve within 10 years, compared to all first marriages. (*Id.* at 5 § III(3).)

Finally, it is undisputed that a married couple would need to obtain a divorce to formally terminate a relationship, whereas individuals in a cohabiting relationship do not need a legal proceeding to terminate their relationship. (FCAC MSJ Ex. 19, Faust Dep. at 86:6-17.) This additional obstacle which accompanies the termination of a marital relationship often gives the partners in the marriage additional incentive to work out their differences and invest efforts to stabilize and save the marriage. In addition to social consequences, there are always certain legal consequences to dissolving a marriage, where there may be none to dissolving a cohabiting relationship. Legal commitments are an incentive to work things out and are a barrier to breaking up, and thus marriage contributes to a stable home environment for children.

iii. Economic Resources and Social Support

The availability of economic and social resources, according to Dr. Peplau, is an important factor affecting the quality of a couple's relationship, which itself is a predictor of relationship stability. (FCAC MSJ Ex. 42, Dep. Ex. 111, Peplau Expert Report 3 § B(1).) Comparing married parents versus cohabiting parents: "married families, on average, have more economic resources than cohabiting families." (FCAC MSJ Ex. 20, Lamb Dep. at 105:22-

106:5.) Individuals in cohabiting relationships tend to be younger than those in married relationships, and age is correlated with income. (*Id.* at 109:16-18.) Dr. Lamb also concedes that, on average, married couples receive more social support from their parents than cohabiting couples. (*Id.* 196:17-25.)

Dr. Osborne agrees "that we would find, on average, a lower level of household income or whatever income it is that you're looking at among cohabitors than we would among marrieds." (FCAC MSJ Ex. 22, Osborne Dep. at 71:8-20; *see also* 104:3-5, and 143:13-24.) Studies show that the average level of education among married couples is higher than the average level of education among cohabiting couples. (FCAC MSJ Ex. 22, Osborne Dep. at 72:1-9; *see also* FCAC MSJ Ex. 51, Dep. Ex. 157, Osborne Rebuttal Expert Report 5 § I, stating that "higher educated parents are less likely to cohabit than less educated individuals.")

Intervenors-Defendants' expert Dr. Wilcox agrees with Plaintiffs' experts regarding the difference in the availability of economic and social resources between married and cohabiting households. He points out that while it is well-known that cohabiting households are more likely to be headed by couples with less education and income, compared to households headed by married couples, "all of the studies referenced [in his expert report] control for socioeconomic factors such as parental income, education, race, and ethnicity. This means that children in cohabiting households are still more likely to do poorly on social, educational, and psychological outcomes compared to children in intact married households, even after factoring in socioeconomic differences between these two different family types." (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶ 17.)

Dr. Deyoub also agrees that "children in cohabiting households have less economic benefit." (FCAC MSJ Ex. 49, Dep. Ex. 144, Deyoub Expert Report 5 § III(3).) He points out

that married fathers are more likely to support their children financially than cohabiting fathers. (*Id.* at 8 § IV.) He notes that cohabiting individuals are less connected to a network of family relationships, have greater social isolation, and show greater tendencies toward individualism, leading to a strong desire for self autonomy within a relationship. (*Id.* at 5 § III(3); FCAC MSJ Ex. 55, Resp. to Pls.' Third Set of Interrog. to Defs., Answer No. 6.)

Finally, the most recent research in the United Kingdom, based on Millennium Cohort Study data of 15,000 new mothers, confirms that marriage is the single biggest predictor of family stability. (FCAC MSJ Ex. 63, James Chapman, *Marriage is What Matters Most To Family Stability As Only 3% of Unmarried Couples Stay Together Until Their Child is 16*, Mail Online UK, Jan. 21, 2010, http://www.dailymail.co.uk/news/article-1244699/Only-3-couples-stay-child-16-unmarried-study-reveals.html.) The study found that "60 per cent of families remain intact until their children are 15. Of these, 97 per cent are married." (FCAC MSJ Ex. 64, Harry Benson, *Married and Unmarried Family Breakdown: Key Statistics Explained*, Bristol Community Family Trust (2010), http://www.bcft.co.uk/2010%20Family%20policy,%20breakdown%20and%20structure.pdf.)

It is undisputed that marriage, when compared to cohabitation, is associated with better relationship quality, higher levels of commitment, lower dissolution rates, and more social and economic support, all of which are predictive of relationship stability. It is also undisputed that relationship stability is associated with positive child development and well-being. Thus, by promoting foster and adoptive placements in married families, Act 1 is rationally related to serving the best interests of Arkansas' most vulnerable children.

b. Cohabitation is associated with higher levels of depression and substance abuse, higher levels of domestic violence, and higher levels of couple infidelity

Intervenor-Defendants' expert Dr. Paul Deyoub asserts that "[t]he benefit of marriage for children is indisputable. Adults who marry live longer, healthier, happier lives, with lower rates of suicide, substance abuse, alcoholism, mental illness, depression, anxiety, and poverty." (FCAC MSJ Ex. 49, Dep. Ex. 144, Deyoub Report 3 § II(2).)

i. Depression and substance abuse

While experts might quibble over causes, the correlation between depression and cohabitation is undisputed as Plaintiffs' expert Dr. Susan Cochran confirms in her rebuttal report that "[s]tudies indicate that married heterosexuals have lower rates of depressive distress than cohabiting heterosexuals." (FCAC MSJ Ex. 45, Dep. Ex. 121, Cochran Rebuttal Expert Report 2 § II(A); FCAC MSJ Ex. 18, Cochran Dep. at 149:3-11, 150:7-11, and 152:4-7.) According to Dr. Osborne, studies reveal that maternal depression is higher among cohabitors than among married couples. (FCAC MSJ Ex. 22, Osborne Dep. at 117:8-22.) Dr. Deyoub agrees that cohabiting individuals are more likely to suffer from depression than married individuals. (FCAC MSJ Ex. 49, Dep. Ex. 144, Deyoub Expert Report 4 § III(2); FCAC MSJ Ex. 55, Resp. to Pls.' Third Set of Interrog. to Defs., Answer No. 1.)

As to substance abuse, Plaintiffs' expert Dr. Cochran testified that studies reveal a higher use of marijuana among people who are in cohabiting relationships versus people who are in married relationships. (FCAC MSJ Ex. 18, Cochran Dep. at 33:13-17.) Dr. Cochran also agreed that one of her references revealed binge drinking decreases among individuals who married. (*Id.* at 115:6-8, 117:11-14; FCAC MSJ Ex. 46, Dep. Ex. 123, G.J. Duncan, B. Wilkerson & P. England, *Cleaning Up Their Act: The Impacts of Marriage and Cohabitation on Licit and Illicit Drug Use*, 43 Demography 691-710 (2003).) Although she would like to see more studies on the

topic, Dr. Cochran did not disagree with the authors' conclusion that "it is strongly institutionalized norms associated with marriage, rather than opportunity that co-residence provides, for monitoring one's partner that reduces behavior, such as binge drinking and marijuana use." (FCAC MSJ Ex. 18, Cochran Dep. at 123:6-124:20.)

Another study relied upon by Plaintiffs' expert Dr. Cochran in preparing her expert report shows that both male and female cohabitors report significantly higher rates of alcohol problems than married individuals, with male cohabitors also reporting higher rates of alcohol problems than unmarried, non-cohabiting men. (FCAC MSJ Ex. 18, Cochran Dep. at 138:22-140:5; FCAC MSJ Ex. 47, Dep. Ex. 124, A.V. Horwitz & H.R. White, *The Relationship of Cohabitation and Mental Health: A Study of a Young Adult Cohort*, 60 Journal of Marriage and the Family 505-514 (1998).) Finally, Dr. Cochran also admits that, in general, married individuals enjoy somewhat better physical health than unmarried individuals. (FCAC MSJ Ex. 18, Cochran Dep. at 78:2-6.) Dr. Deyoub agrees that cohabiting couples have a higher risk of substance abuse than married couples. (FCAC MSJ Ex. 49, Dep. Ex. 144, Deyoub Expert Report 3 § II(3).)

ii. Domestic violence

As to domestic violence, Plaintiffs' expert Dr. Letitia Peplau concedes that studies indicate the rate of partner domestic violence is higher for cohabiting heterosexual couples than for married heterosexual couples. (FCAC MSJ Ex. 43, Dep. Ex. 112, Peplau Expert Report 5 § C; FCAC MSJ Ex. 23, Peplau Dep. at 79:6-19, 230:14-231:4 (*citing* FCAC MSJ Ex. 62, Stets & Straus, *supra*.) Dr. Osborne also concedes that the rate of physical abuse is higher among cohabitors than married couples: "there is generally at the observed level . . . a higher level of conflict observed among our cohabitors – diverse group of cohabitors than our marrieds." (FCAC MSJ Ex. 22, Osborne Dep. at 104:20-105:1, 115:19-116:1.)

Dr. Deyoub agrees strongly with the finding that cohabiting couples have a higher rate of assault than married couples. He points out that these findings persist even after adjusting for age, education, and occupational status. He also notes that violence is "more severe in cohabiting than married couples, not just more frequent." (FCAC MSJ Ex. 49, Dep. Ex. 144, Deyoub Expert Report 5 § III(3).) "Overall rates of violence for cohabiting couples were twice that of marital couples, and rates of severe violence for cohabiting couples were nearly five times the rates for marital couples." (*Id.*; FCAC MSJ Ex. 55, Resp. to Pls.' Third Set of Interrog. to Defs., Answer Nos. 4 and 5.) Simply put, women in cohabiting relationships are more likely to be abused than married women. (FCAC MSJ Ex. 49, Dep. Ex. 144, Deyoub Expert Report 4 § III(2); FCAC MSJ Ex. 55, Resp. to Pls.' Third Set of Interrog. to Defs., Answer No. 2.) In a study by the Centers for Disease Control and Prevention, marital status was the single strongest predictor of abuse ahead of race, age, education, or housing conditions. (FCAC MSJ Ex. 49, Dep. Ex. 144, Deyoub Expert Report 4 § III(2); FCAC MSJ Ex. 55, Resp. to Pls.' Third Set of Interrog. to Defs., Answer No. 3.)

iii. Infidelity

Dr. Osborne testified that in her own studies, which employ the Fragile Families data, cohabitation is correlated with higher levels of sexual infidelity. (FCAC MSJ Ex. 22, Osborne Dep. at 113:6-19.) Dr. Peplau concedes in her rebuttal report that studies indicate the rate of infidelity is higher for cohabiting heterosexual couples than for married heterosexual couples. (FCAC MSJ Ex. 43, Dep. Ex. 112, Peplau Rebuttal Report 1 § II(A); FCAC MSJ Ex. 23, Peplau Dep. at 101:9-102:5, 235:2-15.) Intervenors-Defendants' expert Dr. Deyoub agrees that cohabiting couples have a higher risk of infidelity than married couples, stating that: "the odds of infidelity are at least twice that among cohabitants compared to married couples." (FCAC MSJ

Ex. 49, Dep. Ex. 144, Deyoub Expert Report 5 § III(3); *see also* 3 § II(3); 4 § III(2), and FCAC MSJ Ex. 55, Resp. to Pls.' Third Set of Interrog. to Defs., Answer No. 7.)

Although Dr. Peplau does not believe she has any basis for answering the question of whether sexual infidelity in a relationship is generally harmful to the children being parented by the members of that relationship, the voters of Arkansas could legitimately have been concerned for children placed in relationships where there is known to be a higher rate of sexual infidelity. (FCAC MSJ Ex. 23, Peplau Dep. at 101:3-8.) Likewise, while Dr. Peplau believes that the link between sexual infidelity and relationship satisfaction "really depends upon what kind of couple we are talking about," and that sexual infidelity is not necessarily a predictor of relationship instability, the voters of Arkansas could reasonably have determined that the higher risk of sexual infidelity was predictive of relationship quality and stability, and something to be taking into account in determining whether a particular family structure promotes child welfare. (*Id.* at 99:6-100:15.)

The undisputed fact that cohabitation is correlated with higher levels of depression, higher levels of substance abuse, higher rates of domestic violence, and higher rates of sexual infidelity could certainly have given the voters of Arkansas reason to be concerned for the welfare of children in their care, and provided the voters of Arkansas with a rational basis for precluding placement of adoptive and foster children with individuals cohabiting outside of a valid marriage.

3. Act 1 protects children by favoring placements that provide the best potential for improved child outcomes

Act 1 is rationally related to a legitimate government interest because it is undisputed that on average, children in married and single-parent families have better outcomes than children in cohabiting households.

a. Children in cohabiting families do worse than children in intact, married households when it comes to a range of social, psychological, and educational outcomes

Dr. Michael Lamb admits that when outcomes of children raised by heterosexual parents in different family structures are compared, children who live with both of their married biological parents have better outcomes on average than children living with cohabiting parents. (FCAC MSJ Ex. 59, Lamb Expert Report ¶ 25; FCAC MSJ Ex. 20, Lamb Dep. at 100:3-102:2.) Plaintiffs' experts admission are supported by studies finding that children in cohabiting families are significantly more likely to experience delinquency, drug use, lying, problems relating to peers, and trouble with the police, compared to children in intact, married families. (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶ 15(a) (*citing* FCAC MSJ Ex. 65, Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 Journal of Marriage and Family 351-367 (2004); FCAC MSJ Ex. 22, Dep. Ex. 154, Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 Journal of Marriage and Family 876-893 (2003); and FCAC MSJ Ex. 69, Lingxin Hao & Guihua Xie, *The Complexity and Endogeneity of Family Structure in Explaining Children's Misbehavior,* 31 Social Science Research 1-28 (2001)).) One nationally-representative study of more than 12,000 teenagers found that adolescents living in a cohabiting household were 116% more likely to currently smoke marijuana, compared to children living in an intact, married family. (FCAC MSJ Ex. 67, Shannon E. Cavanaugh, *Family Structure History and Adolescent Adjustment*, 29 Journal of Family Issues 944-980 (2008).)

And it is not contested that, on average, children in cohabiting families are more likely to experience difficulties with concentrating, dropping out of high school, low grades, low levels of school engagement, and school suspension, compared to children raised in intact, married households. (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶ 15(b); FCAC MSJ Ex.

74, Sandi Nelson, Rebecca L. Clark & Gregory Acs, *Beyond the Two-Parent Family: How Teenagers Fare in Cohabiting Couple and Blended Families,* B-31 New Federalism National Survey of America's Families, Urban Institute (2001).) Belonging to a married two biological parent family is associated with lower levels of school suspension and expulsion, lower levels of child delinquency, lower levels of school problems, and higher cognitive outcomes for children than belonging to cohabiting stepfather family. (FCAC MSJ Ex. 22, Osborne Dep. at 145:15-25, 146:17-20, 148:12-24; FCAC MSJ Ex. 50, Dep. Ex. 154, Manning & Lamb, *supra.*) Children who live with a married stepfather have fewer school suspensions and expulsions than children who live with a cohabiting stepfather. (FCAC MSJ Ex. 22, Osborne Dep. at 36:11-13.) And even after adjusting for socioeconomic factors and other covariates, including associated demographic characteristics, family stability, and parenting measures, "on delinquency there is still a significant difference between married steps and cohabiting steps when this list of covariates is included." (*Id.* at 49:9-15, 50:13-20, 51:13-15.) Thus, marriage does make a significant difference on delinquency when the father is unrelated to the children he is raising.

Osborne's own work with the Fragile Families study reveals that mothers in married households observe more reading in children than biological mothers in cohabiting households, and that "reading is correlated with good cognitive outcomes." (*Id.* at 157:21-158:24.) She also found differences in the measures of "warmth and engagement," or showing "affection" between married biological mothers and cohabiting biological mothers. (*Id.* at 160:7-21.) Ultimately, Dr. Osborne concedes there is a significant association between marriage and improved child outcomes, and even more broadly, between family structure and child outcomes. (*Id.* at 146:17-20.)

> Q: But you agree that marriage is associated with benefits both to children and to society?

> A: As I've said earlier today, that looking at certain outcomes, considering certain married couples as compared to a whole range of various other sorts of family structures, that there are some positive associations between marriage and outcomes for children.

(*Id.* at 241:16-23.)

Intervenors' experts agree and point out that studies also show that children in cohabiting families are significantly more likely to experience depression, difficulty sleeping, feelings of worthlessness, nervousness, and tension, compared to children in intact, married households. (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶15(c) (*citing* FCAC MSJ Ex. 65, Brown, *supra*; FCAC MSJ Ex. 67, Cavanaugh, *Family Structure*, *supra*; FCAC MSJ Ex. 74, Nelson, Clark, & Acs, *supra*).) Dr. Deyoub adds that children living with cohabiting parents suffer significantly poorer mental health than children living with married parents. (FCAC MSJ Ex. 49, Dep. Ex. 144, Deyoub Expert Report 6 § III(5).)

b. Children in single-parent families have better outcomes than children in cohabiting households

Plaintiffs' experts and pertinent studies recognize that children in cohabiting families do worse than children in single-parent families when it comes to their exposure to physical and sexual abuse. (FCAC MSJ Ex. 24, Worley Dep. at 88:6-11, 88:25-89:8; *see also* FCAC MSJ Ex. 73, Leslie Margolin, *Child Abuse by Mother's Boyfriends*, *supra*; FCAC MSJ Ex. 72, Margolin & Craft, *Child Sex Abuse by Caretakers*, *supra*; FCAC MSJ Ex. 75, Radhakrishna, *et al.*, *supra*; and FCAC MSJ Ex. 76, Schnitzer & Ewigman, *supra*.) A newly released federal study shows that a child living with a single parent, who is also living with a partner (cohabitants), are more likely to be subjected to a broad range of abuses than if the child is living with a single parent who is not living with a partner. (Andrea J. Sedlak, *supra*.) While Intervenors' expert Dr. Wilcox agrees that the scientific research on single-parent families versus cohabiting families is

less definitive than the research on married-parent families versus cohabiting families, "it does suggest that cohabiting families present unique risks to children above and beyond those found in single-parent families." (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶ 20.)

Studies also find that children in cohabiting families are more likely to suffer from low grades, low levels of school engagement, and school suspension or expulsion than children in single-parent families. (FCAC MSJ Ex. 50, Dep. Ex. 154, Manning & Lamb, *supra.*) Intervenors' experts are in agreement: children in single-parent families have better outcomes than children in cohabiting households. (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶19(b).) One nationally-representative study of adolescents found that 11.3% of teenagers from a single-mother family were suspended or expelled from school in the past year, compared to 23.0% of teenagers from a cohabiting family. (FCAC MSJ Ex. 74, Nelson, Clark, & Acs, *supra.*) Another nationally-representative study of American adolescents found that teenagers living in a cohabiting household were 51% more likely to smoke marijuana, compared to teenagers living in a single-mother household. (FCAC MSJ Ex. 67, Shannon E. Cavanaugh, *Family Structure History and Adolescent Adjustment*, 29 Journal of Family Issues 944-980 (2008).) The research also suggests that adolescents in cohabiting households are more depressed than adolescents in single-mother households. (FCAC MSJ Ex. 48, Dep. Ex. 139, Wilcox Expert Report ¶ 19(c) (citing FCAC MSJ Ex. 67, Cavanaugh, *Family Structure*, *supra*).)

Although Dr. Osborne stresses that many of the negative outcomes associated with cohabitation for adults and children are not associated *per se* with cohabitation, she does not dispute the fact that cohabitation is negatively associated with relational outcomes like sexual fidelity and commitment even after controlling for socioeconomic status, or that it is associated with children's outcomes like delinquency, poor grades, and adolescent behavioral problems

even after scholars control for socioeconomic status. (FCAC MSJ Ex. 51, Dep. Ex. 157, Osborne Rebuttal Report 5-6 § II(A); *compare to* FCAC MSJ Ex. 22, Osborne Dep. at 49:9-15, 50:13-20, 51:13-15, 105:12-24, 113:6-19, 111:9-112:14, 144:3-10, 145:15-25, 146:17-20, 148:12-24; FCAC MSJ Ex. 50, Dep. Ex. 154.) If cohabitation is selective of couples with low-commitment, poorer relationship quality, lower socioeconomic status communities, and couples who do not think they currently are or will ever be ready for the commitment associated with marriage, it would be rational for the voters to recognize this group as presenting an increased risk of instability for children.

Furthermore, while Dr. Osborne asserts in her report that "outcomes for cohabitors as a group would not predict the outcomes for the sub-group of cohabitors who would seek to foster or adopt children together," she concedes that there haven't been any studies conducted on child outcomes for the group of cohabitors she defines as the "sub-group of cohabitors who would seek to foster or adopt children together," nor is there any study comparing cohabiting couples who foster or adopt children to married couples who foster or adopt children. (FCAC MSJ Ex. 22, Osborne Dep. at 169:9-179:23, 196:25-197:24.)

Arkansas voters could legitimately have chosen to preclude placement of already vulnerable children with individuals cohabiting outside of marriage based on their personal knowledge and the studies showing that children living in cohabiting households suffer lower child-adjustment outcomes and are at a higher risk of abuse than children in both married and single-parent households. Finally, voters could also decide that the inclusion of single parent families would allow DHS broader access to persons with skills particular to children with special needs who are not at the same time subjecting the child to the heightened risk and

dysfunction of cohabiting home environments. (FCAC MSJ Ex. 56, DCFS Standards of Approval for Family Foster Homes June 2009 at 9.)

Act 1 is rationally related to a legitimate government interest because Act 1 promotes child welfare by favoring placements of adoptive and foster children in the safer, more stable homes, which provide the best potential for improved child outcomes.

C. Act 1 promotes marriage because it provides the optimal environment for child-rearing

The State has a key interest in encouraging parents to procreate in a context that legally binds them to raise their children in a stable home environment and to discourage unplanned, out-of-wedlock births where the legal responsibilities between the parents and children are more difficult to enforce. Likewise, encouraging the placement of foster and adoptive children in marital homes because of the greater stability it affords for raising children is also a rational state interest, if not compelling. It is not an overstatement that, "Marriage is an important institution which is fundamental to our very existence and survival." *Hatcher v. Hatcher*, 265 Ark. 681, 697, 580 S.W.2d 475, 483 (1979) (Fogleman, J., concurring in part and dissenting in part) (citing *Loving v. Virginia*, 388 U.S. 1 (1967); and *Skinner v. Oklahoma*, 316 U.S. 535 (1942)). This has been long recognized by Arkansas: "Marriage was instituted for the good of society, and the marital relation is the foundation of all forms of government." *Hatcher*, 265 Ark at 698, 580 S.W.2d at 484 (citing *Marshak v. Marshak*, 115 Ark. 51, 170 S.W. 567, 570 (1914)). It is the public policy of this state to surround the marriage relation with every safeguard and to support and maintain the marriage status wherever it is reasonable to do so. *Id. See also Phillips v. Phillips*, 182 Ark. 206, 31 S.W.2d 134 (1930). At the heart of marriage, is the well-being of children.

