IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

Sheila Cole, on her own behalf, and by, for and on behalf of her granddaughter W.H.; Stephanie Huffman and Wendy Rickman; Frank Pennisi and Matt Harrison; Meredith Scroggin and Benny Scroggin, on their own behalves, and by, for and on behalf of their two children, N.S. and L.S.; Susan Duell-Mitchell and Chris Mitchell, on their own behalves, and by, for and on behalf of their two children, N.J.M. and N.C.M.; Curtis Chatham and Shane Frazier; and S.H., R.P. and E.P., by and through their next friend, Oscar Jones,

PLAINTIFFS,

VS.

NO. CV 2008-14284

The State of Arkansas; the Attorney General for the State of Arkansas, Dustin McDaniel, in his official capacity, and his successors in office; the Arkansas Department of Human Services and John M. Selig, Director, in his official capacity, and his successors in office; and the Child Welfare Agency Review Board and Charles Flynn, Chairman, in his official capacity, and his successors in office,

DEFENDANTS.

PLAINTIFFS' OPPOSITION TO THE STATE DEFENDANTS' AND INTERVENOR-DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND RENEWED MOTIONS TO DISMISS

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INTRODUCTION

The State Defendants' and Intervenor-Defendants' motions for summary judgment advance arguments that side-step the central constitutional infirmity in Act 1—the statute serves *no* child welfare purpose. After months of discovery, including testimony of State witnesses, policy-makers, case workers, court officials, child abuse investigators, and State police members responsible for the welfare of children, the record shows that Act 1 serves no permissible purpose whatsoever, but rather Act 1 serves only to categorically exclude good families who would provide loving homes to children. There is no basis for the conclusion that *every single individual* (or even most) in a same-sex or heterosexual cohabiting relationship should be excluded from applying to serve as a foster or adoptive parent. There is no justification for the undeniable effect of Act 1: keeping children in Arkansas's child welfare system, such as Plaintiffs E.P., R.P., and S.H., longer than necessary and exacerbating the chronic shortage of foster and adoptive parents in the State. Faced with this, Defendants' motions do not engage with the actual evidence in this case, but rather offer three bases for summary judgment, each of which is deficient.

First, Defendants seek to avoid any substantive review of Act 1 by rehashing and reframing standing arguments that have already been decided by the Court, as well as raising a mootness argument and attacking the ability of the taxpayer-Plaintiffs to bring any claims. Defendants' standing arguments fail today for the same reason they failed at the motion to dismiss stage. Defendants' mootness argument has no basis because there is plainly a judgment to be rendered that would have a practical legal effect upon the controversy surrounding Act 1 and the taxpayers have properly pleaded their claims.

Second, rather than address the constitutional issues presented in this case, Defendants' motions are directed at hypothetical claims of their own making, different from the

ones Plaintiffs assert. For example, Defendants argue strenuously (and repeatedly) that the Plaintiffs have no constitutional right to adopt or be adopted. As Plaintiffs have made plain for more than a year, they are making no such claim. The fact that State Defendants and Intervenor-Defendants continue to attack this straw man they have created (rather than Plaintiffs' actual claims) demonstrates that their arguments have no basis. But the flaws in Defendants' arguments become crystal clear once the focus is on the six actual claims before the Court:

- The due process claim of children in State care to be free from the harm caused by Act 1 (Counts 1 and 2). Plaintiffs and Defendants have moved for summary judgment on these claims. Defendants fail to refute that Act 1 is in conflict with the applicable due process standard, which requires the State to act in child welfare cases in conformity with child welfare professional judgment. Instead, Defendants point the Court to issues that are not relevant to these claims, including the argument that the State Defendants have "no duty" to act in the best interests of children. Although this "duty" argument underscores how far from children's interests Defendants have veered—and their willingness to act in a manner that directly contradicts instructions from the State Legislature—the "duty" argument misses the point. Regardless what statutory "duties" the State Defendants do or do not fulfill, Act 1 is unconstitutional because it fails to comport with applicable due process requirements. Plaintiffs' motion for summary judgment on these claims should be granted and Defendants' motions should be denied.

- The due process right of Plaintiffs Sheila Cole and W.H. to maintain the integrity of their family without undue interference by the government (Counts 3 and 4). Only Defendants have moved for summary judgment on these claims. Although it is not clear from Defendants' motions, the right to family integrity has its roots in "the Bill of Rights [which, in part,] is designed to . . . preserv[e] certain kinds of highly personal relationships . . . from unjustified interference by the State." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618 (1984). "Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619. Here it is incontrovertible that Act 1 burdens this well-established right to family integrity. It is undisputed that Cole is the only relative of W.H. who is a possible, suitable placement for W.H. And the State Defendants have agreed that it is in W.H.'s best interests to be adopted by Cole. Act 1 clearly imposes a burden on the integrity of this family without the required narrow tailoring to meet a compelling government interest and, therefore, is unconstitutional. Because Defendants do not address this claim—they instead focus on a phantom claim about a grandparent's right to adopt that has not been pleaded—Defendants' motions for summary judgment should be denied.

- The due process rights of parents to make fundamental decisions about their children's futures without the burden of a law that is in no way narrowly tailored to meet a compelling government interest (Counts 5 and 6). Plaintiffs and Defendants have moved for summary judgment on these claims. Defendants' arguments that parents do not have the "sole" authority to direct and control who will be the adoptive parents of their biological children and suggestion that a placement short of an adoption would be adequate again misses the point. There is no possible governmental purpose that could justify Act 1's requirement that a court refuse to even give consideration to the testamentary wishes of the parent-Plaintiffs regarding who should adopt their children if the parents die or become incapacitated. Plaintiffs' motion for summary judgment on these claims should be granted and Defendants' motions should be denied.

- The equal protection rights of children to be treated the same as other children regardless of the status of the caregivers chosen for them by their parents (Counts 7 and 8). Plaintiffs and Defendants have moved for summary judgment on these claims. Defendants again argue that because parents do not have the "sole" authority to direct and control who will be the adoptive parents of their biological children, there can be no equal protection violation. Again, Defendants mischaracterize the claim Plaintiffs actually have pleaded. The child-Plaintiffs do not assert that their parents have "sole" control over their future adoption. The child-Plaintiffs simply seek to have courts consider whether an adoption by their caregivers would be in their best interests, a consideration other children enjoy. There is no basis to deny the child-Plaintiffs the possibility to be adopted by the persons chosen by their parents, if deemed to be in the children's best interests. Because Act 1 discriminates against this class of children based on factors beyond their control, it can only be justified if substantially related to an important government interest, which it is not. Plaintiffs' motion for summary judgment on these claims should be granted and Defendants' motions should be denied.

- The equal protection rights of couple-Plaintiffs to exercise their fundamental right to maintain their intimate relationships without being penalized by the State (Counts 9 and 10). Plaintiffs and Defendants have moved for summary judgment on these claims. Defendants primarily contend, again, that because there is no right to adopt or foster, Act 1 cannot unconstitutionally burden any fundamental right to an intimate relationship. This argument misstates the legal issues presented. To be a foster or adoptive parent is not a right, it is a privilege offered by the State. The State cannot condition that privilege on not exercising a fundamental right. (The State, for example, cannot condition the ability to foster or adopt on forgoing the right to practice any given religion.) Here, the State has conditioned the ability to adopt or foster on individuals forgoing their right to maintain an intimate relationship with a same-sex or unmarried heterosexual partner. Because Act 1 penalizes the exercise of the fundamental right to maintain an intimate relationship, it is the government's burden to show that the law is narrowly tailored to meet a compelling state interest. Here, there is no such effort, much less the required proof. Plaintiffs' motion for summary judgment on these claims should be granted and Defendants' motions should be denied.

- Plaintiffs challenge Act 1 as unconstitutionally vague (Counts 12 and 13). Defendants have moved for summary judgment on these claims. Act 1 prohibits fostering or adoption by an individual who is "cohabiting" with a "sexual partner," but does not define what living arrangements qualify as "cohabiting" or what relationships constitute having a "sexual partner." Workers from the Department of Human Services ("DHS") and the Division of Children and Family Services ("DCFS") testified that they share no common understanding as to what circumstances will disqualify an individual under Act 1. In the face of this claim, Defendants have not told the Court (or promulgated regulations explaining) whether intimate partners who live together for three days a week, or four days a week, or do not engage in sexual relations are banned by Act 1. Such impermissible vagueness causes at least two harms: it leaves state employees to determine who is categorically barred from serving as a foster parent and/or adopting with no means for consistent application, and it further discourages applicants from applying who may think they are barred when they are not—or at least not disqualified because one interpretation of this vague statute by one state employee may so conclude. On this record, there is no basis for summary judgment on these claims. Defendants' motions should be denied.

Third, without any valid legal arguments and facing condemnation of Act 1 from the State Defendants' own Rule 30(b)(6) witnesses, Defendants retreat to the suggestion that the blanket ban against same-sex and heterosexual cohabiting couples is somehow supported by statistical data on group averages from studies that in no way measure applicants who wish to foster or adopt. In essence, Defendants take group averages from surveys which include broad and diverse populations of heterosexual cohabiting couples and compare them with group averages for married couples with biological children to come to the conclusion that it is fair to presume that every single individual (or most) in a same-sex or cohabiting relationship who would seek to provide a loving home for a child is unfit based solely on the fact that they are unmarried. No matter how much Defendants attempt to (improperly) twist the scientific conclusions that can be drawn from the statistics, Act 1 does not pass the tests imposed by the State and Federal Constitutions and does not serve any child welfare purpose.

To begin, Act 1 expressly allows cohabitors to parent children through guardianships. Therefore, the justification for Act 1 cannot be that it is intended to categorically

exclude from parenting a group that is purportedly at too high a risk for being "unfit" parents, because the statute expressly allows this same excluded group (cohabiting individuals) to serve as parents through guardianship. It defies logic that (based on Defendants' self-serving interpretation of the statistics) a child could not be with a cohabitor who is a foster or adoptive parent for child welfare reasons, but can be with the same cohabitor provided it is a parent-guardian relationship. For this reason alone, Defendants' statistical arguments can be dismissed as lacking merit.

In any event, among all the statistics thrown at the Court, there are none that could possibly justify Act 1's blanket ban against all persons in same-sex relationships from adopting or fostering, particularly given the Arkansas Supreme Court's conclusion in *Howard* that excluding gay couples from fostering children is not rationally related to protecting the health, welfare and safety of children. The data on same-sex parents is undisputed. And, no matter how often Defendants seek to disparage *Howard* as a mere separation-of-powers decision, its relevance to this proceeding is inescapable given the findings, such as this, that form the basis for its holding.

Even setting aside these flaws that completely undermine Defendants' statistical arguments, Defendants do not claim, nor could they, that group averages meet the narrow tailoring requirement of strict scrutiny. Moreover, the group averages on which Defendants rely fail to justify Act 1 under any level of scrutiny. For example, the studies on which Defendants rely primarily compare how biological children in "intact married households" fare versus children who are not in these "intact" families. Looking to these data ignores that *absolutely none* of the children who are needlessly kept in state care by Act 1 are going to be placed with their "intact," married, biological parents—these children need non-biological foster or adoptive

placements. Looking to these data also ignores that there is absolutely no requirement that a foster or adoptive parent be married—plenty of children will be placed with single parents regardless of any intention to marry. These data do not support the categorical ban imposed by Act 1. Indeed, these statistics no more justify a blanket ban on cohabiting couples than they do a blanket ban on other demographic groups who are permitted under Act 1 to foster and adopt, such as singles, people with low income, and people with limited education, who have comparable or worse average outcomes than cohabitors. (This alone is fatal to Defendants' arguments given that the State cannot constitutionally exclude cohabitors from applying to foster and adopt when other groups that have similar or worse average outcomes are permitted to apply.) Moreover, Defendants' studies look at broad and diverse populations of heterosexual cohabiting couples, without examining the people at issue in this case—those who have made the solemn decision to apply to care for a child. The studies further do not support Defendants' position because they are based on group averages and the conclusions of these studies—as Defendants' experts admit—tell you nothing about the qualifications of an individual applicant who may apply to adopt or foster a child, but is barred from doing so because of Act 1. Taken together, Defendants' use of these statistics call to mind Mark Twain's familiar statement that "there are three kinds of lies: lies, damned lies, and statistics."

