IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

Sheila Cole, *et al.*,

Plaintiffs,

vs.

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

Defendants,

Family Council Action Committee, *et al.*,

Intervenors.

Case No. CV 2008-14284

INTERVENORS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. ACT 1 DOES NOT TREAT SIMILARLY SITUATED CHILDREN DIFFERENTLY

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

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

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

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

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

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

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

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

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

VI. ACT 1 WOULD SATISFY HEIGHTENED SCRUTINY

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

Conclusion

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

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

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

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

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