Marriage is the state's mechanism that encourages men and women to enter into a committed relationship before having children and to legally bind them to remain in the relationship to raise their children. This not only promotes a stable environment for the natural procreation of children, but also for children which might be adopted. There is little debate that, on average, the optimum environment for raising children is with a married mother and father. To encourage child rearing within marriage, it is rational to discourage child-rearing in cohabiting environments where the automatic legal bonds between cohabiting parents do not exist.

By preferring the placement of children in a marital relationship over cohabitation, Act 1 reinforces the link between marriage and child-rearing, which promotes responsible parenting. For example, Arkansas law presumes that the husband is the father of any child born to his wife during marriage; as the father, he has legally enforceable rights and duties with respect to that child. *R.N. v. J.M.,* 347 Ark. 203, 213, 61 S.W.3d 149, 155 (2001). When a child is born to an unmarried woman, however, Arkansas law can make no presumption as to the identity or responsibilities of the biological father. Ark. Code Ann. § 9-10-113. When married, Arkansas law assigns both mother and father the immediate legal responsibility for the child's well-being and support. But a child born to cohabitants does not have the immediate benefits and security of two legal parents. The uncertainties and instability that often follows this scenario is commonly known. For this reason alone, the state has a strong child welfare interest in promoting child-rearing in marriage, and an equally strong interest in not promoting child-rearing in cohabiting environments.

This interest applies with equal force to foster and adoptive children. Like biological children, children in need of adoption benefit from having a legal bond with a mother and father

who are also legally bound to each other. Foster children benefit when placed with a married couple because, among other things, the foster parents may adopt the child and if married, both must adopt, which gives the child the benefit of two legal parents responsible for his welfare. Marriage not only legally commits the parents to each other, but legally commits the parents to the children. That dynamic means that children are more likely to receive the benefits of a stable home environment where they are, importantly, nurtured by both a mother and a father.

Living models of men and woman taking care of their children, of course, are most likely to occur in a married home environment. That model is an important state interest by its own right: "Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." *Hernandez v. Robles,* 7 N.Y.3d 338, 359, 855 N.E.2d 1, 4, 821 N.Y.S.2d 770, 776 (2006). As models, a married man and woman demonstrate a full commitment to each other and their children and thus, encourage responsible parenting in children who may also one day have children. "It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society -- particularly when those future citizens are displaced children for whom the state is standing *in loco parentis*." *Lofton v. Sec'y Dep't of Children and Family Servs.,* 358 F.3d 804, 819 (11th Cir. 2004). Responsible parenting is more likely to be experienced and taught in marriage for the benefit of children, and certainly for displaced children for whom the state is standing *in loco parentis*.

Act 1 rationally promotes the State's interest in placing vulnerable children with a legally committed mother and father, who are more likely to provide children with a stable environment and encourage them to do the same as part of growing into capable and responsible adults.

D. Act 1 affirms the longstanding State policy that the interests of children are best served by living with a biological parent who is not cohabiting

Act 1 is also rationally related to a legitimate government purpose because cohabitation in the presence of children is contrary to the state's public policy of promoting a stable environment for children. Arkansas divorce and custody orders commonly contain a non-cohabitation clause, whereby neither the custodial nor the non-custodial parent may cohabit in the presence of children. The purpose of the cohabitation prohibition in divorce and custody orders is "to promote a stable environment for the children, and is not imposed merely to monitor a parent's sexual conduct." *Campbell v. Campbell*, 336 Ark. 379, 389, 985 S.W.2d 724, 730 (1999). "Arkansas's appellate courts have steadfastly upheld chancery court orders that prohibit parents from allowing romantic partners to stay or reside in the home when the children are present." *Taylor v. Taylor*, 345 Ark. 300, 304, 47 S.W.3d 222, 224 (2001). As a matter of public policy, Arkansas courts have never condoned a parent's unmarried cohabitation, or a parent's promiscuous conduct or lifestyle, in the presence of a child. *Campbell*, 336 Ark. at 389, 985 S.W.2d at 730; *Taylor*, 345 Ark. at 304, 47 S.W.2d at 224; *Ratliff v. Ratliff*, 2003 WL 1856408 (Ark. Ct. App. Apr. 9, 2003); *Alphin v. Alphin,* 364 Ark. 332, 341, 219 S.W.3d. 160, 165 (2005).

Recently, in *Holmes v. Holmes*, the Arkansas Court of Appeals explained that an appellant mother's sexual orientation was not the basis for the modification of custody. The court upheld the modification because Arkansas courts do not condone extramarital cohabitation and presume that illicit sexual conduct on the part of the custodial parent is detrimental to the children. *Holmes v. Holmes*, 98 Ark. App. 341, 349, 255 S.W.3d 482, 488 (2007). Although the mother argued she had provided the child with a stable home environment, the Court of Appeals was unwilling to "disregard these policies." *Id.*

Given the longstanding State policy that the interests of children are best served by living with a biological parent who is not cohabiting outside of marriage, it would be unexceptional for the voters or Arkansas to apply similar standards to the placement and custody of children under state supervision to promote stable environments for children in need of adoption or foster care.

E. The cost of Act 1 to children in need of adoption or foster care is relatively small in comparison to the benefit to children

As far back as 1986, and at least since 2005, DCFS has not placed children with cohabitants. (FCAC MSJ Ex. 15, Davis Dep. at 51:12-52:13, 55:23-56:16, 56:24-57:3, 57:21-58:19; FCAC MSJ Ex. 13, Blucker Dep. at 78:1-15, 81:5-23; FCAC MSJ Ex. 17, Young Dep. at 128:13-24; FCAC MSJ Ex. 27, Dep. Ex. 11; FCAC MSJ Ex. 29, Dep. Ex. 47.) Cost-benefit analysis of child-well being provides a rational basis for continuing that policy under Act 1:

> In the context of screening foster and adoptive applicants, the first error is wrongly excluding someone who would be an acceptable foster/adoptive parent. The second error is wrongly including someone who proves to be an unacceptable foster/adoptive parent. The risks of these two potential errors are in tension with one another. A very tight screen with high standards would increase the number of acceptable potential parents who are wrongly excluded. A looser screen would increase the number of parents who prove to be harmful to children or otherwise unacceptable but are nevertheless wrongly included. This trade-off is inherent in the risk-balancing process.

(FCAC MSJ Ex. 44, Dep. Ex. 114, Morse Expert Report 2-3 § III(A).). It must be noted that the placement of children in foster care or adoption contains an unavoidable element of risk, because placement decisions require both individual and categorical screening of prospective parents, and all screening is subject to errors. (*Id.* at 2 § III(A).)

Based on the census figures provided by Plaintiffs' expert Dr. Peplau, the 47,000 cohabiting households in Arkansas make up less than 6% of the total households unaffected by Act 1. (*Id.* at 3 § III(B); *see* FCAC MSJ Ex. 42, Dep. Ex. 111, Peplau Expert Report 5 § II(D).) While it is unknown how many actually would apply, it is reasonable to assume that most

cohabitants, who have not made a legal commitment to each other, are not likely to want to make legal commitments to displaced children. Thus, the cost of excluding cohabitants, even if some would make good foster or adoptive parents, is relatively low.

On the other hand, the benefit of Act 1 to children in need of adoption or foster care is substantial because cohabiting couples pose a statistically significant set of risk factors to children. As previously catalogued, it is undisputed that cohabiting relationships are less stable and correlated with lower relationship quality than married relationships. (*See supra* IV(C)(2)(a); and FCAC MSJ Ex. 44, Dep. Ex. 114, Morse Expert Report 6 § C(1), and 8 § C(3).) It is also undisputed that cohabiting couples have higher rates of domestic violence, mental illness, depression and infidelity. (*See supra* § IV(C)(2)(c); and FCAC MSJ Ex. 44, Dep. Ex. 114, Morse Expert Report 7-8 § C(2), and 9 § C(4)-(5).) Furthermore, it is undisputed that married couples receive more social support and have greater economic resources than cohabiting couples. (*See supra* § IV(C)(2)(a)(iii); and FCAC MSJ Ex. 44, Dep. Ex. 114, Morse Expert Report 10-11 § C(6)-(7).) Finally, it is undisputed that children in cohabiting households have poorer outcomes than children in married and single-parent households. (*See supra* § IV(C)(3); and FCAC MSJ Ex. 44, Dep. Ex. 114, Morse Expert Report 12 § C(8).) Keeping in mind that the welfare of children is at stake, and not adult desires to parent, Arkansans could reasonably conclude that the benefit to children of excluding cohabitants is substantial, while the cost is, at best, minimal.

This analysis also implicates the legitimate government interest in the allocation of the State's scarce financial resources. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 854-59 (1984). It is undisputed that DHS does not have an abundance of funds with which to evaluate applicants. (FCAC MSJ Ex. 13, Blucker Dep. at

87:16-23.) Because there is no fundamental right to adopt or foster a child, the State is not required to incur the added costs of hiring additional social workers to evaluate individuals associated with poorer child outcomes, higher levels of violence, and family instability. It would be entirely rational for the voters to determine that if additional recruitment efforts are made, they ought to be made within the pool of individuals with the highest levels of stability, commitment, and better child outcomes.

Act 1 benefits children and preserves scarce government resources by avoiding the risks and expenses of screening a relatively small percentage of Arkansans, which on average, are less likely to want to foster and adopt, and are less likely to provide stable home environments for children.

V. THE TERMS OF ACT 1 ARE SUFFICIENTLY DEFINITE TO DEFEAT PLAINTIFFS' VOID FOR VAGUENESS CLAIMS

Over a year after the commencement of this litigation, the Plaintiffs have taken the desperate step of amending their complaint to assert that Act 1 is void for vagueness under the federal and state constitutions. (FCAC MSJ Ex. 52, Third Am. Compl. ¶¶ 145-155.) In particular, the Plaintiffs allege that the terms "cohabiting" and "sexual partner" are "so vague that individuals of common intelligence must necessarily guess at their meaning and differ as to their application." (*Id.* at ¶ 146.) It should be noted, at the outset, that Plaintiffs repeatedly defined themselves as "cohabiting with a sexual partner (hereinafter 'an intimate relationship')" in their original and amended complaints, belying this late hour assertion that these terms cannot be understood. (*Id.* at ¶ 7, *passim.*) Far from being vague, these terms have long been understood in Arkansas common and statutory law.

The standard to be applied to a void-for-vagueness attack is the same under both the federal and state constitutions: "[A] law is unconstitutionally vague under due process standards

if it does not give a person of ordinary intelligence fair notice of what is prohibited and is so vague and standardless that it allows for arbitrary and discriminatory enforcement." *Benton County Stone Co., Inc. v. Benton County Planning Bd.*, 374 Ark. 519, 522, 288 S.W.3d 653, 655 (2008); *see also Crum v. Vincent*, 493 F.3d 988, 994 (8th Cir. 2007) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)) ("A statute is impermissibly vague if it 'fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or 'authorizes or even encourages arbitrary and discriminatory enforcement.'"). The Court should keep in mind that "we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

"[T]he subject matter of the challenged law . . . determines how stringently the vagueness test will be applied." *Benton*, 374 Ark. at 522, 288 S.W.3d at 655; *see also Craft v. City of Fort Smith*, 335 Ark. 417, 424-25, 984 S.W.2d 22, 26 (1998) (same). There is "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). Moreover, if a challenged law "infringes upon a fundamental right, such as liberty or free speech, a more stringent vagueness test is applied." *Craft*, 335 Ark. At 425, 984 S.W.2d at 26.

Act 1 is a civil law implicating no fundamental rights and imposing no criminal penalties. *See* discussion *supra* Part II. Rather, Act 1 only applies when an individual seeks to adopt or serve as a foster parent. Ark. Code Ann. § 9-8-304(a). The statute is a codification of the longstanding court rule that "cohabitation without the benefit of marriage is an important factor in considering what is in the best interest of the child and extra-marital cohabitation has never been condoned, as it is contrary to the public policy of promoting a stable environment for

children." *Holmes v. Holmes*, 98 Ark. App. 341, 347, 255 S.W.3d 482, 487 (2007). Because the subject matter of Act 1 is purely civil, and does not touch on any fundamental rights, the statute is subject to a less stringent vagueness test.[2]

A. Act 1's use of the term "cohabiting" is not unconstitutionally vague

Arkansas and federal courts generally look to "common law," *Green v. Blanchard*, 138 Ark. 137, 211 S.W. 375, 378 (1919), and "common usage and understanding," *Jordon v. State*, 274 Ark. 572, 578, 626 S.W.2d 947, 950 (1982), to determine whether the terms of a statute are unconstitutionally vague.

1. Because Arkansas common law and statutes provide a clear definition of "cohabitating," Act 1 is not void for vagueness

For over 125 years, Arkansas courts and federal courts have defined "cohabit" as "living or dwelling together." *Turney v. State*, 60 Ark. 259, 29 S.W. 893, 894 (1895). In 1885, the U.S. Supreme Court considered the meaning of the term "cohabit" in a federal polygamy statute that made it crime for "any male person . . . [to] cohabit[] with more than one woman." *Cannon v. U.S.*, 116 U.S. 55, 57 (1885). The Court explained that a "man cohabits with more than one woman" when "he lives in the house with them." *Id.* at 74. This definition, according to the Court, was "in consonance with a recognized definition of the word 'cohabit.' In Webster 'cohabit' is defined thus: '(1) To dwell with; to inhabit or reside in company, or in the same place or country. (2) To dwell or live together as husband and wife.' In Worcester it is defined thus: '(1) To dwell with another in the same place. (2) To live together as husband and wife.'" *Id.*

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[2] To the extent the Plaintiffs are making a facial challenge to Act 1, the relevant inquiry is whether Act 1 is "impermissibly vague in all of its applications." *Vill. of Hoffman Estates*, 455 U.S. at 497 (emphasis added); *see also Craft*, 335 Ark. At 424, 984 S.W.2d at 26 (same). This is a burden of proof that the Plaintiffs obviously cannot carry.

Arkansas courts have long adopted a very similar definition of "cohabit." In 1877, the Arkansas Supreme Court examined the meaning of "cohabit" in a statute making it illegal for a man and a woman to "cohabit[ate] together as husband and wife without being married." *Sullivan v. State*, 32 Ark. 187 (1877). The Court observed: Bouvier, in his Law Dictionary, gives this definition of the word cohabit: "To live together in the same house, claiming to be married," and the definition given in Burrill's Law Dictionary, is: "To live together as husband and wife; to live together at bed and board; to live together as in the same house." And Webster, defines it thus: "*First*- To dwell with; to inhabit or reside in company, or in the same place or country. *Second*- To dwell or live together as husband and wife." *Id.* The Court concluded that "[t]he sense in which the word is used in the statute, is evidently that of living or dwelling together in the same house." *Id.*

The Arkansas courts have consistently reiterated this same definition of "cohabit." *See Turney*, 60 Ark. 259, 29 S.W. at 894 ("[t]he term 'cohabitation' has a definite legal signification, and . . . conveys the idea of living or dwelling together as husband and wife."); *Hovis v. State*, 162 Ark. 31, 257 S.W. 363, 364 (1924) (holding that "[t]he word 'cohabitation,' has a well-defined meaning"—"to dwell or live together"); *Lyerly v. State,* 36 Ark. 39 (1880) (holding that man and woman were "cohabiting" because "they were living together in the same house"); *Taylor v. State*, 36 Ark. 84 (1880) (reversing conviction for illegal cohabitation where no evidence that man and woman "sustained to each other a relation in the house like that of husband and wife"); *Bush v. State*, 37 Ark. 215 (1881) (holding that illegal cohabitation jury instruction requiring that "defendant lived with the [woman], in the same house, as husband and wife, without being married to her" was proper); *McNeely v. State*, 84 Ark. 484, 106 S.W. 674 (1907) (reversing conviction for illegal cohabitation where "no evidence that the defendants ate

at the same table or slept in the same room, or cohabited together as husband and wife"); *Leonard v. State*, 106 Ark. 449, 153 S.W. 590, 591 (1913) (upholding conviction for illegal cohabitation where women "lived in the house with" man and "slept in the same room with him, and necessarily must have eaten at the same table"); *Wilson v. State*, 178 Ark. 1200, 13 S.W.2d 24, 25 (1929) (ruling that couple was not "cohabitating" where "no testimony that the [woman] and [man] lived . . . together"); *Poland v. State*, 232 Ark. 669, 670, 339 S.W.2d 421, 422 (1960) (holding defendant not guilty of illegal cohabitation where he did not live together with woman but only engaged in sexual intercourse with woman "on two separate occasions").[3]

Numerous Arkansas statutes also use the term "cohabit," or some variation of it, all without stating a definition. For example, Ark. Code Ann. § 16-43-901, permits a husband or putative father to testify at a paternity or child support proceeding after a "[p]eriod of cohabitation with the biological mother." Ark. Code Ann. § 9-12-306, requires corroboration of "proof of separation and continuity of separation without cohabitation." Ark. Code Ann. § 9-12-301, spells out the grounds for divorce, including "[w]hen husband and wife have lived separate and apart from each other for eighteen (18) continuous months without cohabitation" and "[i]n all cases in which a husband and wife have lived separate and apart for three (3) consecutive years without cohabitation by reason of the incurable insanity of one (1) of them." Ark. Code Ann. § 9-11-810, directs that judicial separation in covenant marriage "puts an end to [husband's

[3] The only context in which the Arkansas Supreme Court has defined "cohabitation" as something other than "living or dwelling together" is with regard to the separation period required for divorce. In that context, the Supreme Court has held that the term means "sexual intercourse." *McClure v. McClure*, 205 Ark. 1032, 172 S.W.2d 243, 245 (1943). The Court reasoned that the term had to be defined this way to prevent the term from being "meaningless" or "redundant." *Id.* The separation statute already requires that the husband or wife "have lived separate and apart from the other." *Id.* at 243. The Supreme Court was careful to note that its decision did not disturb the "[m]any cases decided by this and other courts in which the literal or derivative definition of the word 'cohabitation' has been sustained" as "living together in the same abode." *Id.* at 244.

and wife's] conjugal cohabitation." Ark. Code Ann. § 9-4-102, bringing "[p]ersons who presently cohabit or in the past cohabited together" within the definition of "[f]amily or household members"

Thus, the term "cohabitating" has a settled meaning under the law of this State. The U.S. Supreme Court and the Arkansas courts have both held that the commonly understood definition of "cohabiting" is "living or dwelling together." The Arkansas statutes repeatedly use the term "cohabiting," without the need to provide a statutory definition. Accordingly, Act 1's use of the term "cohabiting" is hardly novel and cannot be considered vague.

2. Other jurisdictions have rejected vagueness challenges to the term "cohabiting"

The courts of several other jurisdictions have considered and rejected vagueness challenges to the term "cohabiting." For instance, in *People v. Ballard*, 203 Cal. App. 3d 311, 249 Cal. Rptr. 806 (1988), a California Court of Appeal rejected a vagueness challenge to the use of the term "cohabiting" in the state's domestic violence statute. Like the U.S. Supreme Court and the Arkansas courts, the California court defined "cohabiting" as "to live or dwell together." *Id.* at 318. The court held that "the statute is clearly constitutional, since the term 'cohabit' has been used in California statutes and decisions for at least 100 years and has an established common law meaning." *Id.* at 317. *See also In re Marriage of Tower*, 55 Wash. App. 697, 703, 780 P.2d 863, 867 (1989) (holding that "cohabit" is not vague, since "ordinary meaning" is "to live together as husband and wife [usually] without a legal marriage having been performed."); *State v. Green*, 99 P.3d 820, 831-32 (Utah 2004) (holding "that the word 'cohabit' is not vague," since it commonly means to "dwell together as, or as if, husband or wife").

Just as other state courts have declined to hold that the word "cohabitating" is so imprecisely defined so as to be unconstitutionally vague, this Court should hold likewise. The

common law, statutes, and general usage of "cohabiting" all show that the term can be construed with reasonable certainty as "living or dwelling together." Accordingly, the Plaintiffs' claims that Act 1 is void for vagueness should be rejected.

B. The term "sexual partner" is not vague because it can be readily understood

A term is not unconstitutionally vague when "it has a plain and ordinary meaning that [can] be readily understood by reference to a dictionary." *Rolling Pines Ltd. P'ship v. City of Little Rock*, 73 Ark. App. 97, 106, 40 S.W.3d 828, 835 (2001). Act 1's use of the term "sexual partner" is precisely such a term. The dictionary definition of the term is "a person with whom one engages in sex acts." Sexual Partner, *Wikipedia*, available at http://en.wikipedia.org/wiki/Sexual_partner (last visited Jan. 29, 2010); *see also* Sexual Partner, *Wiktionary*, available at http://en.wiktionary.org/wiki/sexual_partner (last visited Jan. 29, 2010). Arkansas courts have repeatedly employed the term "sexual partner" consistent with this definition. For example, in *Turner v. State*, 355 Ark. 541, 543-44, 141 S.W.3d 352, 354 (2004), the Arkansas Supreme Court explained that the victim "told police that she had lied about Turner being her first sexual partner, and she explained that she previously had sex with a boyfriend from Little Rock before she met Turner." *See also Weaver v. State*, 56 Ark. App. 104, 108, 939 S.W.2d 316, 318 (1997) ("[t]he number of sexual partners of the victim would only be relevant if appellant could show that one or more had HIV and that the victim was exposed to it through them or that the victim knew they had HIV and disregarded the dangers associated with having sexual intercourse with them"); *Smith v. State*, 354 Ark. 226, 237, 118 S.W.3d 542, 548 (2003) (holding that "[t]he legislature could have rationally concluded that persons such as appellant should not use their positions as school and school-district employees to find and cultivate their underage sexual partners"); *Echols v. State*, 326 Ark. 917, 943, 936 S.W.2d 509, 521 (1996) (psychologist's notation of statement by murder suspect said, "He typically drinks the blood of a sexual

partner."); *Holmes*, 98 Ark. App. at 349, 255 S.W.3d at 488 (2007) ("[T]he instant record shows that appellant had six different sexual partners in a four-and-a-half year period."); *Hall v. State*, 15 Ark. App. 309, 312, 692 S.W.2d 769, 770-71 (1985) (psychologist testified "that, in her opinion, an adult's abuse of a child is not sexually motivated, and not gratifying, but is an abuse of power; that the 'psychological profile of a perpetrator' is usually heterosexual and they have an adult sexual partner; the first offense is virtually always committed before the age of 40; and alcohol or drugs is 'often a dynamic.'").