Act 1 harms children in State care by categorically excluding applicants to serve as foster or adoptive parents who, all agree, may be good parents to these children. The child-Plaintiffs entrusted to the State's care have never sought the right to be adopted or fostered, only the right not to have arbitrary barriers erected to their placement with a loving family, if one is available, or to an adoptive relationship with their caregivers if a court determines that to be in their best interests. The couple-Plaintiffs willing to provide a loving home to children in need

seek only the right to go through the same individualized review process as all other applicants. Never have these Plaintiffs sought relief in any way related to some form of a mandatory approval of applications to be foster or adoptive parents. Similarly, the relief sought by the parent-Plaintiffs has never been a court order approving an adoptive relationship with their designated caregivers in the event of their death or incapacity—only the right they have as parents to have their recommendations about their children's well-being be given the same weight as any other parent's decisions and to have a court grant such adoptions if deemed in the best interest of the children. The evidence Defendants submitted in support of their motion does not support their request for summary judgment. At the very least, the evidence in Plaintiffs' opening memorandum in support of their motion raises genuine issues of material fact requiring that the State Defendants' and Intervenor-Defendants' motions be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Before the Court are cross-motions for summary judgment on Counts 1 and 2, and Counts 5 through 10.[1] Defendants have additionally moved for summary judgment or dismissal of Counts 3 and 4 and Counts 13 and 14. In the interest of brevity, Plaintiffs incorporate by reference the Factual Background and Proceedings to Date in their opening memorandum of law in support of summary judgment.[2]

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[1] The memoranda of law submitted to date are referred to herein as follows: (i) Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment, dated February 9, 2010 ("Pls.' SJ Memo."); (ii) Brief in Support of State Defendants' Motion for Summary Judgment, dated February 8, 2010 ("State Defs.' SJ Memo."); and (iii) Memorandum of Law in Support of Intervenors' Motion For Summary Judgment and Motion to Dismiss, dated February 9, 2010 ("Int.-Defs.' SJ Memo.").

[2] Because Defendants have renewed their Motions to Dismiss (and, in many respects, essentially re-argue those motions), Plaintiffs also hereby incorporate by reference their Opposition to the Motions to Dismiss.

In addition, on February 11, 2010, Plaintiffs filed an Amended Complaint adding three additional child-Plaintiffs, E.P., R.P. and S.H., to Counts 1 and 2. No new causes of action, legal theories or claims for relief were added by the Amended Complaint. All three of the additional child-Plaintiffs live in a residential group home in Arkansas and are in the custody of DCFS, a division of DHS. R.P. and E.P. are 17 years old and 15 years old, respectively, and are siblings. They have lived at the residential facility for three and a half years. S.H. is 16 years old and has lived at the residential facility for a little more than a year. All three desire a permanent home and have challenged Act 1 as, among other things, unnecessarily restricting the pool of suitable foster and adoptive homes. On February 17, 2010, in an effort to silence the voices of these children with regard to how they are directly harmed by Act 1, the Defendants moved to strike the Plaintiffs' Fourth Amended Complaint ("Fourth Amend. Compl.").[3] The motion to strike will be fully briefed and ripe for decision on March 2, 2010.

II. PLAINTIFFS HAVE STANDING TO PROCEED AND THEIR CLAIMS ARE NOT MOOT.

Defendants assert that Plaintiffs lack standing to pursue Counts 1 through 10 either because they are not prejudiced by Act 1 or because their claims are too speculative to be

[3] As set out in detail in Plaintiffs' memorandum of law, the motion to strike has no basis given Arkansas' liberal rules allowing for amending the pleadings. *See* Plaintiffs' Opposition to State Defendants' and Intervenor-Defendants' Motions to Strike Plaintiffs' Fourth Amended Complaint, dated February 23, 2010. As noted above, the Amended Complaint only adds three new child-Plaintiffs who assert the same claims (Counts 1 and 2) as existing child-Plaintiff W.H. and the taxpayer-Plaintiffs. Counts 1 and 2 have been at issue since the original complaint was filed more than a year ago. The Amended Complaint creates no prejudice or undue delay. For these reasons, and the reasons set forth in Plaintiffs' briefing, the motion to strike should be denied. In the meantime, the operative complaint is the Fourth Amended Complaint and the motions for summary judgment must be assessed in light of that pleading. *Am. Bonding Co. of Baltimore* v. *Morris*, 104 Ark. 276, --, 148 S.W. 519, 522 (1912) (holding that "[t]he amended and substituted complaint took the place of the original complaint, which thereafter could not be considered a pleading in the case").

heard.[4] State Defs.' SJ Memo. at 15-17, 71; Int.-Defs.' SJ Memo. at 11-12, 14. As discussed below, this is wrong as a matter of law.

A. As this Court has previously determined, Plaintiffs have standing to pursue Counts 1 through 10.

First and foremost, this Court has already ruled that Plaintiffs have standing to pursue Counts 1 through 10. On April 16, 2009, this Court fully considered the Defendants' standing arguments (which are, to a large extent, repeated verbatim in their summary judgment motions). This Court held that "that the Plaintiffs have standing to assert Counts 1 – 10." Order on Defendants' Intervenor-Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, dated April 16, 2009, ¶ 3; s*ee* Transcript of Proceedings of March 17, 2009 (Ex. 141), at 66:13-15. Defendants have no basis to assert that this Court is now divested of the ability to hear Plaintiffs' claims: "It is the universal rule . . . that where a court once rightfully acquires jurisdiction of a cause, it has the right to retain and decide . . . . [T]he jurisdiction of the court depends upon the state of things at the time of the action brought, and, after vesting, it cannot be ousted by subsequent events." *Estes* v. *Martin*, 34 Ark. 410, 419, 1879 WL 1317, *5 (1879) (internal quotation marks omitted) (holding that jurisdiction, which includes standing, is assessed at the outset of the case); *see also Oliver* v. *Phillips*, 375 Ark. 287, 291-92, 290 S.W.3d 11, 14 (2008) (same); *Steger* v. *Franco, Inc.*, 228 F.3d 889, 893 (8th Cir. 2000) ("[S]tanding is based on the facts as they existed at the time the lawsuit was filed."). Except for a few unfounded arguments based on circumstances that changed after this action was brought (*see* Section II.B,

[4] Defendants do not contest that the taxpayer-Plaintiffs have standing to challenge Counts 1 and 2 or that Plaintiffs have standing to pursue Counts 12 and 13. Defendants' argument that taxpayer-Plaintiffs have not adequately pleaded their claim that Act 1 constitutes an illegal exaction in violation of Article 16 of the Arkansas Constitution is addressed below. *See* Section II.D, *infra*.

infra), Defendants raise no arguments other than those the Court already has considered and dismissed. For this reason alone, Defendants' standing arguments should be rejected without further consideration.

B. The Defendants' arguments concerning standing fail for the same reasons as set forth in the Plaintiffs' Opposition to Defendants' Motions to Dismiss.

Even if there were a legal basis to revisit standing (there is not), Defendants' standing arguments lack merit. To the extent Defendants rehash the arguments they made at the motion to dismiss stage, those arguments fail now for the same reasons they failed a year ago.

The controlling law has not changed since the Court's prior decision. The Arkansas Supreme Court has held that plaintiffs have standing to challenge a law if they "show that [they have] a right which a statute infringes upon and that [they are] within the class of persons affected by the statute."[5] *Dep't of Human Servs. and Child Welfare Agency Review Bd.* v. *Howard*, 367 Ark. 55, 59, 238 S.W.3d 1, 4 (2006); *see also Ghegan & Ghegan, Inc.* v. *Weiss*, 338 Ark. 9, 14, 991 S.W.2d 536, 539 (1999) (same). "Stated differently, plaintiffs must show that the questioned act has a prejudicial impact on them." *Ghegan*, 338 Ark. at 15, 991 S.W.2d at 539 (internal cites omitted). Plaintiffs also have standing under the Arkansas Declaratory Judgments Act provided that their "rights, status, or other legal relations are affected by a statute," in which case the Act provides that they are entitled to "have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." Ark. Code Ann. § 16-111-104 (West 2009). This Act is "liberally construed" to confer standing, particularly

[5] "Standing in Arkansas courts is a question of state law, and federal cases based on Article III are not controlling." David Newbern & John J. Watkins, Arkansas Practice Series, *Civil Practice and Procedure* § 7:3 (4th ed. 2006).

where, as here, the issue before the court is a matter of significant public interest and a matter of constitutional law. *Bryant* v. *English*, 311 Ark. 187, 190, 843 S.W.2d 308, 309 (1992); *see also* Ark. Code Ann. § 16-111-102 (b) & (c) (West 2009) (explaining that the Act is to be "liberally construed" to meet this legislative purpose of resolving uncertainty about statutes).

Applying this law to the parent-Plaintiffs who are bringing Counts 5 and 6, this Court correctly found that the parent-Plaintiffs have standing to seek a declaration that Act 1 unlawfully interferes with their right to have their judgment about their own children be considered in the event of their death or incapacity.[6] Yet, Defendants assert, as they did at the motion to dismiss stage, that these claims are "too speculative" and will only be justiciable upon the death or incapacity of the parents. State Defs.' SJ Memo. at 27-28. The arguments advanced by Defendants were flatly rejected by the Arkansas Supreme Court in *Jegley* v. *Picado*, 349 Ark. 600, 611-22, 80 S.W.3d 332, 336-343 (2002). In *Jegley*, the court determined that the plaintiffs had standing even where enforcement of the challenged statute was not being enforced and there was no present intention to enforce the statute in the future against the plaintiffs or anyone else, but there was the threat of enforcement in the future. *Id*. The court in *Jegley* restated the rule that plaintiffs must simply belong to a class prejudiced by the statute. *Id.*; *see Gallas* v. *Alexander*, 371 Ark. 106, 119, 263 S.W.3d 494, 504 (2007) ("The general rule is that one must have suffered injury *or belong to a class that is prejudiced* in order to have standing to challenge the validty of a law.") (emphasis added); *Springdale Sch. Dist. No. 50* v. *Evans Law Firm, P.A.*, 360 Ark. 279, 283, 200 S.W.3d 917, 920 (2005). Here, the parent-Plaintiffs belong to the class that is prejudiced by Act 1. The statute interferes with, and creates uncertainty as to, one of the

[6] These Plaintiffs are Meredith and Benny Scroggin and Susan Duell-Mitchell and Chris Mitchell.

most important rights belonging to a parent: the planning for the care of children in event of tragedy and the sense of security that comes from having made those decisions.[7] Just because the parent-Plaintiffs have not died or become incapacitated, the State does not get a "free pass" on claims by them because, as was explained in *Jegley*, the potential future enforcement of Act 1 creates a present dilemma that prejudicially impacts them sufficiently to give them standing to seek a declaration of their rights against Act 1. Ark. Code Ann. § 16-111-104; *id*. § 16-111-102; *see also Jegley*, 349 Ark. at 618, 80 S.W.3d at 341.

As to Counts 7 and 8, this Court has already properly decided that the child-Plaintiffs have standing to assert that Act 1 constitutes a violation of their equal protection rights.[8] Defendants nonetheless argue again that these claims "are not ripe and should be dismissed" because the claims of the child-Plaintiffs are "contingent on events that have not, and might not ever, occur," including that the "parent Plaintiffs might not die before the child Plaintiffs reach adulthood." State Defs.' SJ Memo. at 30. As with the parent-Plaintiffs, the child-Plaintiffs need not wait until Act 1 is actually enforced against them to seek a declaratory relief. *Jegley*, 349 Ark. at 816, 80 S.W.3d at 341 (noting that the Arkansas Supreme Court has "heard challenges to the constitutionality of statutes and regulations by persons who did not allege that they had been penalized under the statutes or regulations"); *see also Magruder* v. *Ark. Game and Fish Comm'n*, 287 Ark. 343, 344, 698 S.W.2d 299, 300 (1985) (holding that there was a justiciable controversy over the validity of regulation despite no allegation by plaintiff that

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[7] Under the Defendants' theory the parent-Plaintiffs will never have standing because their injury will only be imminent after their death or incapacitation. If the parent-Plaintiffs cannot contest this statute during their lifetime, then they will have no remedy for the clear—and current—intrusion upon their right to parental autonomy. This is not the law.

