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,%20 breakdown%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.*

[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 <u>all</u> 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.

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