Act 1's use of the commonly employed and easily understood term "sexual partner" is not void for vagueness. The term is readily comprehended by recourse to a dictionary and repeatedly used by Arkansas courts. The term provides definition to the term "cohabiting" such that what is in view is not simply living or dwelling together with another person, like a family member or relative, but living or dwelling together with a person with whom one is engaging in sex. Thus, rather than being vague or ambiguous, the term "sexual partner" provides greater definition to the intended scope and coverage of Act 1.

Thus, Act 1's use of the terms "cohabiting" and "sexual partner" is sufficiently definite to defeat the Plaintiffs' claims of void for vagueness. The terms have reasonably ascertainable meanings that are routinely employed by Arkansas courts and statutes. As such, the terms do not begin to approach the level of being unconstitutionally vague.

CONCLUSION

The people of Arkansas may legitimately exercise their legislative power to protect the welfare of children in need of adoption or foster care by precluding placements in households associated with the highest levels of violence, instability, and poorest child outcomes. Because no fundamental right or suspect class is implicated by the act, rational basis review applies. *Regan*, 461 U.S. at 547; *Murgia*, 427 U.S. at 311-12. Under the rational-basis test, legislation is

presumed constitutional and rationally related to achieving any legitimate governmental objective under any reasonably conceivable fact situation. *Rose*, 363 Ark. at 293, 213 S.W.3d at 618. And, "[e]ven if the classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn . . . imperfect, it is nevertheless the rule that . . . perfection is by no means required." *Vance*, 440 U.S. at 108. The categorical exclusion of cohabiting individuals is rationally related to the state's interest in promoting marriage, which provides the optimal environment for child-rearing, and affirms the longstanding State policy that the interests of children are best served by preferring placement of children with parents who are not cohabiting. Most importantly, Act 1 is rationally related to the state's interest in protecting adoptive and foster children from further harm by placing them in the safest, most stable households.

For the foregoing reasons, the Court should rule that, as a matter of law, Act 1 does not violate the due process or the equal protection provisions of either the Arkansas or the United States Constitutions and dismiss all of Plaintiffs' claims.

Respectfully submitted this the 9th day of February, 2010.

By: Martha M. Adcock

Martha M. Adcock, AR Bar No. 83002
Family Council
414 S. Pulaski, Suite 2
Little Rock, AR 72201
(501) 375 7000
(501) 375-7040 Fax
Local Counsel

Brian W. Raum, NY Bar No. 2856102 (*Of Counsel*)
Byron J. Babione, AZ Bar No. 024320*
Sara F. Tappen, WY Bar No. 6-4395*
Alliance Defense Fund
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax

Attorneys for Intervenors
Family Council Action Committee and Jerry Cox
**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by email on the following:

Dustin McDaniel
C. Joseph Cordi, Jr.
Colin R. Jorgensen
Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201
Joe.Cordi@arkansasag.gov
colin.jorgensen@arkansasag.gov

Attorneys for Defendants

Christine Sun
American Civil Liberties Union Foundation
PO Box 120160
Nashville, TN 37212
csun@aclu.org

Leslie Cooper
Rose Saxe
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
lcooper@aclu.org
rsaxe@aclu.org

Garrard R. Beeney
Stacey R. Friedman
Jennifer M. Sheinfeld
Stephen Ehrenberg
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
Beeneyg@sullcrom.com
FriedmanS@sullcrom.com
sheinfeldj@sullcrom.com
ehrenbergs@sullcrom.com

Attorneys for Plaintiffs

Marie-Bernarde Miller
Daniel J. Beck
Bonnie Johnson
Williams & Anderson PLC
111 Center Street, Suite 2200
Little Rock, AR 72201
mmiller@williamsanderson.com
DBeck@williamsanderson.com
bjohnson@williamsanderson.com
nmoler@williamsanderson.com

on this the 9th day of February, 2010.

Martha M. Adcock

Martha M. Adcock

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

Sheila Cole, *et al.*,

Plaintiffs,

vs.

The Arkansas Department of Human Services, *et al.*,

Defendants,

Family Council Action Committee, *et al.*,

Intervenors.

Case No. CV 2008-14284

INTERVENORS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs misunderstand the deference accorded the exercise of legislative authority and focus the court's attention on the undisputed, but immaterial fact, that individually assessing cohabitors could yield a suitable foster and adoptive placement. Defendants have never disputed that possibility, but that is not material to whether a rational basis exists for forgoing foster and adoptive placements in cohabiting environments. Intervenors do not have the burden to show that all placements of children in cohabiting environments will harm children. Rather in reviewing the constitutionality of a statute, Plaintiffs have the burden to show that it is undisputed that there are no grounds whatsoever to conclude that placing children in cohabiting environments is a greater risk to their welfare. But as demonstrated in Intervenors' Motion for Summary Judgment and Motion to Dismiss and in this Response, it is undisputed that, on average, children are at a higher risk for negative child welfare outcomes and exposure to abuse if placed in a cohabiting environment. Plaintiffs are correct that no trial is necessary to dispose of the case, but they are not entitled to summary judgment on any of their claims. Rather the Intervenors and the State Defendants' summary judgment motions and motions to dismiss Plaintiffs' claims should be granted.[1]

I. ACT 1 DOES NOT DEPRIVE DUE PROCESS TO CHILDREN IN STATE CARE BECAUSE IT COMPORTS WITH THE DUE PROCESS STANDARDS APPLICABLE TO LEGISLATIVE ENACTMENTS

Even assuming, *arguendo*, that Plaintiffs have standing, they apply the wrong standard to their alleged substantive due process claim that children in state care are entitled to be fostered

[1] To reduce duplication and repetition, Intervenors will refer to their motion for summary judgment and motion to dismiss papers where appropriate, and hereby fully incorporate them by reference in response to the Plaintiffs' motion for summary judgment here. As set out in Intervenors' motion for summary judgment and motion to dismiss papers, Plaintiffs lack standing on all claims alleged in the Third Amended Complaint, and Plaintiffs' claims should otherwise be dismissed on the merits. Intervenors also incorporate all of the State-Defendants' arguments and supporting papers in response to Plaintiffs' motion for summary judgment to the extent they are consistent with Intervenors' positions.

and adopted by cohabitors. The standard for a substantive due process violation "differ[s] depending on whether it is legislation or a specific act of a governmental officer that is at issue." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *see also Putnam v. Keller*, 332 F.3d 541, 547-48 (8th Cir. 2003) (differentiating the standards for substantive due process violations premised on executive action versus a legislative act).

Where the challenged government action is the conduct of a particular government employee or official, the question is whether the conduct "shocks the conscience." *Lewis*, 523 U.S. at 846-47. Where, however, the challenged government action is legislation, as it is here, the question is whether a fundamental right was infringed and, if so, whether the legislation survives strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). If no fundamental right was infringed, the legislation is merely required to bear a rational relation to a legitimate government interest. *Id.* at 728; *see also Reno v. Flores*, 507 U.S. 292, 305 (1993) ("The impairment of a lesser interest . . . demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose.").

Plaintiffs insist that the standard reserved for substantive due process challenges to "specific acts of a government official" should apply here. But the cases they rely upon all involve substantive due process challenges to abusive conduct by government officials, not challenges to legislation. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 193-94 (1989), a mother sued state social workers and other government officials for leaving her child with his father even though they knew he was abusive. In *Youngberg v. Romeo*, 457 U.S. 307, 310-11 (1982), the mother of a mentally disabled child sued state officials for injuries caused to her son while in the custody of the state mental institution. In *Nicini v. Morra*, 212 F.3d 798, 802-03 (3d Cir. 2000), a former ward of the state sued government

officials for knowingly leaving him in the custody of an abusive family member. In *Taylor v. Ledbetter*, 818 F.2d 791, 792-93 (11th Cir. 1987), a foster care child sued state and county officials for injuries received due to knowingly placing her with abusive foster parents. In *Lewis v. New Mexico Department of Human Services*, 959 F.2d 883, 885-86 (10th Cir. 1992), a group of minors sued state officials for injuries suffered while in state custody and placed in a private foster care facility. And in *K.H. v. Morgan*, 914 F.2d 846, 848 (7th Cir. 1990), a child sued state officials for placing him with foster parents that they knew were abusive. Not one of these cases is analogous to the due process challenge brought by the Plaintiffs in this case.

The challenged government action here is legislative—the adoption of Act 1 by the people of Arkansas—not abusive conduct by a government official. The due process standard for misconduct by a government official "is not applicable to cases in which plaintiffs advance a substantive due process challenge to a *legislative* enactment." *Dias v. City & County of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009). When, as here, legislative action is at issue, *Glucksberg* continues to govern, and only the traditional two-part substantive due process framework is applicable. "[W]e ask whether a fundamental right is implicated. If it is, we apply strict scrutiny to test the fit between the enactment's means and ends. Otherwise, we use a rational basis test." *Id.* (citing *Glucksberg*, 521 U.S. at 728). The Intervenors clearly demonstrated in their opening brief that Act 1 satisfies this standard. It implicates no fundamental rights, and is rationally related to the State's interest in protecting child welfare. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss 20-28, 35-63.) Accordingly, under the properly applicable due process standard, Plaintiffs' due process claim fails and the Intervenors are entitled to summary judgment.

Even if this case were treated as a challenge to misconduct by a government official (which it clearly is not), the question would be whether Act 1's limitation of the privilege of adopting and fostering children "shocks the conscience," not whether it fails to meet "accepted professional judgment, practice, or standards." The Eighth Circuit Court of Appeals has repeatedly held that, in the foster care context, "a substantive due process violation will be found to have occurred only if the official conduct or inaction is so egregious or outrageous that it is conscience-shocking." *James v. Friend*, 458 F.3d 726, 730 (8th Cir. 2006). *See also Burton v. Richmond*, 370 F.3d 723, 729 (8th Cir. 2004) ("Before official conduct or inaction rises to the level of a substantive due process violation it must be so egregious or outrageous that it is conscience-shocking."); *Moore v. Briggs*, 381 F.3d 771, 773 (8th Cir. 2004) ("[a] substantive due process violation requires proof that a government official's conduct was conscience-shocking"); *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (discussing need for evidence "of deliberate or conscious indifference" to make out due process claim against state officials); *S.S. v. McMullen*, 225 F.3d 960, 964 (8th Cir. 2000) ("In order to succeed, a complaint for a violation of substantive due process rights must allege acts that shock the conscience, and merely negligent acts cannot, as a constitutional matter, do that.").

Act 1 is plainly designed to spare children from enduring higher risk living environments and it cannot even begin to approach any level of "conscience shocking." Even conduct by government officials that is "grossly negligent or even reckless," according to the Eighth Circuit, is not sufficient to "shock the conscience." *McMullen,* 225 F.3d at 964; *see also Moore*, 381 F.3d at 773. Deliberate indifference by government officials might well "shock the conscience," but even that will "depend[] on the circumstances and the kind of deliberation and indifference involved." *McMullen*, 225 F.3d at 964. Act 1 is based on the legislative decision that placing

children with unmarried, cohabitating couples is harmful to children. It is a logical legislative choice that protects children, rather than harms them, and thus cannot be said to "shock the conscience."

Plaintiffs' citation to cases such as *Taylor*, 818 F.2d 791, actually support the logic of Act 1 in at least two ways. For example, *Taylor* held that a caseworker could be sued in his individual capacity for acting with deliberate indifference to the safety of a child placed in an abusive foster home. Far from being irrational or deliberately indifferent, Act 1 tracks the *Taylor* court's concern that foster home placements remove the child from the immediate protection of state supervision to a foster home where the risk of harm is high:

> In the foster home setting, recent events lead us to believe that the risk of harm to children is high. We believe the risk of harm is great enough to bring foster children under the umbrella of protection afforded by the fourteenth amendment. Children in foster homes, unlike children in public schools, are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is at the mercy of the foster parents.

818 F.2d at 797. Consistent with the court's finding that the risk of harm in placing children in foster care is high, Act 1 seeks to minimize the harm to children by keeping them from being placed in environments, which on average, are more unstable and volatile than other foster care settings. The people of Arkansas could have also acted to minimize the risk to DHS workers who can be sued for unsafe foster care placements, which risk might be exacerbated if caseworkers, acting under the strain of limited resources, were forced to place children with cohabitants. In addition to alleviating stress on caseworkers, Act 1 serves the government interests in minimizing damage awards and the loss of its limited number of caseworkers to time consuming litigation defending foster and adoptive placements in higher risk environments. Act 1 is rationally related to the legitimate government interest of minimizing the risk of harm to

children placed in higher risk environments and the government interest in minimizing the risk of liability for its agents placing children in higher risk cohabiting environments.

A. Plaintiffs' proof fails to negate every conceivable rational basis for Act 1's purpose of placing children in the best home environments

Plaintiffs' reliance on DHS witnesses' individual opinions and professional associational statements do not negate every conceivable basis for Act 1. In fact, Plaintiffs' experts concede the material facts in support of its rational basis. Keeping in mind that legislative acts and ballot initiatives are given every presumption of constitutionality, *Rose v. Arkansas State Plant Board,* 363 Ark. 281, 293, 213 S.W.3d 607, 618 (2005), Plaintiffs' burden is to show that there is no conceivable rational basis whatsoever for the act challenged. *Hamilton v. Hamilton,* 317 Ark. 572, 576, 879 S.W.2d 416, 418 (1994) (the party challenging the legislation has the burden of proving that the act is not rationally related to achieving *any* legitimate objective of state government under any reasonably conceivable state of facts). The standard is not as Plaintiffs have argued in most of their brief, whether the act agrees with the opinions of DHS employees or the viewpoints of some private professional associations. Regardless of any divergent views, the classification is constitutional if "the question is at least debatable." *Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 868 (8th Cir. 2006) (citation omitted). To put it another way, legislation is not subject to veto by dissenting experts and professional organizations because they disagree with its means or ends. *Vance v. Bradley,* 440 U.S. 93, 111 (1979) (Under rational basis review, the trial court does not resolve conflicts in the evidence against the legislature's judgment and conclusion). Plaintiffs are right that there is no disputable issue of fact for trial, but they are wrong that raising a policy disagreement over the placement of children in cohabiting environments entitles them to summary judgment on their claims because Plaintiffs cannot "negative every conceivable basis which might support it." *Lehnhausen v. Lake*

Shore Auto Parts Co., 410 U.S. 356, 364 (1973). Act 1 is supported by an undisputed rational basis whether or not the Plaintiffs' witnesses and sources agree.

B. The professional association statements Plaintiffs rely upon do not contradict Act 1's legitimate and compelling child welfare purposes in protecting children from the risks of cohabiting environments

The professional association statements Plaintiffs seek to rely upon to show a disagreement with Act 1 do not contradict the placement policy of Act 1. According to Plaintiffs, the Child Welfare League of America (CWLA) says that applicants for foster parenting should not be denied solely on the basis of marital status or sexual orientation; the North American Council on Adoptable Children (NACAC) says that applicants for foster care and adoption should be considered without regard to gender, marital status, or sexual orientation; and the National Association of Social Workers (NASW) says that "barriers to foster and adoptive parenting *unsupported by evidence* should be removed, including barriers to single parents, gay and lesbian parents, and other non-traditional families." (Pls.' Mem. 33-34 (emphasis added).) The terms of Act 1 do not preclude individual applicants because of gender, or because they are single, unmarried, or gay and lesbian.

Act 1 does not even mention gender. And it specifically states that it "applies equally to cohabiting opposite-sex and same-sex individuals." Ark. Code Ann. § 9-8-304(b). It does not turn on marital status because both married and unmarried individuals are eligible to become foster or adoptive parents. (*See* FCAC MSJ Ex. 52, Third Am. Compl. ¶ 51.) And both married and unmarried individuals *who are cohabiting outside of a valid marriage* are prohibited from adopting or fostering children. To the extent "non-traditional families," referenced only by the NASW, means unrelated cohabitants, Act 1's wariness of placing children in those environments is certainly not "unsupported by evidence." Thus, accepting Plaintiffs' characterization of these associational statements, Act 1 is not inconsistent with any of them and they do not otherwise

negate Act 1's purpose or basis. But even if Act 1 were inconsistent, the legislative authority of the State of Arkansas is not judged by these associational views as if they were inviolate extensions of the Arkansas and Federal Constitutions.

C. The rationale of Act 1 is not voided because some DHS employees disagree

While it is ultimately irrelevant to the legitimacy of Act 1, Plaintiffs grossly exaggerate the significance of the DHS and CADC[2] witness statements which they rely on to claim Act 1 violates professional standards. These witnesses answering "no" to whether they knew of a child welfare purpose served by Act 1 does not negate the existence of any, especially where the witnesses have no frequent need to weigh the matter because DHS has not made child placements with cohabitants and there have been few, if any, requests. These witnesses admit to having no experience with the efficacy of such placements, total ignorance of the pertinent social science, and even little contemplation of the matter. The fact that some DHS witnesses fail to recognize a child welfare purpose in Act 1 at best presents a debatable issue, but not a triable one. *Citizens for Equal Protection,* 455 F.3d at 868 (citation omitted).

Many of the DHS employees Plaintiffs feature in their brief to suggest that Act 1 does not serve a child welfare purpose have not routinely studied or considered the implications of placing a foster or adoptive child in cohabiting environments. The Director of DCFS, the division overseeing adoption and foster care, is "unaware of any licensed DCFS foster or adoptive placements of children into homes occupied by unmarried cohabitants at any time prior to the passage of Act 1." (STATE MSJ Ex. 23, Blucker Affidavit 4 ¶ 8.) Cassandra Scott, a 10-year employee, with field experience, verified that has been the policy of DHS since she was hired. (FCAC Resp. MSJ Ex. 11, Scott Dep. at 21:3-22:19 and 51:11-52:11.)

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[2] Crimes Against Children Division of the Arkansas State Police.

Employees with field experience admit that they have not either conducted a home study of, or recommended placement in, a cohabiting environment. Long-term employee, Sandi Doherty stated that she had not supervised, either directly or indirectly, the placement of a child with a cohabiting couple or with a gay or lesbian. (PLS MSJ Ex. 21, Doherty Dep. at 29:2-9.) (*See also* Marilyn Counts, the administrator of adoptions, FCAC MSJ Ex. 14, Counts Dep. at 147:15-23; Libby Cox, who handles out-of-state placements, FCAC Resp. MSJ Ex. 4, Cox, Libby Dep. at 64:5-66:12 and Anne Wells, Mental Health Professional, FCAC Resp. MSJ Ex. 15, Wells Dep. at 94:18-95:17.) And Ed Appler, the current chairman of the Child Welfare Agency Review Board, testified that to his knowledge, he had not conducted an adoptive home study on cohabitants. (FCAC MSJ Ex. 12, Appler Dep. at 125:11-12, 127:13-17 and 130:12-131:2.)

In addition to no personal experience making cohabiting placements, DHS officials have not studied or have not read the literature comparing cohabitants and married couples and do not know what the social science literature reveals on these issues. (*See* FCAC Resp. MSJ Ex. 9, Huddleston Dep. at 82:15-25; FCAC Resp. MSJ Ex. 4, Cox, Libby Dep. at 64:14-66:12; FCAC Resp. MSJ Ex. 15, Wells Dep. at 96:1-97:3; and FCAC Resp. MSJ Ex. 16, Zalenski Dep. at 175:13-178:5.) (*See also*, CWARB Chairman Appler, FCAC MSJ Ex. 12, Appler Dep. at 135:22-137:14, 138:24-139:2, and 143:2-9.) With no experience evaluating or studying foster or adoptive placements in cohabiting environments it is not surprising that DHS employees would fail to identify the child-welfare purposes supporting Act 1.

Plaintiffs also cited and mischaracterized deposition testimony of state police employees and DHS witnesses responsible for investigating abuse against children. But these witnesses also admitted that they do not conduct home studies on cohabitants, do not evaluate them, do not

personally track statistics on family structure in their investigations, and do not read any of the studies comparing married and cohabiting home environments because that is not peculiar to their professional role. Then, of course, it makes sense that these witnesses might not recognize a child welfare purpose in excluding child placements in cohabiting environments. (*See* FCAC Resp. MSJ Ex. 14, Thormann Dep. at 60:6-61:21; PLS MSJ Ex.10, Beall Dep. at 55:20-56:14; FCAC Resp. MSJ Ex. 10, Newton Dep. at 29:16-31:4; FCAC Resp. MSJ Ex. 6, Davidson Dep. at 23:4-26:18.)

Plaintiffs also failed to mention that there are DHS employees who do understand the child welfare purpose of Act 1. DHS Supervisor, Cassandra Scott, who has ten years of experience at DHS, believes Act 1 serves the best interests of children by helping to ensure that there is stability in the home. (FCAC Resp. MSJ Ex. 11, Scott Dep. at 37:8-16 and 47:21-48:16.) And Milton Graham, currently an Area Director, has worked for DHS since 1991 in a variety of positions, also stated that Act 1 serves the best interests of children. (FCAC Resp. MSJ Ex. 8, Graham Dep. at 17:21-18:12.)

But in the end, all this shows is that whether Act 1 serves a child welfare purpose is something that can be debated. Laws are validated or invalidated by polling the entire electorate; they are not invalidated by polling the witnesses in a case. Even if these opinions were informed by personal experience and a diligent study of the social science, it would still not create a disputable issue for trial because "a legislative choice is not subject to courtroom fact-finding." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Knapp v. Hanson*, 183 F.3d 786, 789 (8th Cir. 1999) (as long as a plausible reason exists for the classification, the Court's scrutiny must end); *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 21 F.3d 237 (8th Cir. 1994) (affidavit testimony disagreeing with statute's rational submitted in opposition to

motion to dismiss irrelevant). Dissenting witnesses do not negate the fact that Act 1 is solidly justified on multiple legislative facts as the record undisputedly attests.