[8] These Plaintiffs are W.H., N.S., L.S., N.J.M. and N.C.M.

he was either penalized for the conduct or threatened with enforcement of the regulation). Under Arkansas law, a person who belongs to the class "whose rights are thus affected by a statute has standing to challenge it on constitutional grounds," including the child-Plaintiffs before this Court. *Jegley*, 349 Ark. at 619, 80 S.W.3d at 341; *Magruder*, 287 Ark. at 344, 698 S.W.2d at 300.

As to the standing of Plaintiffs to bring Counts 9 and 10, the Court has already properly decided that the Plaintiffs, who are living in same-sex relationships, have standing to seek a declaration that Act 1 unlawfully violates their right to equal protection.[9] However, Intervenor-Defendants contend that because "none of these Plaintiffs have ever contacted DHS to initiate the [adoption or foster] process," their "alleged injuries at the hands of the state are not real and immediate." Int.-Defs.' SJ Memo. at 15. This argument is wrong as a matter of law. The Arkansas Supreme Court rejected this exact argument in *Howard* when it held that the plaintiffs in that case had standing to challenge the State's blanket exclusion of gay people from serving as foster parents: "[E]ven if Appellees had not applied to become foster parents, they still had standing to bring suit because they are within the class of persons affected by the regulation, and each Appellee's attempt to become a foster parent *would be futile because of the regulation*." *Howard*, 367 Ark. at 59, 238 S.W.3d at 4 (emphasis added). Here, as in *Howard*, there can be no question that the couple-Plaintiffs are within the class of persons categorically excluded from serving as foster and adoptive parents by Act 1 and that it would be futile for these Plaintiffs to

[9] These Plaintiffs are Cole, Huffman, Rickman, Pennisi, Harrison, Chatham, and Frazier. Although Plaintiff Huffman was previously approved by DCFS to adopt a child and did so in 2003, Act 1 now categorically bars her from adopting or fostering additional children. Fourth Amend. Compl. ¶¶ 19-20.

apply to foster or adopt.[10] Thus, just like the *Howard* plaintiffs, this Court properly found that they have standing to challenge the constitutionality of Act 1.

Intervenor-Defendants mount a further attack on this Court's prior order with respect to Counts 6 and 7 because Plaintiff Huffman purportedly withdrew a previous application to adopt for reasons unrelated to Act 1 and, therefore, they argue, she "cannot . . . show that she has incurred an injury attributable to Act 1." Int.-Defs.' SJ Memo. at 14. Even if this argument amounted to a full account of the facts (it does not), this argument fails for the same reasons discussed above. Plaintiff Huffman remains within the class of persons categorically excluded from serving as foster and adoptive parents by Act 1. It would be futile for her to pursue any application to foster or adopt because her application would be rejected out-of-hand in accordance with Act 1. Therefore, Plaintiff Huffman has standing because she is within the class of persons affected by the statute.[11]

As to Counts 1 through 4, Defendants' standing arguments are premised on the new argument that because Plaintiffs W.H.'s and Cole's circumstances have changed, a new

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[10] Indeed, the State refused to allow the couple-Plaintiffs to attend, at their own cost, DHS's foster parent training pending the outcome of the suit because "the training is not available to persons who do not qualify to foster or adopt." Letter from C. Jorgensen to C. Sun, dated July 6, 2009 (Ex. 135), at 1.

[11] Intervenors' argument should be disregarded for the additional reason that it plainly misstates the facts. Correspondence with Monica Cauthen, the DHS social worker involved with Plaintiff Huffman's application, demonstrates that Plaintiff Huffman was in constant contact with DHS in an attempt to foster or adopt another child. *See* E-mail from M. Singleston to L. McGee and C. Blucker, dated December 9, 2008 (Ex. 127), at COLE-DHS 00003100 ("I emailed you last Monday to follow-up on if you had any news about Dylan or any of the other children I had requested information on. . . . It is almost December and I first inquired about Dylan the first of August."); *id*. at COLE-DHS 00003095 ("I have been in the system as an approved adoptive home since January 2002. . . . I am a single female in a cohabiting living situation. In light of the recent legislation [Act 1], I thought I would ask where I stand. . . . All I want is the opportunity to give one of the many foster kids in our state a home. . . .").

ruling should be issued dismissing Counts 1 through 4 for lack of standing. State Defs.' SJ Memo. at 16; Int.-Defs.' SJ Memo. at 12-14. Changed circumstances, however, are not a basis to overturn this Court's previous standing decision because the jurisdiction of the court to hear a challenge "depends upon the state of things at the time of the action brought, and, after vesting, it cannot be ousted by subsequent events." *Estes*, 34 Ark. at 419.

Nonetheless, Defendants argue at length that Plaintiffs W.H. and Cole lack standing in Arkansas to bring Counts 1 and 2 because "W.H. is not in the custody of the State Defendants . . . [and therefore] she has no interest that can be adversely affected by Act 1 and she [sic] no stake in whether Act 1 is upheld or not because she is not in the State's custody." State Defs.' SJ Memo. at 16-17; *see also* Int.-Defs.' SJ Memo. at 12-14. Along the same lines, Defendants assert that "[b]ecause neither Plaintiff Cole nor Plaintiff W.H. is a resident of the State of Arkansas, Plaintiff Cole cannot adopt Plaintiff W.H. in Arkansas pursuant to Arkansas law. Thus, any alleged right of Plaintiff Cole's and Plaintiff W.H.'s to family integrity cannot possible be violated by Act 1." State Defs.' SJ Memo. at 19; *see also* Int.-Defs.' SJ Memo. at 13-14. Defendants' argument should be rejected because there remains a justiciable controversy before the Court.

While the Oklahoma adoption is pending (and its outcome is yet uncertain), the record from Arkansas is as follows: the State concedes that it would be in Plaintiff W.H.'s best interest to be adopted by Plaintiff Cole, even though Cole cohabits with her partner. *See* Order, *Arkansas DHS* v. *N.C.*, dated January 13, 2009 (Ex. 139), ¶ 5; Separate Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment, Appendix B, ¶ 36.[12]

[12] For the Court's convenience, Plaintiffs have attached two appendices: Plaintiffs' Response to Intervenors' Statement of Material Facts (attached as Appendix A) and *(Footnote Continued)*

However, Arkansas cannot recognize the adoption as proper because it is barred from doing so by Act 1. Thus, there remains a remedy that this Court can provide to Plaintiffs W.H. and Cole: if Act 1 were struck down (as it should be) and Cole were no longer considered categorically unfit to serve as an adoptive parent under Arkansas law, that would serve as evidence that could benefit Plaintiff Cole's finalization of W.H.'s adoption in the Oklahoma adoption proceeding, and thereby assist in securing Plaintiff W.H. a legal, permanent adoptive home. That adoption is crucial to the Plaintiffs W.H. and Cole because, as discussed throughout the briefing, the adoption would legally consummate the Coles' family relationship in a manner that gives it permanence that is simply not available to, or recognized to the same extent as, guardians. Plainly, Act 1 "has a prejudicial impact on them" and, therefore, W.H. and Cole have standing. *Ghegan & Ghegan, Inc*., 338 Ark. at 15, 991 S.W.2d at 539 (citing *Tauber* v. *State*, 324 Ark. 47, 919 S.W.2d 196 (1996)); *Garrigus* v. *State*, 321 Ark. 222, 224, 901 S.W.2d 12, 13 (1995).

However, even setting aside the flaws in Defendants' argument regarding Plaintiffs W.H. and Cole, Defendants' argument that Counts 1 through 4 should be dismissed for lack of standing still lacks merit because the taxpayer-Plaintiffs and child-Plaintiffs S.H., R.P. and E.P. are parties to this lawsuit.[13] Where, as here, the claim is for injunctive relief, one

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(*Footnote Continued*)

Separate Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment (attached as Appendix B). All exhibits referenced in Appendix B are part of the record and are not resubmitted.

[13] S.H., R.P. and E.P. are child-Plaintiffs who are currently in State custody and have joined Counts 1 and 2 because Act 1 violates their due process rights as children in State care to be free from the harm caused by Act 1. Act 1 indisputably harms these child-Plaintiffs by shrinking the pool of available foster and adoptive parents for no child welfare basis or by categorically disqualifying adoptive placements that would otherwise be in their best interests. Pls.' SJ Memo. at 22-26. They are *presently* prejudiced by Act 1 and thus have standing to seek declaratory relief since a person "whose rights are thus affected by

(Footnote Continued)

plaintiff with standing is sufficient to satisfy the standing requirement for all plaintiffs. *See generally Gen. Bldg. Contractors Ass'n, Inc*. v. *Pennsylvania*, 458 U.S. 375, 402 (1982) (injunctive relief); *Watt* v. *Energy Action Educ. Found*., 454 U.S. 151, 160 (1981) (injunctive and declaratory relief); *Nat'l Wildlife Fed'n* v. *Agric. Stabilization and Conservation Serv.*, 955 F.2d 1199, 1203 (8th Cir. 1992). These child-Plaintiffs' claims—along with the taxpayer-Plaintiffs' claims—defeat any argument that Counts 1 and 2 should be dismissed on standing grounds.

C. Counts 1 and 2 are not moot.

Defendants further contend that even if this Court finds that Plaintiff W.H. has standing—which she does—her claims are moot because "W.H.'s allegations in Counts 1 and 2 are based on the alleged existence of some duty to children in the State's custody, but she is no longer in the State's custody." State Defs.' SJ Memo. at 18; *see also* Int.-Defs.' SJ Memo. at 13-14.[14] A case is not moot unless "any judgment rendered would have no practical legal effect upon a then-existing legal controversy." *Davis* v. *Brushy Island Pub. Water Auth. of Ark.*, 375 Ark. 249, 251, 290 S.W.3d 16, 18 (2008); *see also Forrest Constr. Inc*. v. *Milam*, 345 Ark. 1, 6, 43 S.W.3d 140, 144 (2001); *Dillon* v. *Twin City Bank*, 325 Ark. 309, 312, 924 S.W.2d 802, 804 (1996). Put another way, mootness asks whether there is a claim to be decided in the case, without regard for whether there is one plaintiff that has standing to raise the claim or a dozen plaintiffs. Given this, Defendants' arguments about Plaintiffs W.H. and Cole are simply

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(*Footnote Continued*)

a statute has standing to challenge it on constitutional grounds." *Jegley*, 349 Ark. at 619, 80 S.W.3d at 341; *Magruder*, 287 Ark. at 344, 698 S.W.2d at 300.

[14] It is unclear whether Defendants are also arguing that Counts 3 and 4 should be dismissed as moot. *See* State Defs.' SJ Memo. at 18-19; Int.-Defs.' SJ Memo. at 12-13. Regardless, for the reasons set forth above, any such request should be denied.

irrelevant to the question of mootness because, as discussed above, S.H., R.P. and E.P. and the taxpayer-Plaintiffs all independently seek relief on these same claims. An adjudication of Counts 1 and 2 would have a very "practical legal effect" upon the "then-existing legal controversy" concerning S.H., R.P. and E.P.'s and the taxpayer's rights. There is nothing "moot" about Counts 1 and 2.

The Court should not dismiss Counts 1 and 2 for mootness on the additional ground that it is well-established that Arkansas courts may still consider cases that are moot (these claims are not) if the case concerns "issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation." *Honeycutt* v. *Foster*, 371 Ark. 545, 548, 268 S.W.3d 875, 878 (2007). Courts have recognized this public interest exception for over a century. *Wilson* v. *Thompson*, 56 Ark. 110, 19 S.W. 321 (1892) (addressing issue despite mootness because "the cause was of practical importance"). Arkansas courts invoke the public interest exception to rule on matters to prevent future litigation. *See, e.g.*, *Cummings* v. *Washington County Election Comm'n*, 291 Ark. 354, 355, 24 S.W.2d 486, 487 (1987) (invoking public interest exception to rule on issue of candidate's eligibility to run for office despite completion of election cycle); *Robinson* v. *Ark. State Game & Fish Comm'n*, 263 Ark. 462, 464, 565 S.W.2d 433, 434 (1978) (invoking public interest exception to reverse the grant of a temporary easement, even though the effective dates of the easement had expired); and *Forrest Constr., Inc*., 345 Ark. at 6, 43 S.W.3d at 144 (same, where the rights of a number of persons will be affected). Accordingly, even if Plaintiffs W.H.'s and Cole's claims were to become moot during the course of the litigation, this Court is still empowered to rule on this child's claims:

> [W]here considerations of public interest or the prevention of future litigation are present, the choice remains ours as to whether we may elect to settle an issue, even though moot. Future litigation may well be curtailed by our decision to resolve the

> issues presented in this appeal even though the controversy between the parties is moot, but the main reason we are compelled to go forward is based on the fact that a substantial question exists underlying the constitutionality of [an Arkansas] law[] that will affect countless numbers of Arkansans each year.

Duhon v. *Gravett*, 302 Ark. 358, 360, 790 S.W.2d 155, 156 (1990) (internal citations omitted); *see also Allison* v. *Lee County Election Comm'n*, 359 Ark. 388, 389-390, 198 S.W.3d 113, 114 (2004) (same).

The instant matter clearly falls within the ambit of the public interest exception. At its heart, this case is about children who are in State care because they have been abused or neglected by their biological parents and need the protection of this Court from the damage Act 1 has and will continue to cause by limiting the number of applicants to adopt or foster these children. Many of these children are too young and fearful of the State, upon whose care they depend, to speak for themselves. Few of these children have the resources—psychological and otherwise—to challenge the State for its unconstitutional actions and bring forward the proof that Act 1 not only causes serious harm to children in State care, but also that it serves no child welfare purpose. There is potentially no more important public interest than hearing these claims. Nonetheless, it is beyond credible dispute that if not heard today, the claims certainly will be litigated in the future. With hundreds of children in the custody of the state on any given day, *see* Arkansas DHS, 2009 Statistical Report (Ex. 122) at DCFS-33, there is no doubt that thousands of individuals are affected by Act 1, just a few of whom are before this Court. The constitutionality of Act 1 is exactly the type of litigation for which the public interest exception applies and which this Court should hear.

D. Act 1 constitutes an illegal exaction.

The taxpayer-Plaintiffs have adequately pleaded—and indeed substantiated with undisputed evidence—their claim that Act 1 constitutes an illegal exaction in violation of

Article 16 of the Arkansas Constitution, because it causes the state to misapply tax dollars in enforcing Act 1, which violates the rights of children in state custody. Fourth Amend. Compl. ¶¶ 100, 104, 154, 158. State Defendants and Intervenor-Defendants contend that Plaintiffs have failed to "state a cause of action because Plaintiffs have failed to allege what funds were allegedly misapplied." Int.-Defs.' SJ Memo. at 19; *see also* State Defs.' SJ Memo. at 14. Defendants further contend that even if the taxpayer claims are adequately pleaded, the Court "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." Int.-Defs.' SJ Memo. at 19; *see also* State Defs.' SJ Memo. at 14 ("[T]he indisputable evidence presented in this case demonstrates that Act 1 does not and will not result in the expenditure of State funds that would not be expended in the absence of Act 1."). Defendants misstate the requirements of an illegal exaction claim, although their arguments would fail even under the standard they have invented.

Under the Arkansas Constitution, "[a]ny citizen of any county, city, or town may institute suit, in behalf of himself and others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever." Ark. Const. art. 16, § 13. There are two types of illegal-exaction cases. This is a "public funds" case, where public funds generated from tax dollars are being misapplied or illegally spent because they are supporting enforcement of Act 1, which is unconstitutional. *See McGhee* v. *Ark. State Bd. of Collection Agencies*, 360 Ark. 363, 370, 201 S.W.3d 375, 379 (2005); *Pledger* v. *Featherlite Precast Corp.*, 308 Ark. 124, 128, 823 S.W.2d 852, 854 (1992); *see also Fort Smith Sch. Dist.* v. *Beebe*, No. 08-618, 2009 WL 1564465, at *2-3 (Ark. June 4, 2009) (plaintiff in public funds case "must show that the State misapplied or illegally spent money that was lawfully collected" through taxes). The Arkansas

Supreme Court's analysis in *McGhee* demonstrates beyond contravention that this Court should hear Plaintiffs' taxpayer claims. *McGhee* involved a challenge to the Check-Casher's Act which is administered by a division of the Arkansas State Board of Collection Agencies ("ASBCA"). 360 Ark. at 367-68, 201 S.W.3d at 376-77. The *McGhee* plaintiff did not allege that too much money was spent as a result of the Check-Casher's Act or that the act was itself a tax or identify any specific misapplied funds. Instead, the plaintiffs alleged that the ASBCA "used public funds to finance its operation" and those funds were used to implement the Check-Casher's Act that was challenged as unconstitutional. *Id*. at 372, 201 S.W.3d at 380. The court found that based on these allegations, "the expenditure of public funds to support the [ASBCA's] Division of Check-Cashing would be a misapplication of public funds" and therefore held "that the complaint sufficiently states a cause of action for illegal exaction." *Id*. In a subsequent opinion, the court declared the Check-Casher's Act unconstitutional. *McGhee* v. *Ark. State Bd. of Collection Agencies*, 375 Ark. 52, 65, 289 S.W.3d. 18, 28 (2008).

The basis for standing to assert a justiciable claim in this case is no different than in *McGhee*. Plaintiffs allege that Act 1 causes DHS to expend tax dollars to administer an unconstitutional law. Fourth Amend. Compl. ¶¶ 100, 104, 154, 158. Defendants do not dispute that DHS's operations are funded by tax dollars. Instead, Defendants argue that Plaintiffs have "failed to allege what funds that were allegedly misapplied." Int.-Defs.' SJ Memo. at 19. Defendants cite no authority for the proposition that Plaintiffs must allege that any particular funds—other than general tax dollars—are being misapplied. Nor do they support with authority their contention that Plaintiffs must establish that "Act 1 will result in the expenditure of *additional* State funds" beyond what would have been spent in the absence of Act 1. State Defs.' SJ Memo. at 14 (emphasis added). All that is required is that tax dollars are misapplied in

carrying out an illegal or unconstitutional law. *McGhee*, 375 Ark. at 65, 289 S.W.3d at 28; *Fort Smith Sch. Dist.*, 2009 WL 1564465, at *2-3.

Even if plaintiffs were required to show that Act 1 will cause the expenditure of "additional" funds beyond what would have been spent in its absence—and that is clearly not the standard—the undisputed facts establish that Act 1 does exactly that by reducing the pool of potential foster and adoptive parents, thereby causing children to remain in state custody longer than necessary. *See* Pls.' SJ Memo. at 22-26. Thus, Act 1's categorical bar causes the State to expend tax dollars supporting children in State custody for longer than necessary. *See* Pls.' SJ Memo. at 40. Act 1 constitutes an illegal exaction.

III. COUNTS 1 AND 2: ACT 1 VIOLATES THE SUBSTANTIVE DUE PROCESS RIGHTS OF CHILDREN IN STATE CARE

As discussed below, the Defendants' motions continue to misapprehend the constitutional claims at issue and thus should be denied. Moreover, because the undisputed material facts show that Act 1 causes the State to harm children in its care, Plaintiffs are entitled to summary judgment on these Counts. *See* Pls.' SJ Memo. at 42-52.

A. Defendants' motions attack claims that Plaintiffs do not assert, and thus can be denied for that reason alone.

Plaintiffs established a violation of the constitutional right of children who are in the State's custody not to be harmed by the State. *See* Pls.' SJ Memo. at 42-52. More specifically, in their motion for summary judgment on Counts 1 and 2, Plaintiffs establish, *inter alia*, that Act 1 violates the due process rights of children in state custody because it forces the State's child welfare professionals to arbitrarily deprive those children of available fit and appropriate adoptive and foster families, causing them serious harm. *Id*. Rather than address the substance of Plaintiffs' Due Process claims, Defendants address a claim of their own making: whether children in state care have a right to be fostered or adopted. Plaintiffs do not assert a

right to be fostered or adopted in either these two counts or any other count in the Complaint. Indeed, no Plaintiff seeks as relief an order of adoption if Act 1 is struck down. Defendants' failure to address Plaintiffs' actual due process claims is alone a basis to deny the Motions on Counts 1 and 2. *See JurisDictionUSA, Inc.* v. *Loislaw.com, Inc.*, 357 Ark. 403, 409, 183 S.W.3d 560, 564 (2004) (new issues may not ordinarily be raised on reply, absent intervening circumstances such as new authority).

B. Defendants' motions fail to address, and cannot overcome, the undisputed evidence that Act 1 fails the professional judgment standard and thus violates the due process rights of children in State care.

State Defendants and Intervenor-Defendants fail to address the well-established legal basis for Plaintiffs' claims in Counts 1 and 2: the Due Process clauses of the Arkansas and federal constitutions impose an obligation on DHS and the State Defendants to promote and care for, and at a minimum not arbitrarily harm, the well-being of the children in their custody for whom they have assumed the responsibility of caring as a parent. *See DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200-01 & n.9 (1989)[15]; *Youngberg* v. *Romeo*, 457 U.S. 307, 317 (1982); *see also* Pls.' SJ Memo. at 42-43. As shown in Plaintiffs' summary judgment memorandum, courts have repeatedly recognized this duty in cases challenging policies or actions affecting foster or adoptive children by a State's child welfare agency. Pls.'

[15] The State Defendants' reliance on *DeShaney* for the proposition that DHS does not owe a constitutional duty to children in its care is misplaced. *See* State Defs.' SJ Memo. at 13. In *DeShaney*, the Court recognized that "when the State by the affirmative exercise of its power so restrains an individual's liberty," it acquires a corresponding "affirmative duty" of care toward those persons under the Due Process Clause of the Constitution. *DeShaney*, 489 U.S. at 200. The basis for the Court's holding that there was no constitutional violation in that case is that the harm occurred to the plaintiff at the hands of his natural father, "who was in no sense a state actor," and during a time when that plaintiff was *not* in state custody. *Id.* at 201. Here, unlike *DeShaney*, the Plaintiffs are in State care and are challenging Act 1, which is plainly an action by the State.

SJ Memo. at 43-45. Act 1 clearly violates the substantive due process rights of children in State care because it substantially departs from the "professional judgment" of those in the child welfare field.[16] Pls.' SJ Memo. at 47-52. Indeed, there can be no material dispute that Act 1's categorical ban fails the professional judgment standard, given DHS's own decision to eliminate its policy banning cohabitors from serving as foster parents after concluding in October 2008 that a cohabitation ban harms children in its care. *See* Pls.' SJ Memo. at 34-35. Indeed, because the State Defendants have conceded that in their *own* professional judgment, Act 1 works against the interests of children in State care, there can be no dispute that Act 1 is constitutionally infirm. *Id.* at 29-35. The judgment of the State Defendants is confirmed and supported by the undisputed fact that professional child welfare organizations dedicated to children's health and welfare have concluded it is not appropriate to ban cohabiting individuals from serving as foster and adoptive parents. *See* Pls.' SJ Memo. at 33-34.

Facing what their own witnesses have testified to under oath—that Act 1 serves no child welfare purpose—the State falls back on the only argument it has left to support Act 1, a mystifying argument that it has *no duty* to the children in its care. "Although the State Defendants have an *interest* in advancing the best interests of children in their custody, the Plaintiffs' assertion that the State Defendants have a *duty* to do so is completely mistaken." State Defs.' SJ Memo. at 10 (italics in original). At the most fundamental level, this argument misses

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[16] Under the professional judgment standard, actions violate due process when they are "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." *Jordan* v. *City of Philadelphia*, 66 F. Supp. 2d 638, 646 (E.D. Pa. 1999) (quoting *Youngberg*, 457 U.S. at 323). As the Supreme Court in *Youngberg* further explained, the determination that "professional judgment" has been exercised must be based on a finding that the challenged decision was made by "a person competent, whether by education, training or experience, to make the particular decision at issue" or a person "subject to the supervision of qualified persons." *Id.*

the issue before the Court. Whether or not the State Defendants are fulfilling their statutory duties to children (and regardless of what statutory or regulatory duties may exist), Act 1 is unconstitutional because it violates children's due process rights.