Rather, the people of Arkansas could have reasonably concluded that DHS was ignoring the data about children being placed in cohabiting environments and acted precisely because DHS leadership was unaware or unwilling to recognize its potentially threatening impact on children. In addition, the people, knowing that DHS has finite resources could have acted to spare DHS caseworkers from undertaking additional duties to screen a high-risk group of applicants, which in turn could increase the risk that some children might be placed in a high risk cohabiting environment.

D. Plaintiffs' expert witnesses demonstrate that Act 1 serves legitimate and compelling child welfare purposes in protecting children from the risks of cohabiting environments

Notwithstanding the voices of those who have not studied the relationship between cohabiting environments and poorer child outcomes, Plaintiffs' expert witnesses who have studied the relationship, are accorded silence in Plaintiffs' opening brief. That is likely because their testimony and reports concede that Act 1 is supported by a rational basis.[3] Plaintiffs' experts acknowledge that cohabitants as a group have lower relationship quality than married couples (FCAC MSJ Ex. 22, Osborne Dep. at 243:4-19), and that on average cohabitors score lower on measures of relationship satisfaction (FCAC MSJ Ex. 23, Peplau Dep. at 206:22-207:2). Plaintiffs' expert Dr. Michael Lamb admits that there is evidence that relationship quality between cohabiting adults is lower than among married couples (FCAC MSJ Ex. 20, Lamb Dep. at 94:14-19, 102:24-103:11), and that there is a correlation between the quality of the

[3] Intervenors do not cite all relevant admissions here or the rational basis provided by their own experts, which are undisputed, but incorporate those which were included in earlier filings by reference. (*See* Mem. of Law in Support of Intervenors' Mot. for Summ. J. and Mot. to Dismiss 39-63.)

parental relationship and stability in the family: "individuals who have high-quality relationships are more likely to stay together" (FCAC MSJ Ex. 20, Lamb Dep. at 121:24-122:8.) He also concedes that the higher quality of the relationships among married couples compared to cohabiting couples is more likely to have a positive impact on child outcomes. (*Id.* at 100:24-102:2.) Dr. Lamb also admits that, on average, the quality of a child's relationship with his parents is better if his parents are married than if his parents are cohabiting. (*Id.* at 105:9-21.) This is true even where the father is unrelated to the child -- data suggests that married stepfathers are more involved in the care of their children than are cohabiting stepfathers. (*Id.* at 142:10-13, 142:25-143:4.) Certainly, the relatively lower quality of cohabiting relationships compared to married persons is rationally related to family instability and the legitimate government interest in placing children in more stable home environments.

Plaintiffs' expert Dr. Cynthia Osborne admits that as a group, cohabitants are less committed to their partners than married individuals are to their spouses; cohabitation is selective of people with lower levels of commitment. (FCAC MSJ Ex. 22, Osborne Dep. at 105:12-24, 144:3-10.) She also acknowledges that marriage relationships on average last longer than cohabiting relationships. (*Id.* at 111:9-112:14.) She testified that cohabitation has increased, and there is an increase in the proportion of cohabiting couples who separate and a decrease in the proportion of cohabiting couples who transition to marriage. (*Id.* at 150:1-12.) Dr. Osborne unequivocally testified that a married biological family is the most stable family structure. (*Id.* at 203:2-15.)

Plaintiffs' experts Dr. Peplau and Judith Faust both concede that the relationship dissolution rate for heterosexual cohabitants is higher than the relationship dissolution rate for married heterosexual couples. (FCAC MSJ Ex. 42, Dep. Ex. 111, Peplau Expert Report 4 §

II(B)(3); FCAC MSJ Ex. 23, Peplau Dep. at 37:25-38:22, 48:6-10, 50:3-7, 72:16-73:4, and 227:2-229:18; FCAC MSJ Ex. 19, Faust Dep. at 78:22-79:10.) Dr. Peplau also states in her report that the relationship dissolution rate for cohabiting same-sex couples is higher than the relationship dissolution rates for married heterosexual couples. (FCAC MSJ Ex. 42, Dep. Ex. 111, Peplau Expert Report 4 § II(B)(2).) She admits that the lack of studies specifically dealing with cohabiting couples who adopt children makes it impossible to draw the conclusion that even "long-term" cohabiting couples are as stable as married couples: "[D]o long-term cohabiting heterosexual couples who have decided to adopt a child break up at higher rates or at lesser rates than married couples? We don't know." (FCAC MSJ Ex. 23, Peplau Dep. at 65:8-11.) Finally, Dr. Peplau acknowledges that on average, cohabiting relationships are less stable than marriages. (*Id.* at 114:21-115:3, 115:19-22.)

Plaintiffs' expert Dr. Lamb agrees that, on average, married people are more committed to their relationship than people in cohabiting relationships regardless of their sexual orientation. (FCAC MSJ Ex. 20, Lamb Dep. at 109:22-110:10.) Dr. Lamb agreed with the findings in Larry Kurdek's 2005 study, a review of the research on homosexual couples and a reference on which Dr. Peplau relied upon in preparing her expert report, which states: "With controls for demographic variables, the dissolution rate for heterosexual couples was significantly lower than that for either gay or lesbian couples. . . . [A]lthough rates of dissolution did not differ for either gay couples versus lesbian couples or for gay and lesbian couples [versus] cohabiting heterosexual couples, both gay and lesbian couples were more likely to dissolve their relationships than married heterosexual couples were." (*Id.* at 123:1-124:2; FCAC MSJ Ex. 60, Lawrence A. Kurdek, *What Do We Know About Gay and Lesbian Couples?* 14 Current Directions in Psychological Science 251, 253 (2005).)

Plaintiffs' experts also admit that cohabitation is correlated with higher infidelity. Dr. Osborne testified that in her own studies, which employ the Fragile Families data, cohabitation is correlated with higher levels of sexual infidelity. (FCAC MSJ Ex. 22, Osborne Dep. at 113:6-19.) Dr. Peplau concedes in her rebuttal report that studies indicate the rate of infidelity is higher for cohabiting heterosexual couples than for married heterosexual couples. (FCAC MSJ Ex. 43, Dep. Ex. 112, Peplau Rebuttal Report 1 § II(A); FCAC MSJ Ex. 23, Peplau Dep. at 101:9-102:5, 235:2-15.)

As for domestic violence, Plaintiffs' expert Dr. Letitia Peplau concedes that studies indicate the rate of partner domestic violence is higher for cohabiting heterosexual couples than for married heterosexual couples. (FCAC MSJ Ex. 43, Dep. Ex. 112, Peplau Expert Report 5 § C; FCAC MSJ Ex. 23, Peplau Dep. at 79:6-19, 230:14-231:4 (*citing* FCAC MSJ Ex. 62, Jan E. Stets & Murray A. Straus, *The Marriage License as a Hitting License: Comparison of Assaults in Dating, Cohabiting, and Married Couples*, 4 Journal of Family Violence 161 (1989).) Dr. Osborne also concedes that the rate of physical abuse is higher among cohabitors than married couples: "there is generally at the observed level . . . a higher level of conflict observed among our cohabitors – diverse group of cohabitors than our marrieds." (FCAC MSJ Ex. 22, Osborne Dep. at 104:20-105:1, 115:19-116:1.). Limiting the exposure of children to violence in the home is enough of a rational basis to preclude placing children in cohabiting environments, but the interest is even greater when, as Plaintiffs' experts admit, children are more likely to be the targets of the abuse.

One study focusing on fatal child abuse in Missouri found that preschool children were 47.6 times more likely to die in a cohabiting household, compared to preschool children living in an intact, married household. (FCAC MSJ Ex. 76, Patricia G. Schnitzer & Bernard G.

Ewigman, *Child Deaths Resulting from Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 116 Pediatrics e687, e690 (2005).) In a 2001 article entitled *Male Roles in Families at Risk, the Ecology of Child Maltreatment*, Plaintiffs' expert Dr. Michael Lamb wrote that the presence of an unrelated male in the home was a source of risk for maltreatment to children living in the home and that he believes that is true today. (FCAC MSJ Ex. 20, Lamb Dep. at 140:5-22; FCAC MSJ Ex. 61, Michael E. Lamb, *Male Roles in Families "at Risk"; The Ecology of Child Maltreatment*, 6 Child Maltreatment 310-313 (Nov. 2001).)

Plaintiffs' expert Dr. Worley also testified that sex abuse against children occurs more frequently in cohabiting households than in married households where both parents are biologically related to the child. (FCAC MSJ Ex. 24, Worley Dep. at 72:10-18, 81:16-82:13.) One of the studies on which Plaintiffs' expert Dr. Peplau relied in preparing her expert opinion found that "the highest *rate* of assault is among the cohabiting couples" as compared to both married and dating couples. (FCAC MSJ Ex. 62, Stets & Straus, *supra*, at 176.) Furthermore, the study revealed that "violence is the most *severe* in cohabiting couples," compared to both married and dating couples. (*Id.*) These findings persisted after controls for age and socioeconomic status were introduced. (*Id.*)

Plaintiffs' experts also recognize that children do best on a variety of outcomes when raised by their married biological mother and father. There, children show lower levels of school suspension and expulsion, lower levels of child delinquency, lower levels of school problems, and higher cognitive outcomes for children than those belonging to a cohabiting stepfather family. (FCAC MSJ Ex. 22, Osborne Dep. at 145:15-25, 146:17-20, 148:12-24; FCAC MSJ Ex. 50, Dep. Ex. 154, Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 Journal of Marriage and Family

876-893 (2003).) But even children who live with a stepfather who is married to their mother have fewer school suspensions and expulsions than children who live with a cohabiting stepfather. (FCAC MSJ Ex. 22, Osborne Dep. at 36:11-13.) And even when researchers adjust for socioeconomic factors, demographic characteristics, family stability, and parenting measures, "[o]n delinquency there is still a significant difference between married steps and cohabiting steps when this list of covariates is included." (*Id.* at 49:9-15, 50:10-20, 51:13-15.) Thus, marriage does make a substantial difference on delinquency even when the father is unrelated to the children but is married to their mother of the children he is raising.

Osborne's own work with the Fragile Families study reveals that mothers in married households observe more reading in children than biological mothers in cohabiting households, and that "[r]eading is correlated with good cognitive outcomes." (*Id.* at 157:21-158:24.) She also found differences in the measures of "warmth and engagement," or showing "affection" between married biological mothers and cohabiting biological mothers. (*Id.* at 160:7-21.) Ultimately, Dr. Osborne concedes there is a significant association between marriage and improved child outcomes, and even more broadly, between family structure and child outcomes. (*Id.* at 146:17-20; 241:16-23.)

Finally, it is undisputed that a married couple would need to obtain a divorce to formally terminate a relationship, whereas individuals in a cohabiting relationship do not need a legal proceeding to terminate their relationship. (FCAC MSJ Ex. 19, Faust Dep. at 86:6-17.) There are always social and legal consequences to dissolving a marriage, which are absent when dissolving a cohabiting relationship. The public, social, and legal commitment of marriage makes dissolution a last resort. It contributes to keeping a family intact, which provides stability for children. Thus, steering children into married households where the marital relationship is

bolstered by legal and social incentives is rationally related to steering children away from environments where those incentives are absent.

The undisputed fact that cohabitation is correlated with higher levels of depression, higher levels of substance abuse, higher rates of domestic violence, and higher rates of sexual infidelity could certainly have given the voters of Arkansas reason to be concerned for the welfare of children in their care, and provided the voters of Arkansas with a rational basis for precluding placement of adoptive and foster children with individuals cohabiting outside of a valid marriage.

II. ACT 1 DOES NOT REDUCE THE POOL OF SUITABLE APPLICANTS OR HARM CHILDREN

Plaintiffs' claim that Act 1 harms children by narrowing the pool of qualified applicants is not undisputedly true because it isn't true at all. This claim stems from the mistaken notion that the State must perform individualized assessments of every individual who expresses an interest in adopting or fostering a child. Limiting, as does Act 1, the expensive and time-consuming investigations of potential foster homes to efficiently identify homes least harmful for children is, of course, rational. Plaintiffs' complaint that Act 1 violates the due process rights of children because it excludes higher risk persons is no more valid then saying the 21 year minimum age and the 65 year maximum age requirements violate due process for reducing the size of the pool. Certainly some adults under age 21 and over age 65 could suitably parent children, but a judgment has been made that, in general, those categories present a higher risk for providing a safe and stable home environment. The same rational would apply to the proscriptions on certain criminals serving as foster parents and even the amount of money budgeted to recruitment because those limitations might reduce the pool of applicants. But like

Act 1, these limitations are not due process violations because they are grounded on a rational basis.

Due process for children in state care does not turn on merely maximizing placements. The state must and does consider short range and long range objects that benefit children when placing them in a foster or adoptive home. Of course, reasonable minds may disagree about how that is achieved without running afoul of due process and equal protection. The licensing of adoptive and foster homes is subject to a complex regulatory process, which includes Act 1, to concentrate DCFS efforts on establishing a pool of applicants best suited to raise children. Ark. Code Ann. §§ 9-28-401, *et seq.* By establishing that it is the state's public policy "to favor marriage as defined by the constitution and laws of this state over unmarried cohabitation with regard to adoption and foster care," and 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," Arkansas voters provide an additional tool to expend resources efficiently by focusing evaluation efforts on married individuals because they are more likely to provide a long-term stable environment for children. Ark. Code Ann. §§ 9-8-301-302. This frees case workers from expending resources evaluating individuals more likely to provide unstable environments, and lowers the risk to children who will be placed. (FCAC MSJ Ex. 19, Faust Dep. at 35:18-36:22, 38:6-17, 39:9-40:4.)

Before Act 1, DHS had already determined that foster families should contain two parents, a mother and a father, because "[b]oth parents are needed in order to provide maximum opportunities for personality development of children in foster care." (FCAC MSJ Ex. 56, DCFS Standards of Approval for Family Foster Homes June 2009 at 9.) Exceptions are made for single-parent households on the basis that an applicant's special qualifications may fulfill the

needs of a particular child in foster care. (*Id.*) DHS has determined that single applicants with professional training, such as nurses, may be desirable for special needs children. Allowing single individuals enlarges the pool for special needs, without subjecting children to the risks of cohabiting environments.

In making these judgments, the State's methodology is not fixed. The legislative and the executive branches have considerable flexibility to increase child placements without necessarily reducing quality. For example, this past year DHS increased the number of child placements and received additional funding without lowering or raising the age requirements or otherwise expanding the pool of applicants to higher risk categories. John Selig, Director of DHS, testified that DHS had seen an increase in the number of adoptions, which he credited to a program that encouraged the involvement of private organizations like, the CALL, which are recruiting more adoptive and foster homes. (FCAC Resp. MSJ Ex. 12, Selig Dep. at 127:21-129:22.) Janie Huddleston, Deputy Director of DHS, testified that this has led to an increase in federal money received by DHS. (FCAC Resp. MSJ Ex. 9, Huddleston Dep. at 78:17-79:8.)

Finally, Plaintiffs have mischaracterized Act 1 as reducing the pool of qualified applicants. As far back as 1986, DCFS has maintained a policy of not placing children in homes where there is a live-in boyfriend or girlfriend. (FCAC MSJ Ex. 15, Davis Dep. at 51:12-52:13, 55:23-56:16, 56:24-57:3.) DCFS case workers would have removed a child from a single-parent foster home if the foster parent began cohabiting because cohabitation would create a high-risk and unstable home environment not in the best interest of the child. (*Id.* at 57:21-58:19.) It is undisputed that since 2005, DCFS has maintained a written policy, set forth in two separate executive directives, that prohibits children under the supervision of DCFS from being placed with cohabiting individuals. (FCAC MSJ Ex. 13, Blucker Dep. at 78:1-15, 81:5-23; FCAC MSJ

Ex. 27, Dep. Ex. 11, Policy Directive; FCAC MSJ Ex. 29, Dep. Ex. 47, Policy Directive.) And DHS has not knowingly placed a child in a foster or adoptive home where individuals are cohabiting in a sexual relationship outside of a valid marriage. (FCAC MSJ Ex. 13, Blucker Dep. at 81:24-82:4; 115:1-5; FCAC MSJ Ex. 30, Dep. Ex. 53; FCAC MSJ Ex. 14, Counts Dep. at 135:11-19, 138:11-18.) Therefore, the passage of Act 1 did not reduce the pool of prospective applicants DHS had previously relied upon as a source for foster placements.

Plaintiffs' also rely on the testimony of Choate and Tanner to prove that foster children in the juvenile detention system are kept in detention longer than their sentence because Act 1 reduces the pool of applicants is grossly exaggerated and taken out of context. (Pls.' Mem. 24.) Far from a common occurrence, Judge Choate explained that he "would hold them over in detention and give the DHS people ***the day*** to find a placement for them." (PLS MSJ Ex. 13, Choate Dep. 118:16-18 (emphasis added).) (See also, *id.* at 119:1-7.) Tanner referenced one extreme case in which DHS had a 3-month delay in finding an appropriate foster placement for a juvenile who had 67 failed foster placements and who "struggled violently with any clinician that tried to approach her." (FCAC Resp. MSJ Ex. 13, Tanner Dep. at 32:1-15.) Tanner acknowledged that the typical rationale for a foster family to refuse to accept placement is because of the juvenile's criminal history. (FCAC Resp. MSJ Ex. 13, Tanner Dep. at 84:23-85:14.) There is certainly no nexus between Act 1 and any past failures by DHS to timely identify a foster home for a juvenile leaving DYS custody and finding foster placements in this context cannot be seriously attributed to the qualification restrictions for licensed foster homes.

Finally, Plaintiffs also argue that Act 1 would force DHS to spend more money if children were not placed in cohabiting environments. But the Chief Fiscal Officer of the Division of Children and Family Services testified that there would be no additional financial

cost if Act 1 continued a current policy of not allowing cohabitants to serve as foster parents. (FCAC Resp. MSJ Ex. 5, Crawford Dep. at 214:19-215:12.)

DHS is not required to undertake a lengthy individualized assessment of every individual who wants to foster and adopt children, especially where fostering and adopting is not a constitutional right of adults or children. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 845 (1977); *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 811 (11th Cir. 2004); *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995); *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989). Rather the state is free to pass regulations, like Act 1 that minimize the risk to the welfare of children in a way that efficiently allocates the state's scarce resources. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 854-59 (1984).

III. ACT 1 DOES NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS BECAUSE IT DOES NOT BURDEN PLAINTIFFS' INTEREST IN PRIVATE CONSENSUAL SEX

Act 1 does not preclude any private sexual act, but instead instructs the state not to place children in a foster or adoptive home with unmarried cohabitants. Act 1 does not ascribe criminal or civil penalties for merely engaging in private sex and it does not discriminate against cohabitants based on their sexual orientation. Here Plaintiffs conflate the right to engage in private consensual sex with their desire to foster children, and are in essence claiming a right to foster and adopt children without regard to the impacts cohabiting environments may have on children in need of stable home environments. But as Plaintiffs admit, there is not "a fundamental right to adopt or foster children or a right to be adopted or fostered." (Pls.' Mem. 54 n.28.) *See also*, *Mullins v. Oregon*, 57 F.3d 789 (9th Cir. 1995); *Lindley v. Sullivan*, 889 F.2d 124 (7th Cir. 1989). Therefore, Act 1 is constitutional because it rests, among other reasons, on the rational basis that, on average, cohabiting environments are less stable and children raised in

those environments have poorer outcomes on a wide range of issues. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss 39 -62; *see* § II, *supra.*) Since there is no fundamental right to adopt or foster children and there is a rational basis, Act 1 must be upheld.

A. Act 1 does not violate the fundamental right to privacy

Even though it is clear that Act 1 does not burden Plaintiffs' rights to engage in any private, consensual, non-commercial acts of sexual intimacy, Plaintiffs argue that *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), invalidating criminal sodomy statutes, should be extended to require the placement of children in cohabiting environments. Plaintiffs' reliance is misplaced because *Lawrence* and *Jegley* held only that states could not criminalize the act of private, sexual intimacy between consenting adults. Act 1 is not a criminal statute and does not proscribe private sexual intimacy between two adults; its focus is on providing the best homes for children. These cases have very narrow holdings and do not embrace Plaintiffs' expansive reading that the state cannot refuse to place minor foster and adoptive children in cohabiting environments. In *Sylvester v. Fogley,* 465 F.3d 851 (8th Cir. 2006), the Eighth Circuit did not construe *Lawrence* to hold that there is a fundamental right to engage in private, consensual sex or that strict scrutiny should apply when implicated. 465 F.3d at 852. Instead, the court applied rational basis in rejecting a police officer's claim that he could not be investigated for having private consensual sex with a crime victim. *Id.*

The Supreme Court in *Lawrence* noted its decision did "not involve minors" and it did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578. Act 1 and the current case certainly involve minors and placing those minors into a formal and legally recognized parent-child relationship. Thus, whatever the contours of the right recognized in *Lawrence* and *Jegely*, it does

not reach the state's authority to regulate foster and adoptive placements. *Lawrence* and *Jegley* should not be extended to paralyze the state from enacting civil statutes to regulate the contours of those relationships to best serve children, which do not criminalize or even prohibit or private, consensual sexual behavior.

Contrary to Plaintiffs' characterization of *Department of Human Services v. Howard,* 367 Ark. 55, 238 S.W.3d 1 (2006), the Arkansas Supreme Court did not rely upon *Jegely's* right of private intimate association in affirming the trial court's striking a regulation prohibiting foster placements in households with a homosexual. Plaintiffs' argument that *Howard* gives same-sex couples a right to foster and adopt children rests entirely on the concurring opinion of one Justice in *Howard* who felt that a regulation by the Child Welfare Agency Review Board which specifically prohibited homosexuals from serving as a foster parent violated equal protection and the right to private sexual intimacy. But even though these issues were presented, the full court declined to address them and invalidated the regulation for violating separation of powers because the state did not submit evidence justifying the regulation based on health, safety, and welfare. Interestingly, the trial judge in the *Howard* case expressly ruled that the regulation did not violate equal protection or the right to intimate association. *Howard v. Child Welfare Agency Review Bd,* No. CV 1999-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004). That is the same trial court decision from which the Plaintiffs want to impose the fact findings on this case. But as noted, even on that record, which Plaintiffs' view so favorably, the judge rejected the equal protection and intimate association claims.