At a more basic level, however, the fact that Defendants are even making this argument is important. This argument shows the lengths that Defendants have departed from children's interests, further establishing that there is no child welfare justification for Act 1. Although not central to the due process claims, of course the State Defendants have duties to children in their custody. The General Assembly has recognized that once a child enters DHS custody, the State assumes an ethical and legal obligation to act in that child's individual best interests. *See* Ark. Code Ann. § 9-28-1002(a) (West 2009) ("The General Assembly acknowledges that society has a responsibility, along with foster parents and the Department of Human Services, for the well-being of children in foster care."). DHS has acknowledged that it has an obligation to the children in its care. Huddleston Depo. (Ex. 97) at 55:2-19 (DHS has an obligation to change any policy that is inconsistent with the best interests of children); Selig Depo. (Ex. 104) at 21:19-23:12; *see also* Answer to Plaintiffs' Amended Complaint by Intervenors Family Council Action Committee and Jerry Cox, dated March 31, 2009, ¶ 1. The State has represented that it has these duties in proceedings before the Arkansas courts, including before the Arkansas Supreme Court. Excerpt from State Defendants' Brief, *Dep't of Human Servs.* v. *Howard*, dated November 17, 2005 (Ex. 130) ("When a child is brought into foster care, the State of Arkansas stands *in loco parentis* to the foster children in its care. Thus, the State's overriding interest must be doing what is in the best interests of children in its care. . . . The State has a duty of the highest order to protect the interest of minor children."). Defendants' argument that Act 1 is acceptable because the State Defendants have "no duty" to children in their care

disregards the intent of the legislature, the practices of DHS, and the State Defendants' own representations to the courts. Although this is unpersuasive to the extent it misstates Plaintiffs' claims, it is clear evidence that Act 1 has no child welfare justification.

Because there is no material dispute that Act 1 substantially departs from the professional judgment of those in the child welfare field and not only fails to protect children in state care but actually causes them harm, *see* Pls.' SJ Memo. at 29-39, 47-52, under any level of review, Defendants' motions should be denied and Plaintiffs' Motion for Summary Judgment granted.

C. The Defendants' assertion that its constitutional duty of care does not afford children the right to be placed with the "best family" misses the point.

Consistent with their effort to dismiss claims Plaintiffs have not pleaded, the Defendants also erroneously contend that the child-Plaintiffs seek the right to be placed with the "best family." State Defs.' SJ Memo. at 10. This argument plainly misses the point; the primary effect of Act 1 is to cause some children to have *no family at all*, much less the "best family." *See* Pls.' SJ Memo. at 22-26 (discussing generally the harm to children caused by the shortage in Arkansas of available foster and adoptive parents). Anyhow, the child-Plaintiffs are not seeking placement with a particular family. Rather, the Complaint seeks relief against Act 1 because it violates the State's duty not to arbitrarily harm children in its care by shrinking the pool of suitable foster and adoptive parents. *Id.* at 42-47; *see also Howard*, 367 Ark. at 63, 238 S.W.3d at 7 (categorical ban on gay individuals and couples from serving as foster parents is "harmful to promoting children's healthy adjustment because it excludes a pool of effective foster parents"); *Braam ex rel. Braam* v. *Washington*, 81 P.3d 851, 860 (2003) (holding that "[t]he State, as custodian and caretaker of these children, is therefore liable for the harm allegedly caused by a violation of a foster child's substantive due process right to be free from unreasonable risk of

harm . . . when his or her care, treatment, and services 'substantially depart from accepted professional judgment, standards or practice'").

Similarly, Plaintiffs do not contend that the State Defendants have a duty to "provide them with, anything and everything that may conceivably be in their *very* best interests." State Defs.' SJ Memo. at 11 (emphasis in original). The child-Plaintiffs here are not seeking any procedure not already contemplated by the State's child welfare system, as DHS already has a long history of placing children with cohabiting heterosexual and same-sex couples. In fact, in 2008, DHS decided to eliminate its categorical ban on cohabitors as foster parents because of the State's conclusion that the ban harmed children. *See* Pls.' SJ Memo. at 16, 34-35; *see also id*. at 49. Put in its simplest form, Plaintiffs ask that the State do what it intended to do to meet its obligations to children, but now is prevented from doing because of Act 1. Plaintiffs seek nothing other than DHS acting in accord with what it obviously thought was best.

Thus, the Defendants' reliance on *In the Interest of C.S.*, 516 N.W.2d 851 (Iowa 1994), is misplaced. In that case, the plaintiff sought additional payments from DHS for a placement in an out-of-state psychiatric hospital. *Id.* at 856-57. The Court found that plaintiff was not entitled to an exception to Iowa's dollar-amount cap to treatment facilities, holding that the due process clause does not require the state to provide the "best or the optimal placement" where the state has a countervailing interest such as controlling costs. *Id.* at 861-62. In stark contrast, the State Defendants here have conceded that there is no countervailing interest

advanced by Act 1 and that the shortage of suitable foster and adoptive families exacerbated by Act 1 in fact *increases* the costs to the State.[17] *See* Pls.' SJ Memo. at 29-34, 40.

Thus, the Defendants' reliance on *Reno* v. *Flores* and *In the Interests of Jeremy P.* is similarly misplaced. *See* State Defs.' SJ Memo. at 10-11. As an initial matter, neither of these cases involves the State's duty to children in the child welfare system. In *Reno*, the issue before the Court was the scope of the substantive due process rights of undocumented children in the context of a regulatory scheme enacted by the Immigration and Naturalization Service ("INS"), an area that the government has traditionally been provided great deference under its "plenary power" to regulate all aspects of immigration. *Reno* v. *Flores*, 507 U.S. 292 (1992); *see also Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972) ("The Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.") (internal quotation marks omitted). This is not an immigration case. There is no suggestion in *Reno* that the standard by which child welfare agencies are judged—"professional judgment"—is identical, let alone comparable to the standard by which immigration regulations are judged. *Reno* is simply inapplicable to this

[17] The Defendants' suggestion that the guardianship option in Act 1 would substantially offset the shortage of appropriate placements for children misrepresents the State's guardianship process. In Arkansas, unlike the foster and adoptive process, a person cannot apply to be a guardian of a child unless there is a preexisting relationship between the child and the adult. Blucker Depo. (Ex. 85) at 102:11-18. Thus, the adult-Plaintiffs and couples like them who lack such a preexisting relationship will not be able to provide a loving home to a child in State care, because they are barred by Act 1 from serving as adoptive or foster parents. The "guardianship exception" does not ameliorate the damage caused by Act 1; to the contrary it demonstrates there is no purpose to Act 1 because the exception admits that children should be and can be placed with individuals the Act then seeks to categorically bar from adopting or fostering.

case.[18] For similar reasons, *In re Jeremy P.* is inapposite because that case did not involve a child in state custody *at all*: the issue there was whether Wisconsin's mandatory sex offender registry requirement for juveniles violated the plaintiff's substantive due process rights. *In re Jeremy P.*, 278 Wis. 2d 366, 381-83 (Wis. Ct. App. 2004).

D. The cases concerning cohabitation in custody disputes do not relieve the State of its constitutional duty not to harm children in its custody.

Contrary to Defendants' argument, the custody cases in which courts have imposed restrictions on parents living with unmarried partners after a divorce do not help their case. To begin, the custody cases are plainly different than applications to foster and adopt. These cases do not refute the evidence that, under the federal and state constitutions, a blanket ban on same-sex and unmarried heterosexual couples from adopting and fostering children is not justified by any child welfare purpose.[19] However, to the extent these cases are informative, a recent holding by the Arkansas Supreme Court in the custody arena strongly suggests that such a blanket ban imposed by Act 1, that undertakes no individualized review, is unconstitutional.

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[18] Additionally, *Reno* is unhelpful to the Defendants because the *Reno* Court found that the challenged INS policy in fact "preserve[d] and promot[ed] the welfare of the child." *Reno*, 507 U.S. at 303. In stark contrast, the undisputed evidence here demonstrates that far from promoting the welfare of children in the State's custody, Act 1 causes them significant harm. Pls.' SJ Memo. at 22-26. Moreover, as the State Defendants acknowledge, a key underpinning of the Court's holding in *Reno* was that INS did not have "the expertise or resources to conduct home studies for individualized placements." *See* State Defs.' SJ Memo. at 68 (citing *Reno*, 507 U.S. at 312). Here, there is no material dispute that DHS, DCFS, and CWARB have the expertise and resources to conduct home studies for individualized placements, which they do every day, and that the home study process and other safeguards in place are as effective for screening cohabiting heterosexual and same-sex couples as it is for married and single applicants. *See* Pls.' SJ Memo. at 21-22.

[19] For the same reasons set forth in this section, the custody cohabitation cases do not support the conclusion that Act 1 promotes a child welfare interest for the purposes of any of Plaintiffs' constitutional claims.

The custody standards that apply when a family is being separated do not support the categorical ban imposed by Act 1, a situation where an individual seeks to form a family. In divorce cases, the courts are called upon to resolve disputes between warring parents about the custody and care of the children who are facing the separation of parents the child had seen in union. The courts must assess the impact each parent's subsequent relationships and living arrangements might have on children who were previously living with both parents. Here, the couple-Plaintiffs are seeking to adopt or foster children together and form a family. There is no dispute between parents to be mediated. The child is not being separated from a known family structure; rather, a new family is being created. There is no relevance to how adoption and foster care decisions should be made.[20]

In any event, even if the custody cases cited by Defendants were applicable to adoption and foster placements, they would not support Act 1. The Arkansas Supreme Court has now made it clear that in order for such restrictions to be imposed on parents in a divorce case, harm cannot be categorically presumed (as is the case with Act 1), but rather, courts must look at the evidence of the effects, if any, of the parent's living arrangement on the children. In *Taylor* v. *Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003), the Court held that a trial court abused its discretion in transferring custody away from the mother, because she shared her home and bed

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[20] Indeed, the Arkansas Supreme Court saw no relevance with respect to these cases when, in *Howard*, it ruled in favor of the Plaintiffs, who included some individuals who were living with unmarried partners, *see Howard* v. *CWARB*, No. CV 1999-9881, 2004 WL 3154530 (Ark. Cir. Ct. Dec. 29, 2004), and struck down a ban on fostering by gay persons and those living in households with gay persons as lacking any child welfare basis. In fact, in attempting to defend the foster care ban against gay persons and couples, the State, citing some of the same cases it cites here, argued as it does here that the "courts of this State have never condoned extramarital cohabitation in the presence of a child," *see* Appellants' Reply and Response to Cross Appellants, *Dep't of Human Servs.* v. *Howard*, dated February 6, 2006 (Ex. 121), at 5, but the Court did not consider this germane, as it unanimously ruled in favor of the *Howard* plaintiffs.

with another woman, based on the speculation that this would be harmful to the children. The Court demanded that "evidence-based factors must govern," and because the evidence showed that the children were thriving in their mother's care and "had not been adversely affected by [their mother's] living arrangement," the lower court erred in changing custody. *Id*. at 83-84, 110 S.W.3d at 739. Adopting this evidence-based standard brought Arkansas law in accord with the prevailing standard across the states. *See*, *e.g.*, *Damron* v. *Damron*, 670 N.W.2d 871, 875 (N.D. 2003) (noting that a number of other courts "have recognized that, in the absence of evidence of actual or potential harm to the children, a parent's homosexual relationship, by itself, is not determinative of custody" and collecting cases); *Moses* v. *King*, 637 S.E.2d 97, 100-01 (Ga. App. 2006) ("a parent's cohabitation with someone, regardless of that person's gender, is not a basis for denying custody or visitation absent evidence that the child was harmed or exposed to inappropriate conduct"); *Earls* v. *Earls*, 42 S.W.3d 877, 890 (Tenn. Ct. App. 2001) ("[W]e have repeatedly pointed out that cohabitation alone does not necessarily provide grounds for changing custody when there is no proof that it has or will adversely affect the children."); *Eldridge* v. *Eldridge*, 42 S.W.3d 82 at 85-86 (Tenn. 2001) (rejecting the notion that the sexual orientation of the parent and partner alone can form a valid basis for restricting visitation); *Shipman* v. *Shipman*, 586 S.E.2d 250, 256 (N.C. 2003) (where the change in circumstances in a custody modification case involves a parent's cohabitation, "the effects of the change on the welfare of the child are not self-evident and therefore necessitate a showing of evidence *directly* linking the change to the welfare of the child") (emphasis in original); *Van Driel* v. *Van Driel*, 525 N.W.2d 37, 39 (S.D. 1994); *Hassenstab* v. *Hassenstab*, 570 N.W.2d 368 (Neb. Ct. App. 1997).[21]

[21] In the one post-*Taylor* Arkansas Supreme Court case involving parental cohabitation

(Footnote Continued)

In contrast to this evidence-based standard employed in custody cases, Act 1 categorically bars all applicants in same-sex and unmarried heterosexual relationships regardless of whether there is any factual showing that there is a reason to exclude them. Thus, even under the standard set forth in *Taylor*, Act 1 plainly fails since the undisputed facts show that there is no child welfare basis for the blanket bans created by Act 1. Pls.' SJ Memo. at 29-39.

IV. COUNTS 3 AND 4: ACT 1 BURDENS THE CONSTITUTIONAL RIGHT TO FAMILY INTEGRITY

As set out in the Amended Complaint, Counts 3 and 4 concern the well-established constitutional right of Plaintiffs Sheila Cole and W.H., Cole's granddaughter, to maintain the integrity of their family without undue interference by the government. Again, Defendants' arguments concerning Counts 3 and 4 do not address the actual claims pleaded by the Plaintiffs. Instead, the Motions address phantom assertions that the status of being a grandparent alone entitles one to a constitutional right to adopt one's grandchild or that children have a constitutional right to be adopted by a particular individual. *See* State Defs.' SJ Memo. at 19-23. Because neither Count 3 nor 4 (nor any other of Plaintiffs' claims) concerns the "claim" Defendants have sought to dismiss—a constitutional right to adopt or be adopted—Defendants' motions must be denied.

(*Footnote Continued*)

cited by defendants, *Alphin* v. *Alphin*, 364 Ark. 332, 219 S.W.3d 160 (2005), the Court once again looked to the evidence of the well-being of the child. In *Holmes* v. *Holmes*, 98 Ark. App. 341, 255 S.W.3d 482 (2007), a post-*Taylor* Court of Appeals case cited by defendants, the court similarly applied an evidence-based standard. *Id.* at 349 (noting supreme court's rejection in *Taylor* of the presumption of harm and upholding an award of custody to father because trial court found mother's cohabitation with six different partners over 4½ years was "detrimental to [the child's] welfare" and the evidence showed mother's lack of financial, residential and employment stability).

By Counts 3 and 4, Plaintiffs assert the violation of the uncontroverted constitutional right to family integrity. The United States Supreme Court has long recognized that "the Constitution protects the sanctity of the family," *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977), and that the right to make personal choices in matters of family life "is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 639-40 (1974). As discussed above, this right can be traced to the Bill of Rights, which provided to families "a substantial measure of sanctuary from unjustified interference by the State." *Roberts*, 468 U.S. at 618; *compare Moore*, 431 U.S. 494, *with Doe* v. *Miller*, 405 F.3d 700, 710 (8th Cir. 2005) (residency ordinance that merely restricts the *location* of a home as opposed to who may live together in a home does not violate substantive due process because "nothing in the statute limit[ed] who may live with" plaintiffs). "Protecting these [family] relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Roberts*, 468 U.S. at 619. Specifically, "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id.* at 619-20.

These rights are not limited to biological mothers and fathers. In *Moore*, the United States Supreme Court recognized that the fundamental right to family integrity extends beyond certain traditional notions of the "nuclear" family. 431 U.S. at 504. The Court struck down a zoning ordinance that would have prohibited a grandmother from continuing to live with her grandson. In invalidating the ordinance that limited occupancy in a home to members of a "single family," defined to exclude families like Mrs. Moore's, the Court reasoned that that type

of ordinance "slic[ed] deeply into the family itself." *Id.* at 495-96, 498. The Court held that "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Id.* at 504; *see also Roberts*, 468 U.S. at 619 (recognizing that among the relationships that are within constitutional protection "are those that attend the creation and sustenance of a family—marriage . . . the raising and education of children . . . and *cohabitation with one's relatives*") (emphasis added) (internal citations omitted).

The case law relied upon by Defendants is directed towards the altogether different claim of a grandparent's right to adopt or foster a grandchild based on a biological connection alone.[22] Yet Plaintiffs have never contended that the biological or genetic relationship of Sheila Cole to W.H. engenders a right to an adoptive relationship. Rather, Plaintiffs have asserted the fundamental right of Plaintiffs Cole and W.H. to remain within already existing "[f]amily relationships . . . involv[ing] deep attachments and commitments." *Roberts*, 468 U.S. at 619-20.

Indeed, this difference is well-illustrated in a case cited by State Defendants, *Mullins* v. *State of Or.*, 57 F.3d 789 (9th Cir. 1995). That case asked "whether biological

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[22] In *Cox* v. *Stayton*, 273 Ark. 298, 619 S.W.2d 617 (1981), the issue before the Court was whether the state's adoption statutes "deprive[d] grandparents of their rights to their grandchildren without a showing of a compelling state interest." 273 Ark. at 304, 619 S.W.2d at 620. The Court found that grandparents did not possess any such "presumptive right to custody or adoption of their grandchildren" either at common law or by Arkansas statute by virtue of their biological role alone as the child's grandparents. *Id.* And, contrary to the State Defendants' descriptions, neither *Georgina G.* v. *Terry M.*, 516 N.W.2d 678 (Wis. 1994), nor *In re Adoption of T.K.J.*, 931 P.2d 488 (Colo. 1996), involved the right to family integrity. The issue in those cases was whether the state's adoption law allows an individual to adopt an unmarried partner's child without severing the biological parent's parental rights. *Georgina G.*, 516 N.W.2d at 683; *In re Adoption of T.K.J.*, 931 P.2d at 493.

connection, standing alone, gives a grandmother a constitutionally protected liberty interest in the adoption of her grandchildren." *Id*. at 791. The court found that the grandmother in *Mullins* did *not* possess a viable claim to family integrity because the grandparents there "rarely even visited the children, let alone established a 'family' in any meaningful sense." *Id*. at 793-94. The Ninth Circuit specifically contrasted the grandmother's claim in *Mullins* with the Supreme Court's finding in *Moore* v. *City of East Cleveland*, noting that in the latter case the Court had found "[a] negative right to be free of governmental interference in an already existing familial relationship." *Mullins*, 57 F.3d at 794.

In contrast, the present case does not assert any purported biological or genetic right to adopt one's grandchild. Quite differently, Sheila Cole asserts her "right to be free from governmental interference in an already existing familial relationship." *Mullins*, 57 F.3d at 794. There is no dispute that Plaintiff Cole has been a part of her granddaughter's life since the child was born and that by DHS's actions to take W.H. into its custody, there was the concrete risk that their familial relationship would have been destroyed. Immediately upon learning that the State intended to terminate the rights of W.H.'s parents, Cole sought to have W.H. placed with her. Deposition of Sheila Cole ("Cole Depo.") (Ex. 89) at 15:24-16:19, 21:8-22:10. To that end, Cole obtained a home study in Oklahoma, where she resides, and was approved as a qualified foster parent. *Id.* at 38:12-23; Kutz Depo. (Ex. 98) at 62:16-21. Through DHS's use of the procedures under the Interstate Compact on Placement of Children to allow placement of W.H. with Ms. Cole, who resides in Oklahoma, Ms. Cole has had custody of W.H. since January 13, 2009.[23] Cole Depo. (Ex. 89) at 17:10-18:20.

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[23] The Honorable Jay Finch from the Circuit Court of Benton County found that "[i]t is in the best interests of W.H. that Sheila Cole be awarded physical custody" of W.H. Order, *(Footnote Continued)*

Although the family integrity of W.H. and Ms. Cole was not immediately torn asunder, but for the luck of geography, Act 1 created a significant risk that W.H. would be removed from her grandmother's care, in violation of their constitutional rights under *Moore*. Indeed, the result in Oklahoma is not final, and given Arkansas's conclusion that W.H. should be placed with Ms. Cole (and the undeniable conclusion that but for Act 1, the adoption could have occurred in Arkansas), Act 1 continues to harm Ms. Cole and W.H. in the claim they have pleaded.

Although Act 1 does not on its face apply to guardianships, the State Defendants have taken the position that the statute prohibits them from "recommending or otherwise taking the position that *a placement of any kind, including guardianship or custody*, with a person disqualified from adoption or fostering under Act 1 would be in the 'best interests of the child.'" Joint Stipulation and Proposed Order Re: Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order ("Joint Stipulation") (entered Jan. 12, 2009) at 2 (emphasis added). Given that it is the State Defendants' view that under Act 1, DHS child welfare professionals cannot recommend *any* type of placement with a person in a cohabiting or same-sex relationship, the statute poses to Plaintiff W.H. and Ms. Cole—and continues to pose to others in their situation[24]—a significant risk to their family integrity.

(*Footnote Continued*)

Arkansas DHS v. *N C.*, dated January 13, 2009 (Ex. 139). Yet, because Ms. Cole lives with her partner of ten years, Act 1 prevented her from adopting her granddaughter even though DHS found that adoption by Ms. Cole was in W.H.'s best interests. *See* Plaintiffs' Response to Intervenors' Statement of Material Facts, Appendix A, ¶ 12.

[24] Indeed, Act 1's categorical bar on DHS recommending an adoptive relationship with persons in same-sex relationships has posed a risk of familial separation to at least one other child in DHS custody. Reid Depo. (Ex. 101) at 29:2-37:5.

Further, but for Act 1, Ms. Cole would have been eligible to adopt W.H. in Arkansas, a step which would have ensured that W.H. could remain permanently with her grandmother. The inability to adopt her granddaughter (based on reasons unrelated to her ability to care for the child) denied the family under Arkansas law the security against intrusion that comes with adoption. Adoptive parent-child relationships, like biological parent-child relationships, cannot be severed or otherwise intruded upon by courts absent a determination of parental unfitness. *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978); Ark. Code Ann. 9-9-215(a)(2) (adoption decree creates equivalent of blood relationship). No such security attends a "custodial" placement. *See* Ark. Code Ann. §§ 28-65-322, 28-65-401. By automatically disqualifying Cole and others in her situation from adoption in the State even when the adoption would be in the child's best interests, Act 1 exposes families to the risk of being separated and violates the fundamental right to family integrity.

Defendants have not even attempted to show, nor could they, that there is a compelling government interest narrowly tailored to support Act 1's burden on the right to family integrity. *See*, *e.g.*, *Jegley*, 349 Ark. at 632, 80 S.W.3d at 350 (burden on fundamental constitutional right must be evaluated under strict scrutiny); *Moore*, 431 U.S. at 499 ("[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."). Defendants could not meet these requirements of strict scrutiny given the undisputed facts that: (i) Arkansas individually evaluates all applicants for suitability to adopt and foster consistent with nationally recognized child welfare practices; (ii) cohabiting heterosexual and same-sex couples can be screened as effectively as married and single people; (iii) cohabiting heterosexual and same-sex couples can make good

parents and, in fact, the majority of children of cohabiting couples—like the majority of children of married couples and single parents—have positive outcomes; and (iv) for some children, the optimal placement for their needs is with a cohabiting heterosexual or same-sex couple. *See* Pls.' SJ Memo. at 36-39; Section VIII.C, *infra*; *see also* findings of fact in *Howard*, *supra* at ¶¶ 14, 23-24, 29-32, 37, 46-47.[25]

Instead of addressing whether Act 1 can withstand strict scrutiny, Defendants' answer to Act 1's pernicious effects on Ms. Cole's and W.H.'s family is that Ms. Cole should have "simply refrain[ed] from cohabiting with her partner." State Defs.' SJ Memo. at 22. In other words, Ms. Cole should "simply" break up the stable and loving home that she has created with her partner of ten years and the five-year old daughter they are raising together in order for Ms. Cole to adopt her grandchild out of State care. This cavalier suggestion, far from supporting Defendants' argument, proves Plaintiffs' claim: Act 1 requires that Plaintiff Cole abandon part of her family in order to remain together with another family member. The State simply cannot force such an unconscionable choice on Ms. Cole and her family—and it is nothing short of perverse to claim that doing so promotes family stability. Defendants' motion should be denied.