The other two cases stressed by Plaintiffs are inapposite to their claims. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) dealt with a criminal statute prohibiting the sale of contraceptives to unmarried persons and *Roberts v. U.S. Jaycees,* 468 U.S. 609 (1984) held that females should be

allowed to join the Jaycees. These cases are not analogous to Plaintiffs' claim that Arkansas must place children in cohabiting environments to avoid violating the right of adults to engage in private consensual sex.

Plaintiffs' argument that Act 1 places a special burden on homosexuals because persons cohabiting in a same-sex relationship cannot marry under Arkansas law fails for at least three reasons. First, Act 1 applies equally to individuals cohabiting with a person of the opposite or same sex. Second, that individuals of the same-sex cannot marry is attributable to Arkansas law defining marriage as between one man and one woman, not Act 1. See Ark. Code Ann. § 9-11-107(b) (codifying Act 144 of 1997, § 2); Ark. Code Ann. § 9-11-109 (codifying Act 144 of 1997, § 1); Ark. Const. amend. 83, §§ 1-2. Third, Plaintiffs, have not challenged the constitutionality of the Arkansas marriage laws and have therefore failed to state a claim.

B. Intervenors are not bound by the trial court factual findings of a case decided six years ago

Plaintiffs' argument that the parties here are bound by *Howard v. Child Welfare Agency Review Board,* No. CV 1999-9881, 2004 WL 3200916 (Ark. Cir. Ct. Dec. 29, 2004) is incorrect. Based on the factual findings *in that case*, the court found no evidence that placing a child in a household where a member of the household was homosexual would harm the welfare of children. The argument is off point already because Act 1 does not turn on the sexual orientation of household members; but on the relatively poorer outcomes for children associated with living in a cohabiting environment. And the plethora of evidence in support of that fact *in this case* makes Act 1 rationally related to a legitimate government interest, and the significance of the *Howard* trial court's factual findings irrelevant.

Additionally, the parties and this court are not bound to the *Howard* record or to the "facts" either stipulated to by the parties or found by Judge Fox six years ago because for

starters, the plaintiffs and some of the defendants are different. While *Howard* involved a challenge to an administrative rule, this case involves a challenge to a legislative act passed on the initiative of the people of Arkansas that applies to all regardless of sexual orientation. And of course, as noted, there is an entirely different record. *Howard's* dated and limited record regarding the effects of homosexuals on children living in the same household does not bind Arkansans in perpetuity from regulating living environments for children whenever an adoptive or foster applicant claims he is having an intimate relationship outside of marriage. Contrary to Plaintiffs characterization, this is not "déjà vu." This is a different case with different issues, and an entirely different record demonstrating the relative instability of cohabiting environments.[4]

Plaintiffs assert that the *Howard* trial court's ruling that the presence of a homosexual was unrelated to parenting children coupled with Defendants experts' failure to offer evidence critical of homosexual parenting means that Act 1 cannot be applied to same-sex cohabitants who want to foster or adopt children. Aside from the fact that this wrongly shifts the burden of proof, Act 1 does not discriminate between same-sex and opposite-sex cohabitants and does not need expert evidence to show a peculiar failure in parenting by cohabiting homosexuals. But if the Defendants had such a burden, it is satisfied by Plaintiffs experts' admissions and citations to studies that same-sex relationships are less stable and more violent. (For example see, FCAC MSJ Ex. 42, Peplau Expert Report 4 § II(B(2); FCAC MSJ Ex. 20, Lamb Dep. at 123:1-124:2; FCAC MSJ Ex. 60, Lawrence A. Kurdek, *What Do We Know About Gay and Lesbian Couples?* 14 Current Directions in Psychological Science 251, 253 (2005).) And in making this curious argument, Plaintiffs simply ignored the conclusions drawn by Defendants' experts that there is

[4] It is significant to note that Judge Fox ruled that the cases were not "related" and transferred this case back to this court to which it was originally assigned. (*See* FCAC Resp. MSJ Ex. 18, Order dated 1/5/09.)

less stability and violence in same-sex relationships. (See FCAC MSJ Ex. 49, Deyoub Expert Report 3 § II(4) and 5 § III(4); FCAC MSJ Ex. 55, State's Resp. to Pls.' Third Set of Interrog., Nos. 8 – 10; FCAC MSJ Ex. 44, Morse Expert Report 7 § C(1).)

C. Plaintiffs' right to engage in intimate relationships does not mean Arkansas must screen cohabiting individuals for foster and adoptive care

Plaintiffs argue that because Act 1 infringes on their right to engage in private consensual sex, strict scrutiny must be applied and Act 1's categorical exclusion of cohabitants, without an individual assessment of their suitability to parent, is not narrowly tailored to serve a compelling state interest. But as shown above, the right to engage in private intimate sex does not extend to mandating the placement of foster and adoptive children in cohabiting environments. Thus Plaintiffs' further reliance on *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Grutter v. Bollinger*, 539 U.S. 306 (2003) is misplaced because both of those cases required strict scrutiny and case by case evaluations because the exclusions there were based on a *suspect class* (race). The Plaintiffs have not argued that they are a suspect class because cohabitants seeking to foster and adopt, regardless of their sexual proclivities, are not a suspect class.[5]

Plaintiffs curiously rely on *Reno v. Flores*, 507 U.S. 292 (1993), where the court ruled that juveniles arrested by INS did not have a fundamental right to be released into the "non-custodial" care of an adult instead of being placed in a state custodial institution. There is no constitutional requirement that the State "substitute, wherever possible, private nonadoptive custody for institutional care." *Id.* at 304. In *Reno*, the Court found that the state did not have to provide individual custody hearings for each juvenile to determine whether his individual interests would be better served by detention in a facility or release to a home with a responsible adult. *Id.* at 305 & 308. *Reno* deflates their claim because as INS did not have to conduct

[5] Homosexual persons do not constitute a protected class for equal protection analysis. *Jegley v. Picado*, 349 Ark. 600, 634, 80 S.W.3d 332, 351 (2002)

individual hearings, Arkansas does not have to perform an assessment of all cohabiting applicants to foster or adopt a child.

IV. ACT 1 DOES NOT VIOLATE A FUNDAMENTAL RIGHT TO PARENTAL DECISION MAKING

Plaintiffs' Fifth and Sixth claims are that Act 1 violates their fundamental right of parental autonomy to designate in their wills certain cohabiting individuals to be adoptive parents for their children. (Pls.' Mem. 60.) The Scroggins and Mitchells' liberty interests includes the right of parents to "establish a home and bring up children," the right "to control the education of their own," *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), and the right "to direct the upbringing and education of children under their control," *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). A fit parent also has a liberty interest in making decisions concerning the care, custody, and control of her children. *Linder v. Linder*, 348 Ark. 322, 342-43, 72 S.W.3d 841, 851-52 (2002); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). Contrary to Plaintiffs' argument, that interest has never been extended to allow deceased (or even living) parents to determine who will adopt their children.

Plaintiffs rely heavily on two state court decisions, *Bristol v. Brundage,* 589 A.2d 1 (Conn. App. Ct. 1991) and *Comerford v. Cherry,* 100 So.2d 385 (Fla. 1958) for the principle that courts must be able to consider their testamentary wishes about who should adopt their surviving children. (Pls.' Mem. 60-61.) But the question in both of those cases was whether to consider the parents' testamentary wishes as to who should be named as a guardian of their children. Act 1 does not contradict those cases because it places no restriction on guardianships. Plaintiffs cite no authority regarding a parent's interest in making a testamentary designation for the care and custody of their children that conflict with the language in Act 1.

Plaintiffs also rely on *Linder,* 348 Ark. at 342-43, 72 S.W.3d at 851-52 and *Troxel,* 530 U.S. at 65-66 which hold that courts must give presumptive deference to a fit parent's decisions regarding the care and custody of their minor children. (Pls.' Mem. 60-61.) Both *Linder* and *Troxel* involved a living parent who refused to permit her children to visit their grandparents -- who were parents of the children's deceased father. The courts found that due process required deference to be given to the decisions of the fit and living biological parent concerning who could visit with their children. It should be carefully considered that *Linder* and *Troxel* rest on the reality that only a living parent can evaluate whether custody is appropriate at the time a decision regarding custody is made. Moreover, *Linder* and *Troxel* do not recognize that deceased parents have a liberty interest that courts must give special weight to their *adoptive* designations concerning their surviving children. The Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) made clear that if there is no textual or Supreme Court decisions providing a "careful description of the asserted fundamental liberty interest" there is no such substantive liberty interest. *Id.* at 721. Plaintiffs' claims here fail as a matter of law because no constitutional text or court has carefully described any liberty interest in the consideration of testamentary designations of adoptive parents.

Unlike here, *Linder* and *Troxel* were not dealing with the state's responsibility to place a child in a permanent home through adoption where both parents were dead. And those cases did not consider the wishes of a deceased parent who could no longer make contemporaneous judgments about who should become permanent legal parents of her children. The weight of a deceased parent's judgment regarding permanent custodial care is necessarily diminished because deceased parents cannot contemporaneously evaluate the wisdom of their designation at the time permanent custody actually occurs. In fact, *Linder* and *Troxel* cut deeply across

Plaintiffs' position. Those courts gave no consideration whatsoever to the deceased parent's desires regarding who should visit with the surviving children, even though it was the parents of the deceased who were seeking visitation rights.

To the extent some degree of constitutional presumption regarding permanent custody survives a parent; Act 1 allows a court to give deference to the Scroggins and Mitchells' wishes through guardianships, while respecting the state's heightened interest in placing a child in a higher-risk environment. In *Troxel,* the Supreme Court did not say that the state was not able to intervene at all in custody decisions of fit parents: "The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the mother]'s determination of her daughters' best interests." 530 U.S. at 69. Here, Act 1 certainly gives special weight to a deceased parent's wishes regarding custody of their surviving children through guardianship.

Act 1 strikes the proper balance between parental wishes (even the wishes of deceased parents) and the state's interest in the child's welfare. Since cohabiting environments are a higher risk for children, the state has an interest in the child's welfare should it become jeopardized during the guardianship. While the state would also have an interest in the welfare of a child adopted into a cohabiting environment, the state would face the imposing hurdle of terminating parental rights of the adoptive parent should the child need to be removed. Intervening in a guardianship is easier than terminating parental rights if the child's welfare is compromised. (FCAC Resp. MSJ Ex. 2, Choate Dep. at 97:13-98:3.) And in addition to statutory accountability, courts can craft guardianships to allow for protective oversight and reporting requirements, whereas there is none of that if the child is adopted. *(Id.)*

Thus, by allowing guardianship exceptions to cohabiting placements, the state strikes a balance between satisfying parental designations of caregivers and the state's interest in the well-being of the child. *Smith v. Thomas,* 373 Ark. 427, 433, 284 S.W.3d 476, 480 (2008) ("[I]n both custody and guardianship situations, the child's best interest is of paramount consideration, and the statutory natural-parent preference is one factor. However, that preference is ultimately subservient to what is in the best interest of the child."); *Blunt v. Cartwright,* 342 Ark. 662, 669, 30 S.W.3d 737, 741 (2000) ("Indeed, any inclination to appoint a parent or relative must be subservient to the principle that the child's interest is of paramount consideration."). Act 1 balances the natural parents' preferences with the paramount interests of the child's welfare.

Act 1 does not prevent the Scroggins and Mitchells from making arrangements for the care of their children with certain individuals if they should become unable, because Act 1 does not apply to guardianships. Since Act 1 does not affect the guardianship of minors, Plaintiffs have no basis for their contention that Act 1 does not give appropriate weight to their ability to designate people of their choosing to care for their children.

V. ACT 1 DOES NOT TREAT SIMILARLY SITUATED CHILDREN DIFFERENTLY

Plaintiffs contend that Act 1 violates the minor Scroggins and Mitchell children's rights to equal protection under the United States and Arkansas constitutions because surviving children whose parents designate a cohabiting caregiver cannot have that person adopt them, while surviving children whose parents designate a non-cohabiting caregiver can have that person adopt them. This different treatment, they argue, can only be justified by heightened scrutiny. Plaintiffs' claims fail because Act 1 does not does not discriminate against a protected or quasi-protected class, infringe upon a fundamental right, or treat similarity situated children

differently. To the extent it treats children differently; it is rationally related to a legitimate government interest in protecting the welfare of children and even heightened scrutiny.

Act 1 does not infringe a fundamental right because the minor children in this context are not a protected class, and as noted in point IV above, there is no fundamental right that a court consider his parents' testamentary designation for adoption. There is no right to be adopted and the court's consideration of such a single factor when granting adoption should not be identified as fundamental. Adoption is a mechanism of the state and something the state decides as it deems in the child's best interest. *Smith v. Thomas,* 373 Ark. 427, 433, 284 S.W.3d 476, 480 (2008); Ark. Code Ann. §§ 28-65-105, 28-65-201, 28-65-210. To the extent such designations are accorded any deference, Act 1 respects the parental choice of caregivers without restricting guardianships, and balances the state's interest in protecting children who are subjected to the higher risk of being placed in a cohabiting environment. See point IV, *supra.*

The equal protection claims here slip in the blocks because Act I does not treat similarly situated children differently. Equal protection "requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and conditions." *Engquist v. Oregon Dep't of Agriculture*, 128 S. Ct. 2146, 2153 (2008) (citations and quotation marks omitted). Act 1 does not discriminate against any class of surviving children because all surviving children are treated the same under Act 1, regardless of who their parents have suggested as future caregivers. It does not preclude guardian placements of any children with cohabitants or non-cohabitants, and it

precludes all children from being adopted by cohabitants. It does not allow some children to be adopted by cohabitants, and preclude to others the same. Because Act 1 does not treat similarly situated surviving children differently, there is no differential classification to review under any standard and these claims falter at the gate.

Plaintiffs' reliance on *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972), *Mills v. Habluetzel,* 456 U.S. 91, 99 (1982); *United States v. Clark,* 445 U.S. 23, 27 (1980), and *Gomez v. Perez*, 409 U.S. 535, 538 (1973) are inapposite to Plaintiffs' claims. These cases invalidated laws that deprived illegitimate children of the legal advantages of legitimate children without any basis except to benefit legitimate children at the expense of illegitimate children. Unlike Act 1, those laws were not calculated to protect children from harm, but were calculated to punish one class for the benefit of another. Likewise, Plaintiffs' citation of *Plyer v. Doe,* 457 U.S. 202 (1982) does not help them. There, classifying children to grant an education to one and denying it to the other is not analogous to Act 1, which treats all children equally. Act 1 does not create separate classes of children, and Plaintiffs here are not deprived of inheritance shares or educational rights because they are illegitimate or not legally in the country. Act 1 only identifies once class of children, surviving children, and Act 1 does not treat them differently from other children with whom they are similarly situated.

But even if the court were to consider the tortured rationale that the choices of the parents creates separately treated classes of children, Act 1 still passes constitutional scrutiny. This is so because Act 1 is strongly related to the governments' interest in child welfare. As established throughout the briefing, the record bears out that in married environments, where the parents are legally committed children are more likely to receive and learn responsible parenting. Moreover, it is rational to conclude that children on average will do better and be safer when not subjected

to the risks and instability that is disproportionately associated with cohabiting environments.

Therefore, the minor Plaintiffs have not been denied equal protection and are not entitled to summary judgment on claims Seven and Eight.

VI. ACT 1 WOULD SATISFY HEIGHTENED SCRUTINY

Although it is plain that the statute does not infringe fundamental rights or target a protected class, Act 1 would still satisfy heightened or strict scrutiny because it is substantially related to an important government interest and is narrowly tailored to serve a compelling government interest. The legitimate government interest in child welfare, especially as it relates to child safety and development are just as accurately described as important or compelling. Act 1's restriction is narrowly tailored given that child welfare is at stake and the obvious difficulty in knowing whether one is truly placing a child in a suitable cohabiting environment. Act 1's restriction on placing children in cohabiting environments could not be less restrictive given that no child's welfare should be subjected to a known heightened risk of cohabiting environments. Plaintiffs' insistence that allowing all cohabitants to be screened to identify low risk cohabiting environments as least restrictive means on the alleged right of cohabitants to foster and adopt children would take too great a liberty with the welfare of children. All screening is fallible and when the day would come that a child is seriously harmed in a cohabiting environment, it will not answer to say that the state could have employed some other means of placing children other than restricting cohabitants altogether. Perfect tailoring is not possible, and given the interest in every child's welfare, there is not a workable least restrictive means.

Conclusion

The Plaintiffs cannot meet their burden on summary judgment to show that Act 1 is void of any hint of deliberate and lawful purpose. The court's role is to "consider whether any rational basis exists which demonstrates the possibility of a deliberate nexus with state

objectives, so that the legislation is not the product of utterly arbitrary and capricious government purpose and void of any hint of deliberate and lawful purpose." *Arkansas Hosp. Ass'n v. Arkansas State Bd. of Pharmacy,* 297 Ark. 454, 456, 763 S.W.2d 73, 74 (1989). They cannot meet their burden of proving that the act is not rationally related to achieving *any* legitimate objective of state government under any reasonably conceivable state of facts. *Id.* To have succeeded, Plaintiffs would have had to show that placing children in cohabiting environments would never pose any additional risks to children. Moreover, legal rationality is not lost because the Plaintiffs do not agree with the rationale of the legislation because "the interpretations and choices for kinds and types of legislation for the legislature are many and whatever choice, be it a mistake or not, is constitutional if that choice is rational." *Streight v. Ragland,* 280 Ark. 206, 216, 655 S.W.2d 459, 465 (1983). Few laws, if any, receive unanimous approval, but it cannot be doubted that Act 1 rests on a rational basis.

Plaintiffs have a political disagreement with Act 1, but they don't have a constitutional grievance. Their motion for summary judgment must be dismissed, and Intervenors' Motion for Summary Judgment and Motion to Dismiss should be granted.

Respectfully submitted this the 1st day of March, 2010.

By: Martha M. Adcock

Martha M. Adcock, AR Bar No. 83002
Family Council
414 S. Pulaski, Suite 2
Little Rock, AR 72201
(501) 375 7000
(501) 375-7040 Fax
Local Counsel

Byron J. Babione, AZ Bar No. 024320*
Sara F. Tappen, WY Bar No. 6-4395*
Brian W. Raum, NY Bar No. 2856102 (*Of Counsel*)
Alliance Defense Fund
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax

Attorneys for Intervenors
Family Council Action Committee and Jerry Cox
**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by email on the following:

Dustin McDaniel
C. Joseph Cordi, Jr.
Colin R. Jorgensen
Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201
Joe.Cordi@arkansasag.gov
colin.jorgensen@arkansasag.gov

Attorneys for Defendants

Leslie Cooper
Rose Saxe
Christine Sun
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
lcooper@aclu.org
rsaxe@aclu.org
csun@aclu.org

Marie-Bernarde Miller
Daniel J. Beck
Bonnie Johnson
Williams & Anderson PLC
111 Center Street, Suite 2200
Little Rock, AR 72201
mmiller@williamsanderson.com
DBeck@williamsanderson.com
bjohnson@williamsanderson.com
nmoler@williamsanderson.com

Garrard R. Beeney
Stacey R. Friedman
Jennifer M. Sheinfeld
Stephen Ehrenberg
Christopher Diffee
Emma Gilmore
Angelica Sinopole
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
Beeneyg@sullcrom.com
FriedmanS@sullcrom.com
sheinfeldj@sullcrom.com
ehrenbergs@sullcrom.com
diffeec@sullcrom.com
gilmoree@sullcrom.com
sinopolea@sullcrom.com

Attorneys for Plaintiffs

on this the 1st day of March, 2010.

Martha M. Adcock

Martha M. Adcock

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

Sheila Cole, *et al.*,

Plaintiffs,

vs.

The Arkansas Department of Human Services, *et al.*,

Defendants,

Family Council Action Committee, *et al.*,

Intervenors.

Case No. CV 2008-14284

INTERVENORS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

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INTRODUCTION

Plaintiffs have asked this Court to veto the political process by which Act 1 was enacted because they deem it to be entirely insufficient, as if rendering absurd results, when in their view the Act serves "no permissible purpose whatsoever." In Plaintiffs' minds there can be no child welfare purpose for a classification denying them their perceived "right" to foster or adopt children in Arkansas while cohabiting with a sexual partner. Nonetheless, no fundamental right or suspect class is implicated by Act 1, and the Act *is* rationally related to the governments' interest in promoting child welfare. The passage of the Act 1 reveals Arkansans' recognition that family structure *does* matter. And indeed, there is strong scientific consensus that family structure matters for the social, psychological, and educational welfare of children. The undisputed facts show that children living in cohabiting households suffer lower child-adjustment outcomes and are at a higher risk of abuse than children in both married and single-parent households. Instead of addressing the blatant fact that no fundamental right is implicated by the Act, nor any suspect class employed, Plaintiffs continually mischaracterize *their rights* as they seek to impose on the Act a higher standard of review than is warranted. Plaintiffs also fail to remedy or adequately respond to their lack of standing on all claims alleged in the Third Amended Complaint. Intervenors' Motion for Summary Judgment and Motion to Dismiss should be granted, and Plaintiffs' claims should be dismissed on the merits.[1]

[1] Intervenors may refer to their motion for summary judgment and motion to dismiss memorandum, as well as their response to Plaintiff' motion for summary judgment, and hereby fully incorporate these papers by reference in reply to the Plaintiffs' opposition to summary judgment. Intervenors also incorporate all of the State-Defendants' arguments and supporting papers in response to Plaintiffs' motion for summary judgment and in reply to Plaintiffs' opposition to summary judgment to the extent they are consistent with Intervenors' positions.