V. COUNTS 5 AND 6: ACT 1 VIOLATES THE PARENT-PLAINTIFFS' CONSTITUTIONAL RIGHT AGAINST STATE INTERFERENCE IN THE CARE, CUSTODY, AND MANAGEMENT OF THEIR CHILDREN, WHICH INCLUDES PLANNING FOR THEIR CARE IN THE EVENT OF PARENTAL DEATH OR INCAPACITY.

Act 1 violates the parent-Plaintiffs' rights to make decisions about their own children, as guaranteed by the Arkansas and federal constitutions. As shown in detail in Plaintiffs' summary judgment memorandum and in the cases cited therein, the fundamental right of a parent to make decisions concerning the care, custody, and control of his or her children is

[25] *See also* Kutz Depo. (Ex. 98) at 80:8-13.

one of the oldest liberty interests recognized under the United States Constitution. *See* Pls.' SJ Memo. at 60-64. Here, in the event of death or incapacity, the parent-Plaintiffs have exercised their judgment as to what is best for their children and have designated cohabiting gay individuals to be adoptive parents for their children. Act 1 abrogates the effect of this parental designation by requiring DHS and the courts utterly to disregard the parents' wishes and to deny Plaintiffs' their right to parental autonomy without any inquiry into the best interests of the Plaintiffs' children. Because Defendants lack any (let alone a compelling) justification to support this interference with the parent-Plaintiffs' rights, Defendants' motions should be denied and Plaintiffs granted summary judgment. *See* Pls.' SJ Memo. at 60-64.

Plaintiffs Meredith and Benny Scroggin have, after long and careful thought, made the difficult decision that in the event they are unable to care for their children, they believe it is in their children's best interests to be adopted by Meredith's cousin Matt Harrison, who is living with his same-sex partner of ten years, Frank Pennisi. *See also* Affidavit of Meredith Scroggin ("M. Scroggin Aff.") (Ex. 81) ¶ 1; Affidavit of Benny Scroggin ("B. Scroggin Aff.") (Ex. 80) ¶ 1. Yet Act 1 prohibits an Arkansas court from even considering the Scroggins' wishes as parents, even if the court were to find such a placement to be in the best interests of the Scroggins' two children. Act 1 constitutes an arbitrary and harmful intrusion into their planning as responsible parents for the well-being of their children as the statute requires "that our wishes as parents that our children be adopted by their Uncle cannot even be considered by a court because their Uncle is in a loving, stable relationship but cannot get married under Arkansas law." M. Scroggin Aff. (Ex. 81) ¶ 4.

The claims of Plaintiffs Susan Duell-Mitchell and Chris Mitchell are essentially the same: as set out in Plaintiffs' summary judgment memorandum, these Plaintiffs challenge

Act 1 because the statute requires Arkansas courts to ignore their parental judgment that it would be in their children's best interests to be adopted by their close friend Chris Shields, who is barred solely because he has created a home with his partner of ten years, Rick Shelton. *See* Pls.' SJ Memo. at 60-64; *see also* Affidavit of Susan Duell-Mitchell ("S. Duell-Mitchell Aff.") (Ex. 78) ¶¶ 1-2 (designating Chris Shields "because we believe he and his partner Rick Shelton would raise them in the same nurturing environment we have provided them since their adoption five years ago. Chris Shields and his partner Rick share our spiritual beliefs, our views on education, and our philosophy on parenting. Most importantly, Chris and Rick genuinely love our children and have been a constant, positive presence since they arrived home"); Affidavit of Chris Mitchell ("C. Mitchell Aff.") (Ex. 79) ¶¶ 1-2 (same). While recognizing that a court must make the final determination whether such an adoption lies in the best interests of their children, the Mitchells are challenging Act 1 because it is their "responsibility as parents to do all that we can *today* to make plans for our children's well-being and future," including fighting for their rights as parents to have their wishes about the future well-being of their children given the proper weight and consideration. S. Duell-Mitchell Aff. (Ex. 78) ¶ 4; C. Mitchell Aff. (Ex. 79) ¶ 4.

There is no possible governmental purpose that could justify Act 1's requirement that a court refuse to consider the testamentary wishes of the parent-Plaintiffs. *See* Pls.' SJ Memo. at 26-29.[26] Instead, Defendants contend that "there is no parental right to control who might someday adopt one's child." State Defs.' SJ Memo. at 25. Defendants' arguments are flawed and their motions should be denied. The parent-Plaintiffs have never asserted the right to

[26] Defendants' experts Wilcox and Morse concede that there is no basis for Act 1's disregard of parental testamentary wishes. *See* Pls.' SJ Memo. at 63.

dictate the adoptive placement of their children through their testamentary wishes. Pls.' SJ Memo. at 62. Rather, the parent-Plaintiffs are seeking to vindicate their constitutional right to have their recommendations about the well-being and care of their children given the same consideration as any other parent's recommendation.[27]

State Defendants also seek to justify that the intrusion of Act 1 on the sacred determinations of parents at issue here by claiming that Act 1 does not prohibit parent-Plaintiffs from designating guardians in cohabiting heterosexual or same-sex relationships. State Defs.' SJ Memo. at 27-28. Guardianship is no substitution for the adoptions Plaintiffs seek for their children, if something should happen to them. There is no dispute that guardianship does not provide the same security and permanency that adoption does, and the State has no grounds for refusing to extend the benefits of adoption to a child solely because the child's guardian is in a cohabiting heterosexual or same-sex relationship. *See* Pls.' SJ Memo. at 64 n.33 (listing legal rights extended through adoption, but not guardianship, under Arkansas statutes); *see also id.* at 60-67; M. Scroggin Aff. (Ex. 81) ¶ 3; B. Scroggin Aff. (Ex. 80) ¶ 3; S. Duell-Mitchell Aff. (Ex. 78) ¶ 3; C. Mitchell Aff. (Ex. 79) ¶ 3. Thus, rather than curing the constitutional infirmity of Act 1, Defendants' response underscores the total disconnect between Act 1 and promoting the interests of children—it allows children to be raised by cohabiting parents as guardians, but arbitrarily denies those children the benefits and security of adoption even if that would be in the child's interests. *See also* Section VI, *infra.*

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[27] To the extent that Defendants claim that Arkansas courts do not give any consideration or weight to a deceased parent's testamentary wishes in evaluating an adoption petition under the best interests test, those practices or policies are unconstitutional. *Linder*, 348 Ark. at 350-51, 72 S.W.3d at 856-57; *Troxel*, 530 U.S. at 70.

More troubling, Defendants' arguments about a "guardianship option" not only overlook the significant legal deficiencies of a guardianship versus an adoption, the arguments are completely misleading. Although Act 1 expressly requires the State to permit cohabitors to serve as guardians, the State Defendants have taken the position that Act 1 prohibits them from "recommending or otherwise taking the position that *a placement of any kind, including guardianship or custody,* with a person disqualified from adoption or fostering under Act 1 would be in the 'best interests of the child.'" Joint Stipulation at 2 (emphasis added).

Defendants have offered no support that would meet the government's burden of showing that Act 1's interference with the Scroggins' and Mitchells' judgment as parents is narrowly tailored to meet a compelling state interest. And the undisputed facts—as well as the *Howard* findings—make such a showing impossible. *See* Pls.' SJ Memo. at 62-64; Section VIII.C, *infra*. Defendants' motions should be denied, and the parent-Plaintiffs' motion for summary judgment should be granted on counts 5 and 6.

VI. COUNTS 7 AND 8: ACT 1 VIOLATES THE CHILD-PLAINTIFFS' RIGHT TO EQUAL PROTECTION.

Just as Act 1 violates the rights of the parent-Plaintiffs to parental autonomy, the undisputed facts demonstrate that Act 1 constitutes a violation of the rights of child-Plaintiffs to equal protection under the law. *See* Pls.' SJ Memo. at 65-67. Act 1 treats children whose parents want them to be adopted by individuals in cohabiting heterosexual and same-sex relationships differently than children whose designated caregivers are not in a cohabiting heterosexual or same-sex relationship. The effect of this unlawful classification is to significantly disadvantage the child-Plaintiffs by depriving them of the possibility of obtaining the security and benefits of an adoptive relationship with the adult deemed by their parents best

suited to meet their needs, solely based on factors beyond the children's control: the marital status or sexual orientation of their designated caregivers.

As shown in Plaintiffs' summary judgment memorandum, the Arkansas and federal constitutions prohibit disparate treatment of similarly situated persons. *See, e.g.*, *Jegley*, 349 Ark. at 633, 80 S.W.3d at 350 (citing *Reed* v. *Reed*, 404 U.S. 71, 77 (1971); Ark. Const. art. 2 § 18 (Equal Rights Amendment)); *Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972) (holding as unconstitutional law that denied children recovery under worker's compensation laws based on illegitimacy); Pls.' SJ Memo. at 65-67 (cases cited therein). Laws that disadvantage a class of children based on factors beyond their control are subject to heightened scrutiny and can only stand if substantially related to a legitimate government interest. *See, e.g.*, *Mills* v. *Habluetzel*, 456 U.S. 91, 99 (1982); Pls.' SJ Memo. at 65-67. Here, Act 1 disadvantages the children whose designated caregivers are, by Act 1, categorically banned from consideration as adoptive parents. The child-Plaintiffs have no control over the marital status of the designated caregivers chosen for them by their parents. Therefore, Act 1 is subject to heightened scrutiny and cannot stand because it is not substantially related to any legitimate government interest.

Rather than address the issue presented, Defendants argue that because parents do not have "the sole legal authority to direct and control who will be the adoptive parents of their biological children," there can be no equal protection violation. State Defs.' SJ Memo. at 29. Defendants' argument again misconstrues the issues before the Court. The child-Plaintiffs do not assert that their parents have the right to control the adoption process, nor do they assert that they have the right to be adopted by their parent-designated caregivers. Rather, the child-Plaintiffs seek access to the same procedures available to all children to obtain the benefits of an adoptive relationship with a designated caregiver if a probate court determines that to be in their

best interests. As in *Weber*, discussed in Plaintiffs' summary judgment memorandum, the child-Plaintiffs were not seeking an absolute right to recovery under the state's worker's compensation laws, which, like adoption, is a statutory creation. *See* Pls.' SJ Memo. at 66-67. Rather, the child-Plaintiffs contend that Act 1 violates their right to equal protection by foreclosing to them the opportunity to be adopted by their parent-designated caregivers based on factors beyond the child-Plaintiffs' control.

In the alternative, Defendants claim that Act 1 does not treat the child-Plaintiffs any differently than any other child because it does not permit "any child to be adopted by cohabiting individuals." State Defs.' SJ Memo. at 30. Such an argument completely misunderstands equal protection. It is no answer to an equal protection claim that other members of the disadvantaged class are also being disadvantaged. Here, the class being discriminated against is children whose designated caregivers are in cohabiting relationships. Just as it was no answer to the plaintiffs in *Weber* that no child of unmarried parents can recover under the state's worker's compensation laws, it is no answer here than no child can be adopted by their unmarried caregivers.

Act 1 disadvantages children whose designees are in cohabiting relationships and the undisputed facts—as well as the *Howard* findings—make it impossible for the classification to withstand heightened scrutiny. *See* Pls.' SJ Memo. at 27-29, 65-67; Section VIII.C, *infra*. Defendants' motions should be denied, and the parent-Plaintiffs' motion for summary judgment granted on counts 7 and 8.

VII. COUNTS 9 AND 10: ACT 1 VIOLATES THE COUPLE-PLAINTIFFS' RIGHT TO EQUAL PROTECTION AND DUE PROCESS.

As discussed below and in Plaintiffs' summary judgment motion, because Act 1 penalizes individuals solely for exercising their fundamental constitutional right to maintain their

intimate relationships with their partners, it is subject to strict scrutiny—it can only stand if the Defendants can show that it is narrowly tailored to serve a compelling government interest. *See* Pls.' SJ Memo. at 52-60; *see also City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Bosworth* v. *Pledger*, 305 Ark. 598, 604-05, 810 S.W.2d 918, 921 (1991). Act 1 cannot withstand strict scrutiny. Indeed, the undisputed facts make that impossible. *See* Pls.' SJ Memo. at 52-58; Section VIII.C, *infra*. Thus, Defendants' motions should be denied, and the Plaintiffs' motion for summary judgment granted on counts 9 and 10.