I. PLAINTIFFS' CLAIMS ARE NON JUSTICIABLE

Arkansas has adopted the federal "case and controversy" requirement of Article III of the United States Constitution such that "[o]nly a claimant who has a personal stake in the outcome of a controversy has standing to invoke jurisdiction of the circuit court in order to seek remedial relief; his injury must be concrete, specific, real and immediate rather than conjectural or hypothetical." *Estes v. Walters*, 269 Ark. 891, 894, 601 S.W.2d 252, 254 (Ark. App. 1980) (citing *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 714 (D.C. Cir. 1977)). Plaintiffs do not have standing to challenge the constitutionality of Act 1 because they have not suffered any concrete, specific, real or immediate injury in relation to the passage of the Act.

A. Plaintiffs Cole and W.H.'s claims are moot

This court need not address Cole and W.H.'s claims because they have already received the relief they requested and the issues they present are now moot. *Shipp v. Franklin*, 370 Ark. 262, 267, 258 S.W.3d 744, 748 (2007). A case becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy. *Id.* To maintain an action in Arkansas courts "there must exist a justiciable controversy that [the court's] decision will settle." *Richardson v. Arkansas Dep't of Human Servs.*, 86 Ark. App. 142, 143, 165 S.W.3d 127, 128 (2004).

Here, while Cole and W.H. might have had standing at the filing of this lawsuit, Sheila Cole was subsequently awarded legal custody of W.H. on January 13, 2009, a fact not disclosed by Plaintiffs at the March 2009 hearing on the motions to dismiss. By the time Cole was deposed in September 2009, W.H. was no longer in the protective custody of the Arkansas DHS. (FCAC MSJ Ex. 2, Conf. Cole Dep. at 23:13-24:2.) Since W.H.'s ICPC case in Benton County was already closed, and because Cole believed that W.H.'s ICPC case in Oklahoma would be closed sometime in October 2009, Cole admitted at her September 2009 deposition that she was

already taking steps to adopt her granddaughter in Oklahoma. (*Id.* at 17:10-18:7; 24:3-13, 24:24-25:9.) Simply put, W.H. is no longer subject to the laws of the State of Arkansas or the oversight of Arkansas courts and agencies.

Plaintiffs incorrectly cite *Steger v. Franco*, 228 F.3d 889 (8th Cir. 2000), as standing for the proposition that once a court determines that a party has standing in a case there can be no legal basis to reconsider whether there remains a justiciable controversy. In *Steger*, the Court reviewed de novo a district court's determination that plaintiffs lacked standing to seek injunctive relief under the ADA, stating: "Because standing is determined as of the lawsuit's commencement, we consider the facts as they existed at that time." *Steger*, 228 F.3d at 893 (citing *Park v. Forest Serv.*, 205 F.3d 1034, 1038 (8th Cir. 2000)). A simple review of *Park v. Forest Service* demonstrates that the *Steger* Court was merely reaffirming the principle that if standing does not exist at the time of the filing of a lawsuit, it cannot not be gained *as the case progresses*. The *Steger* court, however, did not address the question of mootness when standing can most certainly be lost *as the case progresses*. According to the Plaintiffs, there never could be a basis for finding a case moot once the parties initially allege an injury in fact, regardless of any change in the underlying facts supporting the claims. (*See* Pls.' Opp. Mem. 10 and 15, where Plaintiffs confuse the court's personal and subject matter jurisdiction with the issue of mootness due to changed circumstances.) Plaintiffs' arguments are at odds with the longstanding principle that courts will not render advisory opinions when the issues before the court become moot. *Shipp*, 370 Ark. at 267, 258 S.W.3d at 748; *Richardson*, 86 Ark. App. at 143, 165 S.W.3d at 128.

Just as in *Richardson*, where the appeal of a daughter's removal from her mother's custody was found to be moot when an agreement was reached to restore custody to the mother,

because Cole has gained custody of W.H. and is pursuing adoption under the laws of the State of Oklahoma, "a decision on the merits . . . will have absolutely no legal effect on the issue of [the child's] custody." *Richardson*, 86 Ark. App. at 143, 165 S.W.3d at 128. Plaintiffs' argument that this Court's decision on the merits of Cole and W.H.'s claims "would serve as evidence that could benefit Plaintiff Cole's finalization of W.H.'s adoption in the Oklahoma adoption proceeding," is conspicuously devoid of any explanation as to how the constitutionality of an Arkansas statute could have any legal effect on the adoption of a child in Oklahoma. (Pls.' Opp. Mem. 16.) Cole's qualification as an adoptive parent under the laws of the state of Arkansas is plainly irrelevant to her qualification as an adoptive parent under the laws of the state of Oklahoma.

Furthermore, because Cole is not (and never has been) a resident of the state of Arkansas, Arkansas courts would have no jurisdiction over her adoption of W.H. even if she now alleged that she wished to adopt W.H. under Arkansas law. Pursuant to Arkansas' Revised Uniform Adoption Act, the state has jurisdiction over the adoption of a minor *only* if the person seeking to adopt the child, or the child, is a resident of this state. *See* Ark. Code Ann. § 9-9-205(a)(1). Cole and W.H.'s claims should be dismissed now that Cole has custody of W.H. in Oklahoma because there remains no justiciable controversy before the Court. Remarkably, Plaintiffs' desperate and crafty attempt to join additional child plaintiffs to this lawsuit just one day after all parties had submitted summary judgment motions to the Court, and their outlandish "sur-reply" to Defendants' motions to strike, expose their frantic recognition that the due process claims presented by W.H. have now become moot.

A number of the other Plaintiffs have also alleged under the First and Second claims that Act 1 violates the due process rights of children in state care by reducing their chances of being

fostered or adopted. Since the claims of W.H., a child formerly in state care, are now moot, none of the remaining Plaintiffs can bring suit because they are not children in state care and do not otherwise have a "close relationship" with a child in state care. "Constitutional rights, including the guarantees of due process, are personal rights and may not be asserted by a third party." *Matter of Adoption of B.A.B.*, 40 Ark. App. 86, 88, 842 S.W.2d 68, 69-70 (1992) (quoting *Cox v. Stayton*, 273 Ark. 298, 302, 619 S.W.2d 617, 619-20 (1981)).

The only exception to this rule is where "the party asserting the right has a 'close' relationship with the person who possesses the right," in which case they may assert third-party standing. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *see also Irving v. Clark*, 758 F.2d 1260, 1267 (8th Cir. 1985) (considering "the relationship of the litigant to the person whose right he seeks to assert" for purposes of determining third-party standing). Plaintiffs' claims that Act 1 "deprives children in State care of their constitutional right to due process" (*see* Pls.' Mem. of Law in Supp. of Mot. for Summ. J. 42) is foreclosed by *Kowalski*, where the U.S. Supreme Court held that attorneys lacked third-party standing to challenge a Michigan statute on behalf of hypothetical future clients. 543 U.S. at 131. The attorneys in *Kowalski* argued a "requisite closeness" to "unascertained Michigan criminal defendants" who might be future clients. *Id.* at 130. The Supreme Court concluded that, far from having a "close relationship with their alleged clients," the attorneys had "no relationship at all." *Id.* at 131 (internal quotations omitted). The same is true here. Plaintiffs have absolutely no relationship with the children whose rights they purport to be asserting. Plaintiffs are neither the adoptive or foster care parents of these children. In fact, none of the Plaintiffs have even met the children in state care whom they claim they would adopt "but for Act 1." Because these Plaintiffs have "no relationship at all" with the children in state custody, they cannot claim standing to assert their constitutional rights.

Finally, Plaintiffs argue that the Court should not dismiss Cole and W.H.'s claims because they fall within the ambit of the public interest exception. (Pls.' Opp. Mem. 18, 19.) Although Plaintiffs cite to seven decisions where the Supreme Court recognized the applicability of the public interest exception, Plaintiffs noticeably did not direct this Court to the one ruling which is most on point with the facts in this case. In *Stair v. Phillips*, 315 Ark. 429, 430, 867 S.W.2d 453, 454 (1993), a former stepfather appealed from the denial of his motion to intervene in a protective services custody petition concerning the two natural children of his former wife. The Court held that the lower court correctly found the couple was divorced and that this finding rendered moot any interest the stepfather asserted in the matter affecting the natural mother's children. The Court refused to review the matter under the public interest exception because the stepfather's attempt to intervene in custody proceedings was not a matter of public interest and because as a former stepparent he had no legal rights in the children. *Id.* at 435, 867 S.W.2d at 456.

Likewise, here, Cole's desire to adopt her granddaughter is not a matter of public interest and she has no constitutional or statutory right to adopt the child. Cole and W.H.'s very personal claims do not "raise considerations of substantial public interest" and, now that Cole has achieved her goal of obtaining custody of her granddaughter, an advisory ruling on the merits of their claims would not "prevent future litigation." *Honeycutt v. Foster*, 371 Ark. 545, 548, 268 S.W.2d 875, 878 (2007). There is no one else attempting to adopt the child or remove her from Cole's care and custody. No future litigation regarding the custody of the child is in sight. The only legal proceeding in which W.H. might participate in the near future would be the finalization of her adoption by Cole in an Oklahoma court. Plaintiffs Cole and W.H.'s claims should be dismissed as moot as they do not fall within the public interest exception.

B. None of the remaining Plaintiffs have been injured by Act 1 and their claims are not ripe for review

Plaintiffs Stephanie Huffman, Wendy Rickman, Shane Frazier, Curtis Chatham, Frank Pennisi and Matt Harrison claim, in counts 9 and 10, that the enforcement of Act 1 will violate their rights to engage in private, consensual, non-commercial acts of sexual intimacy and maintain their relationships under the federal and state constitutions' due process and equal protection clauses. These Plaintiffs, however, lack standing because their alleged injuries are not "concrete, specific, real and immediate" but only "conjectural or hypothetical." *Estes*, 269 Ark. at 894, 601 S.W.2d at 254. Because it is not known whether Rickman, Frazier, Chatham, Pennisi or Harrison would qualify under the minimum licensing standards for foster or adoptive parents, it cannot be affirmatively stated that Act 1 would be the reason they are precluded from fostering or adopting. At the motion to dismiss hearing, these myriad requirements were not before the court and have only surfaced in discovery. Each of these Plaintiffs might be denied foster or adoption certification for any number of reasons (all unrelated to cohabitation) under the applicable regulations, including inadequate compliance for the physical standards of their home, insufficient financial resources, or a social worker's unfavorable home study report.

Although Plaintiffs believe that they may simply assert that it would be "futile" for them to apply to serve as foster or adoptive parents, the Arkansas Supreme Court limited the extension of standing in *Howard* to individuals "within the class of persons affected by the regulation" — individuals whom the Court recognized were in fact "seeking to become [] foster parent[s]." *Dep't of Human Servs. and Child Welfare Agency Review Bd. v. Howard*, 367 Ark. 55, 59 n.2, 238 S.W.3d 1, 4 (2006). Plaintiffs Rickman, Frazier, Chatham, Pennisi and Harrison lack standing because none of them have ever sought to adopt or foster a child in the State of Arkansas. During the course of discovery, it was revealed that none of these Plaintiffs had ever

attempted to contact DHS even about the *possibility* of becoming foster or adoptive parents. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ I, I(C).) These Plaintiffs' fleeting desire to adopt, unaccompanied by even a single attempt to contact any child welfare agency in the state about becoming foster or adoptive parents cannot put them within the class of persons "seeking to [adopt or] become [] foster parent[s]." *Howard*, 367 Ark. at 59 n.2, 238 S.W.3d at 4. While many Americans think about adopting, there is evidence that only a small percentage of these individuals actually *seek to become* adoptive parents. The *Howard* court surely did not intend to extend standing to every person who ever thought that adoption might be something worth looking into someday.

Finally, Stephanie Huffman's hesitation in moving forward with the possibility of expanding her family also precludes her from belonging to the class of persons affected by the regulation: such vacillation cannot be recognized as concretely "seeking to adopt." (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ I, I(B).)

Plaintiffs Meredith and Benny Scroggin, Susan Duell-Mitchell, and Chris Mitchell, and their minor children also do not have standing to enjoin the enforcement of Act 1 because none of them have in fact suffered, and likely ever will suffer, any injury attributable to Act 1. At the time this Court considered the Scroggins and Mitchells' standing on the motions to dismiss, the Court assumed the truth of the allegations that Plaintiffs had designated cohabiting individuals as adoptive parents by testamentary instrument. However, these Parent-Plaintiffs revised their wills after the suit was commenced to request that the designated guardians also take steps to adopt their surviving children. The Court should reconsider the Plaintiffs' standing in light of these facts uncovered during discovery. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ I, I(D).)

A litigant must have suffered an injury as a member of a class affected to have standing to challenge the validity of a law. *Arkansas Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 363, 166 S.W.3d 550, 554 (2004). Plaintiffs' reliance on *Jegley v. Picado*, 349 Ark. 600, 80 S.W. 3d 332 (2002), is misplaced because none of the Parent-Plaintiffs' can demonstrate that they *currently* belong to a class affected by Act 1 since their claims are premised on the speculative occurrence of an improbable sequence of events. The fact that the Parent-Plaintiffs' (and their children) might "some day in the future" belong to a class affected by Act 1, based on the unlikely event that a multitude of unfortunate circumstances might simultaneously occur in their lives and the lives of their children,[2] is not sufficient to grant them standing in the present case: their claims are impeded by the threshold justiciability requirement of "ripeness." Ripeness poses the question of whether a claim was brought too early. A future-looking, hypothetical threat is not enough. A real "controversy" must be definite and concrete, admitting of specific relief and not an advisory opinion issued for hypothetical facts. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-1 (1937). In other words, a case is ripe only if the issues are *not* speculative or hypothetical. *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996); *see also Quapaw*

[2] As explained in Intervenors' Memorandum of Law in Support of Intervenors' Motion for Summary Judgment and Motion to Dismiss at 17, each of these Child- and Parent-Plaintiffs' claims are contingent on the simultaneous occurrence of *all* of the following events: 1) both of a Child-Plaintiff's natural parents would have to die or become incapacitated at the same time, while the Child-Plaintiff is still a minor; 2) the designated adoptive parent would still have to be willing and able to adopt the minor Child-Plaintiff at the time of her parents' death or incapacity; 3) the designated adoptive parent would still have to be cohabiting at the time of the parents' death or incapacity; 4) the designated adoptive parent would have to qualify for and obtain certification by meeting every other requirement set forth by a licensed placement agency to adopt a child in the State of Arkansas, and 5) a court would have to determine that it is in the best interest of the child to be adopted by the designated adoptive parent, rather than remaining in their custodial care in a guardianship relationship. In addition, in order for the Scroggins and their children to belong to a class affected by Act 1, Jared Butler would either have to be no longer able or no longer willing to perform his role as named guardian of the Scroggin children, given the fact that Matt Harrison is only named as an alternate to Mr. Butler.

Care & Rehabilitation v. Arkansas Health Servss Permit Comm'n, 2009 Ark. 356, --- S.W.3d ---- (2009). Because the Parent- and Child-Plaintiffs have not suffered, and may never suffer any injury attributable to Act 1, none of their claims are ripe for adjudication, and any ruling on the matters they raise would be merely advisory.

C. Act 1 does not constitute an illegal exaction

Plaintiffs' claim that Act 1 constitutes an illegal expenditure of public funds must be dismissed because the Act does not authorize the taxing or expenditure of any funds. Plaintiffs have never identified how, where or when funds, if any, have been misapplied. Plaintiffs' allegation that Act 1 will reduce the pool of applicants and cause unnecessary expenditures due to children remaining in state custody is a mere conclusion unsupported by specific factual allegations. It is in fact disproven by the Plaintiffs' own acknowledgment that DHS has maintained an internal written policy barring placement of foster children with cohabiting individuals since 2005 which was never rescinded prior to Act 1's enactment. (*See* Pls.' Opp. Mem. App. A at 6, ¶¶ 13 and 15.) Act 1 cannot in fact cause additional expenditure by codifying a previously established policy and practice because it does nothing new to increase expenditures.

Plaintiffs assert Intervenors have invented an incorrect standard for the requirements of an illegal exaction claim. But as Plaintiffs' own citations set forth, plaintiffs in public funds cases "*must show* that the State misapplied or illegally spent money that was lawfully collected." (*See* Pls.' Opp. Mem. 20 (emphasis added).) Plaintiffs have made no such showing, neither have they presented facts anywhere nearing the specificity of the allegations contained in *McGhee v. Arkansas State Board of Collection Agencies,* 360 Ark. 363, 372, 201 S.W.3d 375, 380 (2005) to which they compare their unsupported allegations. Plaintiffs' broad reading of *McGhee* would warrant illegal exaction claims in every complaint filed against a government entity since all

government action is in some degree supported by taxpayer funds. Moreover, in *McGhee*, the court was reviewing an improperly granted motion to dismiss when it found that appellants' complaint contained specific factual allegations that the Board was aware that the check-cashers were charging unconstitutionally usurious fees while continuing to provide them licenses. Here, undisputed evidence exists that Act 1 does not increase expenditures for keeping children in state care by restricting foster placements with cohabiting individuals since this practice and policy pre-dates Act 1. (*See* Intervenors' Resp. to Pls.' Mot. for Summ. J. § II; and FCAC Resp. MSJ Ex. 5, Crawford Dep. at 214:19-215:12.) Ultimately, Plaintiffs' illegal exaction claim is merely derivative of illegal conduct by the State and contingent on Plaintiffs' improbable ability to prevail on any of their claims that Act 1 is unconstitutional. Intervenors respectfully submit that this Court should dismiss Plaintiffs' illegal exaction claims because Plaintiffs do not state and cannot otherwise maintain a cause of action.

II. THE CONSTITUTIONALITY OF INITIATED ACTS MUST BE JUDGED BY STANDARDS APPLICABLE TO THE ACT OF THE LEGISLATURE

By mischaracterizing the individual rights they claim are implicated by the Act, Plaintiffs have sought to impose on Act 1 a heightened standard of review, one which goes well beyond the well-established rational basis review standard applicable to state legislation whenever fundamental rights and suspect classes are not implicated. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983). The Arkansas Supreme Court has long held that state statutes are presumed constitutional and that the burden is on the challenging party to prove a statute's unconstitutionality. *Hamilton v. Hamilton*, 317 Ark. 572, 575, 879 S.W.2d 416, 418 (1994); *Rose v. Arkansas State Plant Bd.*, 363 Ark. 281, 293, 213 S.W.3d 607, 618 (2005). Plaintiffs simply cannot come to terms with the fact that their due process claims do not implicate any fundamental rights, or that cohabiting individuals have never been afforded

"suspect class" status. Because Intervenors have already presented detailed arguments that Act 1 does not infringe on any fundamental right or liberty protected by the Due Process clauses, and that Act 1 does not violate the Equal Protection clauses (*see* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ II, III), Intervenors now address only the Plaintiffs' mischaracterization of the rights they claim are implicated by Act 1 and their subsequent misapplication of heightened levels of scrutiny.

A. Children in protective State custody have no fundamental right to be placed in any particular foster home or to be adopted

Plaintiffs argue that Act 1 violates the State's duty of care to children in their custody by limiting the pool of foster and adoptive parent applicants. In asserting that Act 1 violates the substantive due process rights of children in state custody Plaintiffs rely strictly on cases involving challenges to abusive conduct by government officials, not challenges to state legislation.[3] None of these cases are analogous to the due process challenge Plaintiffs present in this case. Consequently, Plaintiffs incorrectly impose a "professional judgment standard" on Act 1. The standard for a substantive due process violation "differ[s] depending on whether it is legislation or a specific act of a governmental officer that is at issue." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Here, the challenged government action is legislation dealing

[3] In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 193-94 (1989), a mother sued state social workers and other government officials for leaving her child with his father even though they knew he was abusive. In *Youngberg v. Romeo*, 457 U.S. 307, 310-11 (1982), the mother of a mentally disabled child sued state officials for injuries caused to her son while in the custody of the state mental institution. In *Nicini v. Morra*, 212 F.3d 798, 802-03 (3d Cir. 2000), a former ward of the state sued government officials for knowingly leaving him in the custody of an abusive family member. In *Taylor v. Ledbetter*, 818 F.2d 791, 792-93 (11th Cir. 1987), a foster care child sued state and county officials for injuries received due to knowingly placing her with abusive foster parents. In *Lewis v. New Mexico Department of Human Services*, 959 F.2d 883, 885-86 (10th Cir. 1992), a group of minors sued state officials for injuries suffered while in state custody and placed in a private foster care facility. And in *K.H. v. Morgan*, 914 F.2d 846, 848 (7th Cir. 1990), a child sued state officials for placing him with foster parents that they knew were abusive.

with child welfare, it is not abusive conduct by a government official or, as Plaintiffs would have the Court believe, by extension, some sort of a departure from an accepted professional judgment standard.

Where the challenged government action is legislative action, as it is here, the question is whether a fundamental right was infringed and, if so, whether the legislation survives strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). If no fundamental right was infringed, the legislation is merely required to bear a rational relation to a legitimate government interest. *Id.* at 728; *see also Reno v. Flores*, 507 U.S. 292, 305 (1993) ("The impairment of a lesser interest . . . demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose."). Because the state of Arkansas acts in the protective and provisional role of *in loco parentis* for children who due to various circumstances have become wards of the state or lost their natural parents, the State certainly has a legitimate interest in determining what adoptive home environments will best serve all aspects of children's growth and development. *Lofton v. Secretary of Dep't of Children and Family Servs.*, 358 F.3d 804, 809-10 (11th Cir. 2004).

Any professional associational statements and any DHS witness's individual opinion expressing disagreement with the policy adopted by Arkansas voters is entirely irrelevant to the constitutionality of the Act. (Pls.' Opp. Mem. 24.) Legislation is not subject to veto by dissenting experts and professional organizations who disagree with either its means or its ends. *Vance v. Bradley,* 440 U.S. 93, 111 (1979) (under rational basis review, the trial court does not resolve conflicts in the evidence against the legislature's judgment and conclusion). Regardless of any divergent views, the classification is constitutional if "the question is at least debatable."

Citizens for Equal Protection v. Bruning, 455 F.3d 859, 868 (8th Cir. 2006) (citation omitted). (*See also* Intervenors' Resp. to Pls.' Mot. for Summ. J. § I(A).)

Intervenors established in their opening brief that Act 1 amply satisfies the rational basis test. Act 1 seeks to minimize the harm to children by keeping them from being placed in home environments which, on average, are more unstable and volatile than other foster care settings. The Act implicates no fundamental right of children in State custody,[4] and is rationally related to the State's interest in protecting child welfare. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ II(A) and IV.) Plaintiffs argue that the custody cases, presenting the State's longstanding policy that the interests of children are best served by living with a biological parent who is not cohabiting, bear no relevance to how adoption and foster placements should be made. However, this line of cases at the very least demonstrates that the courts recognize that cohabitation *may* be harmful to children and as such are sufficient to show that Act 1 is rationally related to a legitimate government interest. Under the properly applicable due process standard of review, Plaintiffs' due process claims fail and Intervenors are entitled to summary judgment.

B. Children whose parents become incapacitated or are deceased, and for whom a guardian has been designated by testamentary instrument, have no right to be adopted by the designated guardian

The Child-Plaintiffs—whose parents have designated guardians for them by will, and whom the parents have designated to adopt their children upon their death or incapacity—insist that they merely "seek access to the same procedures available to all children." (Pls. Opp. Mem. 43.) Contrary to the Child-Plaintiffs' assertion, Act 1 does not treat them any differently than

[4] Plaintiffs acknowledge that children in State custody have no fundamental right to be fostered or adopted. (*See e.g.* Pls.' Opp. Mem. 2 and 46.) Neither have (or could) Plaintiffs asserted that children in State custody have a fundamental right to the individualized assessment of every individual interested in fostering or adopting children. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § II(D).)

any other children in the State of Arkansas. Since parents and children have no statutory right, cognizable liberty or property interest in directing who, if anyone, will adopt the children upon the parents' death or incapacity, or any such right in having the court consider a designated individual to adopt the surviving children, all children and parents are equally reliant on the court's consideration of their testamentary designations of legal guardians. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ II(A)(1)-(2).)

Try as they might, Plaintiffs cannot acquire the right to bypass statutory adoption requirements by challenging Act 1. It is the State's role to assure that children are placed with individuals who will serve their best interests. Therefore, all adoptions are subject to the State's oversight and scrutiny. No parent in Arkansas can insist that his child be adopted by an individual whom the State has legislatively prohibited from adopting children. Simple examples illustrate this point: a natural mother's designation of a convicted child molester to adopt her child upon her death would under no circumstances be approved by the courts, even if the molester was the mother's brother, and both mother and child wanted the adoption to proceed. Ark. Code Ann. §§ 9-28-409(f)(1)–(h)(2). Neither would a child be able to insist that a 17 year-old cousin be appointed as his adoptive parent when his father dies, simply because the father had named the cousin to adopt the child upon his death. Ark. Code Ann. §§ 9-9-202(3)-(4), 9-9-204(2). The fact that the Child-Plaintiffs claim they have "no control over the marital status of the designated caregivers chosen for them by their parents," does not, as they claim, subject Act 1 to heightened scrutiny. (Pls.' Opp. Mem. 43.) That children do not have any control over the criminal activity or age of their designated caregivers does not equate to a violation of equal protection. (*See* Intervenors' Resp. to Pls.' Mot. for Summ. J. § II.)

C. The right to "family integrity" does not include a fundamental right for children in protective state custody to be fostered or adopted by their relatives

Cole and W.H. maintain that Act 1 violates their right to family integrity because Cole couldn't adopt W.H. while that she is also cohabiting in a sexual relationship with another adult. These Plaintiffs rely on *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), which held that the right to family integrity includes the right of grandparents to reside with their children and grandchildren. *Id.* at 504. But, Act 1 is not a criminal ordinance that excludes grandparents from living with grandchildren. It is legislation aimed at providing the best homes for vulnerable children. Unlike the zoning ordinance in *Moore*, Act 1 steers children into homes that are more likely to provide stability and continuity for their development. The right of family integrity does not require the state to make any placement, whether that be with a grandmother or any other relative, which may expose the child to the risks associated with cohabiting environments. Thus, Plaintiffs continue to mischaracterize the rights implicated by the application of Act 1.[5] While they admit grandparents have no constitutional right to adopt their grandchildren, Plaintiffs would have this Court believe that the right to family integrity includes the right for a child in protective custody to be fostered or adopted by her relatives even if the relative's home is not recognized by the State as a suitable placement for the child. (Pls.' Opp. Mem. 33-35.) Again, the right to family integrity cannot be equated to a right to adopt one's relatives in the unfortunate event that their parents can no longer care for them. And the right to family integrity

[5] Notably, in *Moore*, the "overriding factor" which cuts against the right to family integrity was that the zoning ordinance excluded family members related by "blood, adoption, or marriage." 431 U.S. at 498. The Court stated that zoning ordinances excluding certain household members had been otherwise upheld under the rational basis standard because they did not infringe on the right to family integrity. *Id.* at 498-99 (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).) In most cases, Act 1 regulates foster and adoptive placements where all members of the household are unrelated to the child. In Cole's case, her cohabiting partner is not related to W.H. and the right to family integrity is not implicated.

certainly cannot override the State's interest in protecting the children entrusted to its care such that relatives could bypass the statutory adoption requirements. *See supra* II(B).

Plaintiffs are undisputedly wrong in their characterization of Act 1 as having "created a significant risk that W.H. would be removed from her grandmother's care." (Pls.' Opp. Mem. 36.) Plaintiffs provide no evidence, nor could they, that because of Act 1 the State of Arkansas was intending to separate W.H. from her grandmother and placing her in an adoptive home. The guardianship placement of W.H. with Cole demonstrates the opposite; and more, that Act 1 strikes the proper balance between the right to family integrity and the state's interest in the child's welfare. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ II, II(B).)

D. The parental right to make decisions concerning the care, custody and control of their own children does not grant parents the right to bypass statutory adoption requirements

A parent's liberty interest in making decisions concerning the care, custody, and control of her children has never been interpreted as allowing a parent to bypass statutory adoption proceedings through testamentary designations. The two cases cited by Plaintiffs, *Linder v. Linder*, 348 Ark. 322, 342-43, 72 S.W.3d 841, 851-52 (2002), and *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), do not recognize that a deceased parent has a fundamental right to have a court consider their testamentary wishes regarding who might adopt their child. Adoption, which is wholly a creature of the state, and governed entirely by statute, does not implicate the rights of parents to "establish a home and bring up children," "control the education of their own," and "direct the upbringing and education of children under their control." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925).

The holdings in *Linder* and *Troxel* are both premised on the fact that only *living* fit custodial parents can evaluate whether visitation by a relative is appropriate at the time a decision regarding visitation is made. *Linder*, 348 Ark. at 351, 72 S.W.3d at 857; *Troxel*, 530 U.S at 68-69. In neither of these cases were the courts considering the wishes of the deceased parent who could no longer make contemporaneous judgments regarding permanent legal custody of his child. In fact, neither the *Linder* Court or the *Troxel* Court gave any consideration whatsoever to the deceased parent's wishes regarding visitation by the grandparents, even though it was the parents of the deceased who were seeking visitation rights. If anything, these cases corroborate the parental role taken over *by the state* upon the death of a natural parent. Upon the death of both of a child's natural parents, the State "acts in the protective and provisional role of *in loco parentis* for those children who, because of various circumstances, have become wards of the state." *Lofton*, 358 F.3d at 809. Acting *parens patriae*, the state is vested with authority to make in the moment decisions for a child whose deceased parents can no longer evaluate potential changed circumstances or newly disclosed facts relevant to the welfare of the child. *Id.*

When a child is deprived of the supervision and care of his parents due to their untimely death or incapacity, any adult may file a petition for guardianship of the minor child. Ark. Code Ann. §§ 28-65-104, 28-65-205. The court will make a determination of the petitioner's suitability for appointment as legal guardian based on a determination of the best interests of the child, in conjunction with state policy. Ark. Code Ann. §§ 28-65-105, 28-65-201, and 28-65-203. Naturally, the courts may look to a parent's testamentary designation of a guardian for their children because a fit parent is given a presumption that he or she is acting in a child's best interests. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("[N]atural bonds of affection lead parents to act in the best interests of their children."). However, even if the testamentary designation

includes a desire that the appointed guardian also adopt the child, that designated guardian, like any person desiring to *adopt* a child in the State of Arkansas, must submit to the statutory adoption scheme by which all adoptions are governed. *Swaffar v. Swaffar*, 309 Ark. 73, 78, 827 S.W.2d 140, 143 (1992). The court's authority in matters relating to adoption is limited to the authority set forth by statute. The court will not grant a petition for the adoption of a minor, even by a person designated by natural parents, without the petitioner having first submitted himself to a child welfare agency's review of suitability as an adoptive parent for the child, through the completion of a home study and successful fulfillment of all other licensing requirements. Ark. Code Ann. § 9-9-212.

Plaintiffs admit they have no reason to believe that the individuals they have named as guardians in their respective wills would not in fact be appointed as guardians of their children. Since Act 1 does not affect the guardianship of minors, Plaintiffs have no basis for their contention that Act 1 interferes with their ability to plan for their children's future or to designate people of their choosing to care for their children. Insofar as the physical care and legal custody of their children by specific individuals is concerned, Act 1 in no way precludes Plaintiffs from making the testamentary guardianship designations of their choosing. Act 1 plainly does not prevent the testamentary designation of an individual cohabiting with a sexual partner outside of a marriage which is valid under the constitution and laws of the state of Arkansas as the legal guardian of a minor child. Ark. Code Ann. § 9-8-305.

Plaintiffs argue that Act 1's exclusion of guardianships entirely discredits any child welfare justification offered by the defense in this case. (Pls.' Opp. Mem. 53-55.) Contrary to Plaintiffs' assertion, there is a rational basis for the exclusion of guardianships from the Act. While guardianship placement decisions might initially be made more quickly than adoptive

placement decisions, guardianships entail much more long-term judicial oversight than Plaintiffs imply. With guardianship the state retains a swift and immediate remedy for the removal of a child whose welfare becomes compromised by the placement. In contrast to adoption, the state retains the ability to remove a child from a guardianship placement without facing the imposing hurdle of terminating parental rights. (*See* FCAC Resp. MSJ Ex. 2, Choate Dep. at 97:13-98:3.) Furthermore, in addition to the statutory safeguard of annual accountability, the courts may craft individual guardianships to require additional reporting in appreciation of the heightened risks associated with placing a child in a cohabiting environment. Guardianships allow for the placement of children with individuals with whom they already developed a bond without going so far as to create a formal parent-child relationship. In contrast, foster-parent placements often become adoptive placements, and are intended to at the very least model and often serve as a substitute for the parent-child relationship. The state is not required to promote the modeling or creation of parent-child relationships in environments which are less likely to promote responsible parenting. By allowing guardianship exceptions to cohabiting placements, the state strikes a balance between satisfying parental designations of caregivers and the state's interest in the well-being of the child. (*See* Intervenors' Resp. to Pls.' Mot. for Summ. J. § IV.)

Once again, no fundamental right is implicated and Act 1 is subject only to rational basis review. Insofar as the Parent-Plaintiffs have the right to "have their wishes about the future well-being of their children given the proper weight and consideration" by an Arkansas court upon their death or incapacity, Act 1 does not prevent the appointment of an individual cohabiting in a sexual relationship outside of marriage as guardian of a minor child. (Pls.' Opp. Mem. 40.) Act 1 does not, as Plaintiffs' assert, "require[] Arkansas courts to ignore their parental judgment." (*Id.*)

E. The right to "form and maintain intimate relationships" is not infringed by Act 1, and has never been interpreted as a fundamental right to cohabit with a sexual partner

Act 1 does not burden Plaintiffs' rights to engage in private, consensual, non-commercial acts of sexual intimacy. Unlike the statutes in *Jegley* and *Lawrence*, Act 1 does not proscribe any sexual conduct, much less make anyone's private sexual conduct a crime. Plaintiffs maintain that *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), invalidating criminal sodomy statutes, should be extended to require the placement of children in cohabiting environments. Because *Lawrence* and *Jegley* only invalidated statutes criminalizing acts of private, sexual intimacy between consenting adults, it cannot be employed to invalidate a statute which is neither criminal, nor proscribes private sexual intimacy between two adults. The right recognized in *Jegley* and *Lawrence* is narrow and cannot be read so broadly as to prevent Arkansas from making child placement decisions based on the legal commitment between the adults living in a prospective adoptive home. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § IV(B).)

The state is not obligated to place children in environments where adults are cohabiting in a sexual relationship unanchored by the accountability marriage provides, because any fundamental right the Plaintiffs might claim in their freedom to form and maintain intimate relationship is secondary to, or must at least be balanced against, a child's interest in being placed in the safest and most stable home available. While Plaintiffs have cataloged a number of "benefits and privileges" which they argue cannot be conditioned by law on the cessation of activity in which an individual may claim a "fundamental right," the competing human interests of a child cannot be compared to tax exemptions, medical benefits, or eligibility for government employment. (*See* Pls.' Opp. Mem. 46.) Adopting a child cannot be compared to receiving unemployment benefits: children are not commodities. *See Coyote Pub., Inc. v. Miller*, --- F.3d -

--, 2010 WL 816936, at *6 (9th Cir. Mar. 11, 2010) (citations omitted) ("The Thirteenth Amendment to the U.S. Constitution enshrines the principle that people may not be bought and sold as commodities. Payment for consent to adoption of a child is widely prohibited.") With adoption, a court must consider whether the best interests of the child will be served, while in granting property interests a court will not consider whether "medical benefits" own any competing interests or rights. Therefore, even if a state may not condition property tax exemptions on the taking of an oath because it would violate the fundamental right to free speech, the state may condition the *adoption of a child* on meeting legislatively enacted eligibility requirements because every adoption decision must be made with one standard in mind: the best interest of a child. *Smith v. Thomas,* 373 Ark. 427, 433, 284 S.W.3d 476, 480 (2008) ("[I]n both custody and guardianship situations, the child's best interest is of paramount consideration, and the statutory natural-parent preference is one factor. However, that preference is ultimately subservient to what is in the best interest of the child."); *Blunt v. Cartwright,* 342 Ark. 662, 669, 30 S.W.3d 737, 741 (2000) ("Indeed, any inclination to appoint a parent or relative must be subservient to the principle that the child's interest is of paramount consideration."). Plaintiffs cannot prevail in arguing that the best interest of the child must be subservient to their fundamental right to engage in private, consensual, non-commercial acts of sexual intimacy.

Ultimately, Plaintiffs misinterpret the right of two adults to engage in consensual acts of sexual intimacy as involving the right of those individuals to foster or adopt a child without any thought being given, or weight afforded, to the consequences associated with their choice of intimate relationships, or the effect that choice might have on the child entrusted to their care. Neither *Jegley* nor *Lawrence* extends any such right. The Plaintiffs are free to maintain their

intimate relationships, but cannot demand that the state not take into account the heightened risks associated with those relationships when making placement decisions for children in state care. Agency placement decisions involving the welfare of children cannot be equated to agency decisions concerning social security benefits.

Finally, Plaintiffs' argument that Act 1 places a special burden on homosexuals because persons cohabiting in a same-sex relationship cannot marry under Arkansas law must fail because Act 1 applies equally to individuals cohabiting with a person of the opposite or same sex. Plaintiffs cannot prevail because it is the Arkansas marriage laws, not Act 1, which prevent persons of the same sex from marrying. *See* Ark. Code Ann. § 9-11-107(b) (codifying Act 144 of 1997, § 2); Ark. Code Ann. § 9-11-109 (codifying Act 144 of 1997, § 1); Ark. Const. amend. 83, §§ 1-2. Plaintiffs, however, have failed to challenge the constitutionality of the Arkansas marriage laws, and therefore have failed to state a claim upon which relief can be granted. Furthermore, the allegation that "where a state limits marriage to heterosexual couples *and then conditions a privilege on being married*, it cannot be said that this is not discrimination on the basis of sexual orientation" does not advance Plaintiffs' case. (Pls.' Opp. Mem. 50.) If Plaintiffs wish to dispute the constitutionality of statutes granting benefits to individuals based on their marital status, they should at least chose one which does so. Even if the State was conditioning a benefit on marital status, it would not be the first time a state had done so. The courts have long recognized the states' legitimate interest in promoting marriage: "Marriage is an important institution that is fundamental to our very existence and survival." *Hatcher v. Hatcher*, 265 Ark. 681, 697, 580 S.W.2d 475, 483 (1979) (Fogleman, J., concurring in part and dissenting in part) (citing *Loving v. Virginia*, 388 U.S. 1 (1967); and *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)). "It is difficult to imagine a State purpose more important and

legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children." *Goodridge v. Dep't of Public Health*, 440 Mass. 309, 385, 798 N.E.2d 941, 997 (2003).

Plaintiffs are free to choose whether or not to comply with the wide range of requirements essential to becoming an adoptive parent. Act 1 does not prevent any individuals from maintaining their current living arrangements, nor their sexual relationships. But those same individuals cannot claim an imaginary fundamental right prevents the State from putting in place safeguards rationally related to securing the best available homes for children in need of foster care and adoption, because the fundamental right to maintain intimate relationships simply does not spawn a fundamental right to cohabit.

III. ACT 1 IS RATIONALLY RELATED TO LEGITIMATE GOVERNMENT INTERESTS

The voters of Arkansas have a constitutional right to enact legislation which serves the best interests of children in need of adoption or foster care. *Roberts v. Priest*, 334 Ark. 503, 510, 975 S.W.2d 850, 852 (1998). "[A]n Initiated Act, as regards constitutionality, is to be determined just as though it were an Act of the Legislature, because in adopting an Initiated Act the People become the Legislature, and must legislate within constitutional limits." *Jeffery v. Trevathan*, 215 Ark. 311, 319, 220 S.W.2d 412, 416 (1949). Since no fundamental right or suspect class is implicated by Act 1, rational basis review applies. *Regan*, 461 U.S. at 547; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 311-12 (1976).

It is not the role of the Court to discover the actual basis for the legislation but "merely to consider whether any rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives, so that the legislation is not the product of utterly arbitrary and capricious government purpose and void of any hint of deliberate and lawful purpose."

Hamilton v. Hamilton, 317 Ark. 572, 576, 879 S.W.2d 416, 418 (1994) (citations omitted). Plaintiffs alone carry the burden of proving that Act 1 is not rationally related to achieving *any* legitimate objective of state government under any reasonably conceivable state of facts. *Id.* Legislative classifications are not subject to a trial just because the opponents disagree over the policy or whether there are better means to effectuate the policy.

Act 1 passes rational basis review without resort to empirical data because Arkansas voters could consult their own experiences, observations, and knowledge to reasonably conclude that cohabiting households are less stable and less safe for children. Nonetheless, Act 1 is also firmly justified by a large body of scientific literature and research. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ IV(B), (C) and (D).) Despite the filing of Plaintiffs' lengthy 73-page brief in opposition, along with 2 appendices and over 1000 pages of exhibits, it remains undisputed that married and single parent homes are on average safer than cohabiting homes. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § IV(B)(1).) It is undisputed that marriage, when compared to cohabitation, is associated with better relationship quality, higher levels of commitment, lower dissolution rates, and more social and economic support, all of which are predictive of relationship stability. It is undisputed that relationship stability is associated with positive child development and well-being. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § IV(B)(2)(a).) It also remains undisputed that cohabitation is correlated with higher levels of depression, higher levels of substance abuse, higher rates of domestic violence, and higher rates of sexual infidelity. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § IV(B)(2)(b).)

Plaintiffs do not dispute that average child outcomes are higher among married parent families than some other family structures, including cohabiting parent families. (See Pls.' Opp. Mem. App. A at 14 ¶ 31.) Plaintiffs also do not dispute that married people are more committed to their relationship than people in cohabiting relationship, whether heterosexual or homosexual. (See Pls.' Opp. Mem. App. A at 9 ¶ 20.) Plaintiffs recognize that married families on average have more economic resources than cohabiting families. (See *id.* at 9 ¶ 21.) Plaintiffs also do not dispute that married couples have lower rates of depressive distress than cohabiting couples. (See *id.* at 11 ¶ 26.) Furthermore, Plaintiffs agree that the rate of partner domestic violence is higher for cohabiting couples than for married couples. (*See id.* at 11-12 ¶ 27.) These five undisputed facts alone are sufficient to further undergird the rational basis for precluding the placement of children in cohabiting environments, especially where such children have already been exposed to abuse and neglect or, at the very least, great loss.

While Plaintiffs do not refute that, on average, children have better outcomes in married homes than they do in cohabiting environments, Plaintiffs argue there can be no child welfare purpose in prohibiting the placement of children in foster and adoptive cohabiting environments, while allowing such guardianship placements. (Pls.' Opp. Mem. 52.) Plaintiffs ignore the logic and overall effect of Act 1, that even with guardian placements, Act 1 still certainly minimizes the risk associated with placing children in cohabiting environments.

It does so without shutting out all cohabiting placements by the courts in unique situations, for example, where a special relationship exists between the child and caregiver. This is almost universally not the case where a child is placed in foster or adoptive care through agencies because the parties are strangers. For parental preferences, pre-established relationships, and relative placements, an allowance for court-appointed guardianship is made

because the risk is deemed lower where the relationship is extended family, historical, pursuant to a fit biological parent's recommendation. As Plaintiffs themselves have insisted, guardianship differs from foster care or adoption in important ways, and therefore can serve a unique role in providing care for children whose parents are unable or unwilling to care for them. Far from being inferior, DHS employees testified that guardianship was considered a permanency placement and the best placements for certain children. (FCAC MSJ Ex. 13, Blucker Dep. at 83:8-18, 84:8-14, 93:14-24, 95:15-19; FCAC MSJ Ex. 15, Davis Dep. at 120:18-121:16, 143:20-146:11, 355:15-21.)

And the guardianship exclusion allows the state to address unique situations, without creating and promoting parent-child relationships in cohabiting environments. Guardianships do not create formal parent-child relationships where foster and adoptive placements do. Thus, the guardianship exception to cohabiting placements does not undermine the State's interest in creating and promoting parent-child relationships within marriage where the child is more likely to experience and learn responsible parenting. As a regulator and a teacher, Act 1 promotes parenting within marriage to maximize responsible parenting, while accommodating special relationships and exigencies through guardianships.

Finally, as explained in Intervenors' opening brief, by allowing guardianship exceptions to cohabiting placements, Act 1 strikes a balance between satisfying parental designations of caregivers and the state's interest in the well-being of the child. (Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § II(B).) Guardianship is unique in that it remains under the oversight of the courts and can be terminated much more quickly than parental rights could be in the case of adoption, should the State have reason to step in for the welfare of a child placed in a cohabiting environment. In any event, that Act 1 allows an exception for

guardianships does not invalidate it as irrational because the act as a whole minimizes the risk to children while also allowing some leeway in unique circumstances.

Relying on their appendix entitled "Plaintiffs' Response to Intervenors' Statement of Materials Facts," Plaintiffs try to create the appearance of a disputed fact by repeating the unsubstantiated claim that the research provided by each of the experts in this case (including their own) is not applicable to homosexual couples and that, therefore, Act 1 is irrational with respect to same-sex cohabitors wishing to foster or adopt. (*See e.g.* Pls.' Opp. Mem. App. A at 6-8 ¶¶ 17-19, and 11-15 ¶¶ 26-34.) Plaintiffs do not have the burden to prove that the research on cohabitants include same-sex couples or any other articulated subgroup of cohabitants because it is not material. Plaintiffs cannot demand that legislatures undertake the impractical burden of identifying all conceivable subgroups of and the subtle differences that might distinguish them from the broader regulated class. Classes are necessarily under and over inclusive in all legislation because mathematical precision in regulation is not only exceedingly impractical, it is impossible.

Even if the question of whether the social science research somehow *excludes* homosexual couples were a material issue of fact (it is not), the Plaintiffs would have the burden to demonstrate that all homosexual couples "rise above," or at least overcome, the negative relationship indicators associated with cohabitation among other cohabitants and the negative outcomes associated with children raised in other cohabiting environments, and that they are equivalent to married persons with respect to the state's interests. Simply stating again and again that cohabitants are a "heterogeneous group" does not provide the court with the invisible data on which to rely for the extreme and unsubstantiated proposition that same-sex cohabitants are, on average, equivalent to married families when it comes to raising children. The Plaintiffs have

not presented any evidence that same-sex cohabiting couples who are interested in adopting children are on average, equivalent. In fact, the opposite is undisputable.

Even if comparing an excluded subgroup to the included group were relevant to constitutional review (which it is not), the studies relied on by Plaintiffs' experts are undisputedly legislative facts demonstrating that homosexual individuals have elevated rates of psychological disorders,[6] substance abuse,[7] and infidelity,[8] and that homosexual couples have

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[6] (FCAC Reply MSJ Ex. 1, Cochran Expert Report, Ex. B; S.D. Cochran, V.M. Mays, M. Alegria, A. Ortega, D. Takeuchi, *Mental Health and Substance Use Disorders Among Latino and Asian American Lesbian, Gay, and Bisexual Adults*, 75 Journal of Consulting and Clinical Psychology 785-794 (2007).)

> "Thus our findings suggest two broad conclusions. First, like previous surveys of the general population have demonstrated, minority sexual orientation appears to be a risk indicator for some small elevation in mental health and substance use morbidity, especially among women, within Latinos and Asian Americans. Recent histories of suicide attempts also appear elevated." (*Id.* at 790.)

(FCAC Reply MSJ Ex. 2, Cochran Expert Report, Ex. B; S.D. Cochran, J.G. Sullivan, V.M. Mays, *Prevalence of Psychiatric Disorders, Psychological Distress, and Treatment Use Among Lesbian, Gay and Bisexual Individuals in a Sample of the U.S. Population,* 71 Journal of Consulting and Clinical Psychology 53-61 (2003).)

> "In the present work, sexual orientation was measured explicitly, and our findings demonstrate that minority status sexual orientation is associated with somewhat higher rates of mental health morbidity, including comorbidity, and use of mental health services. Although approximately 58% (*SE* = 6.6%) of lesbian, gay, and bisexual individuals studied did not evidence any of the five disorders assessed in the MIDUS, in the group as a whole, we did observe higher prevalences on all of the mood, anxiety, and substance use disorders measured when they were compared with heterosexuals of the same gender. Among men, these differences were most extreme for major depression and panic disorder, whereas among women the difference was more extreme for generalized anxiety disorder. Among men also, we observed higher rates of current psychological distress in those who were gay or bisexual compared with heterosexual men." (*Id.* at 58.)

[7] (FCAC Reply MSJ Ex. 3, Cochran Expert Report, Ex. B; S.B. Burgard, S.D. Cochran, V.M. Mays, *Alcohol and Tobacco Use Patterns Among Heterosexually and Homosexually Experienced California Women*, 77 Drug and Alcohol Dependence 61-70 (2005).)

> Abstract: "Results: Overall, homosexually experienced women are more likely than exclusively heterosexually experienced women to currently smoke and to evidence higher levels of alcohol consumption, both in frequency and quantity." (*Id.* at 61.)

higher dissolution rates.[9] (*See* Intervenors' Resp. to Pls.' Mot. for Summ. J. § I(D).) For example, Dr. Cochran's most recent study entitled *Burden of Psychiatric Morbidity Among Lesbian, Gay, and Bisexual Individuals in the California Quality of Life Survey*, states that: "Our findings, using measures of both identity and adult sexual behavior, confirm that minority sexual orientation, broadly defined, is associated with an elevated risk for common affective, anxiety, and substance use disorders for some members of this subpopulation. . . . In conclusion, after measuring sexual orientation with greater precision than the majority of previous studies and with more statistical power, we find confirming evidence that minority sexual orientation is, in fact, a risk indicator for psychiatric morbidity of similar import as other major demographic status characteristics." (FCAC Reply MSJ Ex. 5, Cochran Expert Report, Ex. A; S.D. Cochran & V.M. Mays, *Burden of Psychiatric Morbidity Among Lesbian, Gay, and Bisexual Individuals in the California Quality of Life Survey*, 118 Journal of Abnormal Psychology 647, 654-655 (2009).)

Dr. Peplau reports that married heterosexual couples "perceive more barriers" to ending the relationship than do gay, lesbian or cohabiting heterosexual couples. (FCAC Reply MSJ Ex. 6, L.A. Peplau & A.W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 Annual Review of Psychology 405, 412 (2007).) She also notes that little is known about the longevity of same-sex relationships because there exist no comparable "divorce" statistics to those which are available for heterosexual married couples. "Longitudinal studies provide further clues about

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[8] (FCAC Reply MSJ Ex. 4, Peplau Expert Report, Ex. A; L.A. Peplau, S.D. Cochran & V.M. Mays, *A National Survey of the Intimate Relationships of African-American Lesbians and Gay Men: A Look at Commitment, Satisfaction, Sexual Behavior and HIV Disease*, Ethnic and Cultural Diversity Among Lesbians and Gay Men 11, 29 (B. Greene ed., Newbury Park: Sage Publications) (1997).)

[9] (*See* FCAC MSJ Ex. 60, Lawrence A. Kurdek, *What Do We Know About Gay and Lesbian Couples?* 14 Current Directions in Psychological Science 251, 253 (2005).)

relationship stability. In a five-year prospective study, Kurdek (1998) reported a breakup rate of 7% for married heterosexual couples, 14% for cohabiting gay male couples, and 16% for cohabiting lesbian couples. Controlling for demographic variables, cohabiting gay and lesbian couples were significantly more likely than were married heterosexuals to break up (see also Kurdek 2004)." (*Id.*, Peplau & Fingerhut, *The Close Relationships Of Lesbians And Gay Men*, at 412.)

In addition, Dr. Lamb agreed with the findings in Larry Kurdek's 2005 study, a review of the research on homosexual couples and a reference on which Dr. Peplau relied upon in preparing her expert report, which states: "With controls for demographic variables, the dissolution rate for heterosexual couples was significantly lower than that for either gay or lesbian couples. . . . [A]lthough rates of dissolution did not differ for either gay couples versus lesbian couples or for gay and lesbian couples [versus] cohabiting heterosexual couples, both gay and lesbian couples were more likely to dissolve their relationships than married heterosexual couples were." (FCAC MSJ Ex. 20, Lamb Dep. at 123:1-124:2; FCAC MSJ Ex. 60, Lawrence A. Kurdek, *What Do We Know About Gay and Lesbian Couples?* 14 Current Directions in Psychological Science 251, 253 (2005).). The Defendants do not have the burden to prove that this or any other subgroup of cohabitants may present higher risks to children when it has met its burden on the broad class of cohabitants. But the Plaintiffs' experts have undisputedly provided the above legislative facts that would justify such an exclusion had the act done so specifically.

Ultimately, because they cannot dispute the material facts regarding the "disparities in average outcomes" of cohabiting couples versus married couples, Plaintiffs attempt to minimize the difference by calling what are admittedly "statistically significant" differences "extremely small." (*See* Pls.' Opp. Mem. App. A at 9 ¶¶ 20, 30.) Plaintiffs argue that these statistical

differences cannot justify the "blanket exclusion of all cohabiting couples." But Arkansas need not minimize statistical differences in the area of child welfare when the State is entrusted with the crucial role of placing vulnerable children in temporary (foster) or permanent (adoptive) homes. Furthermore, it is undeniable that legislatures may rely on just such statistical data in passing numerous other state and federal laws. Examples abound just in the area of convicted felons and the restrictions society places on them following their release from confinement: whether it be the restrictions on firearm ownership for felons convicted of armed robbery, or the restrictions placed on sex offenders from residing within a given parameter from public schools, all such restrictions may be based on statistical probabilities. The state does not have to prove that each and every sex offender will offend again: it is sufficient that the statistics prove that, on average, there is a heightened risk of recidivism.[10]

Plaintiffs incorrectly assert that because the available social science looks at children in intact biological parent families, and not foster or adoptive families, it cannot serve as a rational basis because foster and adoptive children will not be placed with intact biological parents. (Pls.' Opp. Mem. 60.) Plaintiffs err by requiring an exact comparison to the basis for Act 1, which is plainly not necessary when passing legislation. Plaintiffs' argument fails because as the party with the burden of proof, they offer no evidence that children specifically placed for foster or adoption with unrelated cohabitants will fare as well as if placed with unrelated married parents. Plaintiffs further compound their error by stating the question in this case is whether children are better off being placed in a cohabiting environment or remaining in and aging out of

[10] Plaintiffs' argument that it is irrational to categorically ban all cohabitors based on statistical averages about negative behavior and characteristics "when DHS and CWARB routinely assess the suitability of all applicants, even those who have committed crimes," (Pls.' Opp. Mem. 64) misrepresents the facts. The state legislature has disallowed certification of adoptive and foster homes where the applicant has committed certain unappealable crimes. *See* Ark. Code Ann. §§ 9-28-409 (e)-(h).

the State's system. This is plainly wrong because on constitutional review, the statutory classifications -- placements in married versus unmarried cohabiting environments -- must be compared. Plaintiffs' additional argument that Act 1 is unconstitutional because an individualized assessment process could identify more stable cohabiting environments again ignores the burden of proof when challenging legislation. (Pls.' Opp. Mem. 62.) Aside from the State's rational decision to invest its efforts in placements in marital home environments that are on average more stable, Plaintiffs have not and could not present evidence to meet their burden of proof that an individualized screening process would be foolproof in identifying cohabiting environments that are on par with married families to eliminate that risk which the State need not undertake.[11]

Plaintiffs also seek to cast aside the significance of the instability and negative outcomes associated with cohabitation by arguing that correlation cannot be equated with causation. (Pls.' Opp. Mem. 63, and App. A at 14 ¶ 31.) Again, policy decisions are frequently based on statistical correlations. Legislative rationality is not lost because a classification is based upon averages or generalities. Under rational-basis review, "[e]ven if the classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn . . . imperfect, it is nevertheless the rule that . . . perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (citations omitted). Legislatures are permitted to use generalizations so long as "the question is at least debatable." *Heller v. Doe by Doe*, 509 U.S. 312, 326 (1993). The State

[11] Plaintiffs also introduce a host of classifications that are not regulated by Act 1 which purportedly could have a negative impact on child welfare. (Pls.' Opp. Mem. 61.) But Arkansas didn't vote to regulate any of the groups they mentioned such as males having a higher propensity to drug abuse, certain ethnic and racial drug abuse rates, and persons with lower levels of education. Even if Plaintiffs' assertions are true, because Arkansas has addressed one source of risk for children, does not mean it must, or can in case of sex and racial classifications, address all others in the same legislation, or even at all. It isn't irrational to target one problem just because all problems are not addressed.

does not bear the burden of proving that *all* cohabiting homes are unstable and unsafe for children for Act 1 to survive rational basis review. The burden remains on Plaintiffs to prove that Act 1 is not rationally related to achieving *any* legitimate objective of state government under any reasonably conceivable state of facts. *Hamilton*, 317 Ark. at 576, 879 S.W.2d at 418. Act 1 is not irrational even if some married persons would do poorly raising children, while some cohabitants might do well. The finding that the increased instability of cohabiting homes versus other family structures is not a favorable environment for raising children is supported by both the common wisdom of Arkansans who rigorously debated the issue during the initiative campaign and the scientific literature. This finding is certainly more than debatable and should not be now subject to veto by trial.

Finally, Plaintiffs' attack on the promotion of marriage as an adequate rational basis in support of the constitutionality of Act 1 again misconstrues Intervenors' opening brief. Defendants are not, as Plaintiffs suggest, using Act 1 to promote marriage in a manner that has no child welfare purpose. (Pls.' Opp. Mem. 64 n.37.) Instead, Intervenors have explained that marriage not only legally commits parents to each other, but legally commits parents to children. Because of the legal bond of marriage, children are more likely to receive the benefits of a stable home environment where they are nurtured by both a mother and a father.

A living model of a father and a mother caring for their children is an important state interest by its own right: "Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." *Hernandez v. Robles,* 7 N.Y.3d 338, 359, 855 N.E.2d 1, 4, 821 N.Y.S.2d 770, 776 (2006). As models, a married man and woman demonstrate a full commitment to each other and their children and thus encourage responsible parenting in children who will likely one day become

parents themselves. "It is hard to conceive of an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society -- particularly when those future citizens are displaced children for whom the state is standing *in loco parentis*." *Lofton v. Sec'y Dep't of Children and Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004).

Because responsible parenting is most likely to be modeled in the context of marriage, Act 1's preclusion of state-created families who are not legally bound to one another is rationally related to a legitimate government interest. Simply stated, Act 1 is rationally related the State's interest in providing children with a set of parents who are most likely to provide them with a stable environment and to encourage them to commit to the people with whom they will one day form lifelong family ties, especially their own offspring and the person with whom they conceive their offspring.

IV. ACT 1 IS NOT UNCONSTITUTIONALLY VAGUE

Despite the fact that Plaintiffs employ the term cohabiting or its derivative dozens of times in their initial and amended complaints, several times in reference to their chosen lifestyle, Plaintiffs continue to insist that the word does not give "a person of ordinary intelligence" notice of who is categorically barred from fostering or adopting. (*See e.g.* FCAC MSJ Ex. 52, Third Am. Compl. ¶¶ 91, 107.) Amending their complaint over a year after it was initially filed to assert a vagueness claim against the language of the act they are challenging simply reveals the desperate state in which Plaintiffs find themselves.

Plaintiffs' argument that Act 1 is unconstitutionally vague fails because the Act does *not* "leave judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis." (*See* Pls.' Opp. Mem. at 68; incorrectly substituting the word "judges" with "officials" in citing *Ratliff v. Ark. Dep't of Human Servs.*, 104 Ark. App. 355, 362,

292 S.W.3d 870, 876-77 (2009).) The guidelines which Plaintiffs claim are erroneously omitted from the Act already exist in the law: in cases from the highest court of this state, as well as in the pervasive and continuous use of the term in state statutes. "Flexibility and reasonable breadth in a statute, rather than meticulous specificity or great exactitude, are permissible so long as the statute's reach is clearly delineated in words of common understanding. Impossible standards of specificity are not required, and a statute meets constitutional muster if the language used conveys sufficient warning when measured by common understanding and practice. It is not necessary that all kinds of conduct falling within the reach of the statute be particularized. Statutes are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute." *Ratliff*, 104 Ark App. at 363, 292 S.W.3d at 877.

The Intervenors have already explained that because Arkansas common law and statutes provide a clear definition of "cohabitating," Act 1 is not void for vagueness. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § V(A)(1).) *See e.g. Turney v. State*, 60 Ark. 259, 29 S.W. 893 (1895); *Sullivan v. State*, 32 Ark. 187 (1877); *Lyerly v. State*, 36 Ark. 39 (1880); *Taylor v. State*, 36 Ark. 84 (1880); *Bush v. State*, 37 Ark. 215 (1881); *McNeely v. State*, 84 Ark. 484, 106 S.W. 674 (1907); *Wilson v. State*, 178 Ark. 1200, 13 S.W.2d 24, 25 (1929); *Poland v. State*, 232 Ark. 669, 670, 339 S.W.2d 421, 422 (1960); *see also* Ark. Code Ann. § 16-43-901; Ark. Code Ann. § 9-12-306; Ark. Code Ann. § 9-12-301; Ark. Code Ann. § 9-11-810; Ark. Code Ann. § 9-4-102. The Intervenors also have submitted that other jurisdictions have rejected vagueness challenges to the term "cohabiting." (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § V(A)(2).) *See e.g. People v. Ballard*, 203 Cal. App. 3d 311, 249 Cal. Rptr. 806 (1988); *In re Marriage of Tower*, 55 Wash. App. 697, 703, 780 P.2d 863, 867 (1989); *State v. Green*, 99 P.3d 820, 831-32 (Utah 2004).

In addition, the term "sexual partner" is not constitutionally vague because "it has a plain and ordinary meaning that [can] be readily understood by reference to a dictionary." *Rolling Pines Ltd. P'ship v. City of Little Rock*, 73 Ark. App. 97, 106, 40 S.W.3d 828, 835 (2001). (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § V(B).) For example, in *Turner v. State*, 355 Ark. 541, 543-44, 141 S.W.3d 352, 354 (2004), the Arkansas Supreme Court explained that the victim "told police that she had lied about Turner being her first sexual partner, and she explained that she previously had sex with a boyfriend from Little Rock before she met Turner." *See also Weaver v. State*, 56 Ark. App. 104, 108, 939 S.W.2d 316, 318 (1997) ("[t]he number of sexual partners of the victim would only be relevant if appellant could show that one or more had HIV and that the victim was exposed to it through them or that the victim knew they had HIV and disregarded the dangers associated with having sexual intercourse with them"); *Smith v. State*, 354 Ark. 226, 237, 118 S.W.3d 542, 548 (2003) (holding that "[t]he legislature could have rationally concluded that persons such as appellant should not use their positions as school and school-district employees to find and cultivate their underage sexual partners"); and *Holmes v. Holmes*, 98 Ark. App. 341, 349, 255 S.W.3d 482, 488 (2007) ("[T]he instant record shows that appellant had six different sexual partners in a four-and-a-half year period.").

Both the term "cohabiting" and "sexual partner" have reasonably ascertainable meanings that are routinely employed by Arkansas courts and statutes. Plaintiffs' assertion that Act 1 will be arbitrarily applied because DHS has yet to promulgate regulations "to delineate what these terms mean" does not support the proposition that the terms are themselves void for vagueness. (Pls.' Opp. Mem. 67.) The fact that a government entity is charged with implementing policies enacted by the legislature, and that doing so might or might not involve promulgating definitions

of terms to adequately fulfill the purpose of the legislation, and further that the agency might drag its feet in accomplishing that task, does not mean that the legislation itself is unconstitutionally vague. Act 1's use of the terms "cohabiting" and "sexual partner" is sufficiently definite to defeat the Plaintiffs' claims of void for vagueness.

CONCLUSION

While Plaintiffs have a political disagreement with Act 1, they cannot dispute the material facts supporting the people of Arkansas' legitimate exercise of their legislative power to protect the welfare of children in need of adoption or foster care. Because no fundamental right or suspect class is implicated by the Act, rational basis review applies. The categorical exclusion of cohabiting individuals is rationally related to the state's interest in promoting marriage, which provides the optimal environment for modeling responsible parenting and commitment to family, and affirms the longstanding State policy that the interests of children are best served by preferring placement of children with parents who are not cohabiting. Most importantly, Act 1 is rationally related to the state's interest in protecting adoptive and foster children from further harm by placing them in the safest, most stable households.

For the foregoing reasons, Intervenors respectfully request that their motion be granted, that the Court rule, as a matter of law, that Act 1 does not violate the Due Process or Equal Protection provisions of the Arkansas or United States Constitutions, and that the Plaintiffs' claims be dismissed and their motion denied.

Respectfully submitted this the 15th day of March, 2010.

By: Martha M. Adcock

Martha M. Adcock, AR Bar No. 83002
Family Council
414 S. Pulaski, Suite 2
Little Rock, AR 72201
(501) 375 7000
(501) 375-7040 Fax
Local Counsel

Byron J. Babione, AZ Bar No. 024320*
Sara F. Tappen, WY Bar No. 6-4395*
Brian W. Raum, NY Bar No. 2856102 (*Of Counsel*)
Alliance Defense Fund
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
(480) 444-0028 Fax

Attorneys for Intervenors
Family Council Action Committee and Jerry Cox
**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by email on the following:

Dustin McDaniel
C. Joseph Cordi, Jr.
Colin R. Jorgensen
Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201
Joe.Cordi@arkansasag.gov
colin.jorgensen@arkansasag.gov

Attorneys for Defendants

Leslie Cooper
Rose Saxe
Christine Sun
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
lcooper@aclu.org
rsaxe@aclu.org
csun@aclu.org

Marie-Bernarde Miller
Daniel J. Beck
Bonnie Johnson
Williams & Anderson PLC
111 Center Street, Suite 2200
Little Rock, AR 72201
mmiller@williamsanderson.com
DBeck@williamsanderson.com
bjohnson@williamsanderson.com
nmoler@williamsanderson.com

Garrard R. Beeney
Stacey R. Friedman
Jennifer M. Sheinfeld
Stephen Ehrenberg
Christopher Diffee
Emma Gilmore
Angelica Sinopole
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004
Beeneyg@sullcrom.com
FriedmanS@sullcrom.com
sheinfeldj@sullcrom.com
ehrenbergs@sullcrom.com
diffeec@sullcrom.com
gilmoree@sullcrom.com
sinopolea@sullcrom.com

Attorneys for Plaintiffs

on this the 15th day of March, 2010.

Martha M. Adcock

Martha M. Adcock