A. Strict scrutiny applies to these claims because the classifications in Act 1 penalize the exercise of a fundamental right.

In an effort to evade the repercussions of the fact that Counts 9 and 10 must be assessed under the strict scrutiny standard, Defendants offer several arguments as to why Act 1 places no burden (or no meaningful burden) on any fundamental right. Defendants' arguments are without merit.

Defendants first argue that Act 1 does not infringe Plaintiffs' fundamental right to intimate association because "Act 1 does not require the Plaintiffs or anyone else to abandon their intimate relationships. Act 1 merely provides that if the Plaintiffs wish to be eligible to adopt or foster a child in Arkansas, *a privilege that is not constitutionally protected*, they cannot cohabit with an intimate partner outside of marriage."[28] State Defs.' SJ Memo. at 31 (emphasis in original). Defendants' argument is wrong as a matter of law. Strict scrutiny is triggered whenever the government burdens the exercise of a fundamental right, whether by completely barring the exercise of the protected activity, or by penalizing individuals by withholding a

[28] Contrary to Defendants' assertion, the couple-Plaintiffs' argument in counts 9 and 10 is not premised on the notion of having to choose between two constitutional rights (although, as discussed above regarding Sheila Cole and W.H.'s family integrity claim, Act 1 does force such a choice on Ms. Cole).

benefit or privilege because they have exercised the right. Indeed, the United States Supreme Court has struck down laws conditioning the following benefits and privileges on the individual's cessation of the fundamental right at stake:

- Conditioning eligibility for free non-emergency hospital or medical care on living in state for at least a year violated fundamental right to interstate travel, *Memorial Hosp.* v. *Maricopa County.*, 415 U.S. 250, 257-58 (1974);
- Conditioning employment as teacher on not becoming pregnant violated fundamental right to procreate, *Cleveland Bd. of Educ.*, 414 U.S. at 640;
- Conditioning eligibility for welfare benefits on living in state violated fundamental right to interstate travel, *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969), *overruled in part on other grounds*, *Edelman* v. *Jordan*, 415 U.S. 651, 652 (1974);
- Conditioning property tax exemptions on taking a loyalty oath violated fundamental right to freedom of speech, *Speiser* v. *Randall*, 357 U.S. 513, 528-29 (1958);
- Conditioning eligibility for unemployment benefits on willingness to work on the Sabbath, despite employee's religious beliefs, violated fundamental right to freedom of religion, *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

As explained in detail in Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Pls.' Opp. to Defs.' MTD"), none of the benefits or privileges threatened in these cases was itself a fundamental right—instead, as with adoption and foster care, they were all statutory creations. Pls.' Opp. to Defs.' MTD at 30-32. But, in every case, the Court held that the state could not condition those benefits or privileges on not exercising a fundamental right. Indeed,

the Supreme Court has expressly rejected the very argument that Defendants assert here: "Nor may. . . [a] statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U.S. at 404; *see also id.* at 404 n.6 (citing "examples of conditions and qualifications upon governmental privileges and benefits which have been invalidated because of their tendency to inhibit constitutionally protected activity"). As these cases and others demonstrate, it is clear that when a statute conditions a government privilege—whether it be welfare benefits, unemployment pay, employment as a school teacher, or the ability to adopt or foster—in such a way as to penalize or burden the exercise of a fundamental right, strict scrutiny applies and it is the government's burden to show that the law is narrowly tailored to meet a compelling state interest. *See also Howard*, 367 Ark. at 68, 238 S.W.3d at 10 (Brown, J., concurring) (concluding that regulation banning gay couples from serving as foster parents "overtly and significantly burdens the privacy rights" the Supreme Court declared to be fundamental in *Jegley* v. *Picado*).

As a fall-back argument, Defendants argue that any infringement Act 1 imposes on the right to intimate association is too indirect and insubstantial to constitute a burden on the exercise of protected rights. State Defs.' SJ Memo. at 34. In support of this argument, Defendants rely on *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986), which examined a food stamp rule that drew eligibility lines based on the income of those who live together as a family. *Lyng*, 477 U.S. at 636. Defendants claim that if the income calculations in *Lyng* did not directly and substantially interfere with living arrangements, then Act 1 does not burden the fundamental right at issue here. State Defs.' SJ Memo. at 34. There is no merit to Defendants' comparison of

the *Lyng* statute and Act 1. The challenged policies in *Lyng* drew eligibility lines based on the income of those who live together as a family. Obviously, if you live with and share expenses with a person who is wealthy, that can be considered when distributing benefits. The government was not penalizing people *because* they were married or cohabiting or otherwise formed family units. Individuals affected by the *Lyng* statute were not excluded from benefits *because* they chose to live together. Rather, the government merely sought to distribute benefits fairly to everyone, while recognizing that when people live together, certain economies of scale that occur (when, by way of example, individuals live together and eat meals together) that must be assessed when calculating income and benefits. The *Lyng* Court held that these income calculation policies did not burden a fundamental constitutional right to intimate associations or otherwise. Here, in contrast, Act 1 penalizes people precisely for exercising a fundamental right. This is not a law that incidentally affects people who exercise the right to form intimate relationships with their partners; excluding people who enter into unmarried cohabiting relationships is its objective. Act 1 penalizes the exercise of the fundamental right to maintain intimate relationships. And the burden imposed by Act 1 is hardly trivial. This is not a law that denies an individual a tax exemption or a potential job. The penalty Arkansas imposes on people because of their relationships is severe. The price of exercising this right is being permanently excluded from the possibility of forming parent-child relationships through adoption or foster care.

Defendants next assert—without citation to any supporting case law—that this entire constitutional analysis can be discarded because the Arkansas courts have the discretion to approve or deny a petition for adoption on grounds that may include the prospective parents' exercise of constitutional rights if the factor is relevant to the best interests of the child. State

Defs.' SJ Memo. at 32-33. If Defendant's argument had any basis (it does not), there would be no constitutional limitations on government actions in the child welfare context. There is no such automatic "escape hatch" in either the U.S. or the Arkansas constitution. *See, e.g.*, *Santosky* v. *Kramer*, 455 U.S. 745, 747-748 (1982) (invalidating state's standard for termination of parental rights of children). The comparison to individual placement decisions is inapposite because the government undoubtedly has a strong interest in making placements that meet the needs of each child and can take into account for purposes of placement decisions any factors that affect the interests of the child. Indeed, the State Defendants acknowledge that factors that relate to the exercise of constitutionally protected rights are only properly taken into account "if the factor is relevant to the best interests of the child to be adopted." State Defs.' SJ Memo. at 33. Here, the undisputed facts and evidence to be presented at trial if necessary show that there is no government interest, compelling or otherwise, supporting Act 1's presumption that all same-sex couples and cohabiting heterosexual couples are unfit to serve as foster and adoptive parents. *See* Pls.' SJ Memo. at 52-60.

To illustrate the illogic of Defendants' reliance on individual placement decisions, for some children, parents who already have children would not meet their needs. Thus, couples who have exercised their constitutional right to procreate may be deemed unsuitable for those particular children. But that does not mean the government could ban all people who already have children from adopting or fostering.[29] With respect to the right at stake here, while it could

[29] The State's example of the statute allowing biological parents to express a religious preference similarly relates to the individual needs of a particular child. Of course, the State could not have a blanket ban on placements with members of a particular faith adopting or fostering.

be that for a particular child, a cohabiting couple would not be a suitable placement given that child's needs, that does not mean a blanket exclusion of all cohabiting couples is constitutional.[30]

Finally, the Intervenor-Defendants, while acknowledging that Act 1 discriminates on the basis of cohabitation status, argue that there is no differential treatment of gay people because it is the Arkansas Constitution, not Act 1, that prohibits same-sex marriages. Int.-Defs.' SJ Memo. at 34-35. Plaintiffs are not seeking the right to marry or challenging the constitutionality of the limits on marriage within the Arkansas constitution. But where a state limits marriage to heterosexual couples *and then conditions a privilege on being married*, it cannot be said that this is not discrimination on the basis of sexual orientation. *See Alaska Civil Liberties Union* v. *State*, 122 P.3d 781, 788 (Ak. 2005) (holding that statute created classification based on sexual orientation because "[s]ame-sex unmarried couples . . . have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying", and so the "programs consequently treat same-sex couples differently from opposite-sex couples"); *Tanner* v. *Oregon Health Sciences Uni*v., 157 Or. App. 502, 516, 971 P.2d 435, 443 (Or. App. 1998) (holding that policy limiting insurance benefits to married couples discriminated on the basis of sexual orientation because "there can be no question but that the effect of OHSU's practice of denying insurance benefits to unmarried domestic partners, while facially neutral as to homosexual couples, effectively screens out 100 percent of them from

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[30] Whether the State would have a sufficiently compelling interest, *e.g.*, in supervising placements, to justify limiting adoption and foster placements to state residents is not before the Court. In any event, there is already a procedure that DHS utilizes to place Arkansas children with out-of-state adoptive and foster parents. *See* Interstate Compact on the Placement of Children. Ark. Code Ann. § 9-29-201 *et seq*. (West 2009) (establishing procedures and rules for placing children out of state).

obtaining full coverage for both partners" because "under Oregon law, homosexual couples may not marry").[31]

B. Act 1 fails strict scrutiny.

Defendants do not even attempt to argue that Act 1 is narrowly tailored to serve a compelling government interest. That is because the undisputed facts—as well as the Court's findings in *Howard*—make that impossible. Plaintiffs' summary judgment memorandum demonstrated in detail the uncontested facts that establish that Act 1 fails strict scrutiny. Pls.' SJ Memo. at 52-60; *see also* Section VIII.C, *infra*.

Indeed, Act 1 cannot even satisfy rational basis review. With respect to same-sex couples, the Arkansas Supreme Court has already recognized that there is no rational connection between excluding gay people, including gay couples, from serving as foster parents and promoting the health, safety or welfare of foster children. *Howard* v. *CWARB*, No. CV 1999-9881, 2004 WL 3200916 (Ark. Cir. Ct. Dec. 29, 2004) Conclusions of Law ¶¶ 4-6. Moreover, the undisputed facts and expert testimony to be presented at trial if necessary show that neither the exclusion of gay couples nor the ban on heterosexual cohabiting couples is rationally related to the furtherance of any child welfare interest. *See* Section VIII.C, *infra*. In fact, the evidence shows, the exclusions work directly against the interests of children by denying them access to good parents.

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[31] Intervenor-Defendants also contend that Act 1 does not discriminate against a suspect class. Int.- Defs.' SJ Memo. at 32-33. However, Plaintiffs have not argued that Act 1 discriminates against a suspect class, but rather that it unconstitutionally burdens Plaintiffs' fundamental right to intimate association. *See* Pls.' SJ Memo. at 53-54.

VIII. DEFENDANTS' STATISTICS DO NOT SUPPORT THEIR MOTION OR ALTER THE CONCLUSION THAT ACT 1 IS UNCONSTITUTIONAL.

Defendants' primary argument in support for Act 1's blanket ban against same-sex and heterosexual cohabiting couples amounts to unsupported conclusions drawn from statistical data on group averages. Defendants point to group averages for a wide variety of heterosexual cohabiting and married couples with respect to child outcomes and various adult characteristics such as depression and relationship instability to support their argument that Act 1 promotes child welfare by presuming that *every single individual* who is in a same-sex and heterosexual relationship is unfit to serve as a foster or adoptive parent while still—illogically—permitting placements with those same excluded persons in guardianships. State Defs.' SJ Memo. at 50-68; Int.-Defs.' SJ Memo. at 39-59.

Defendants' statistics do not support their motion for summary judgment. *First*, because Act 1 expressly allows cohabitors to raise children through guardianships, which involve less oversight than adoption and fostering, Act 1 cannot be credited with serving any child welfare purpose. There is no merit to the argument that the statute can constitutionally exclude cohabitors as purportedly at risk of being "unfit" to be foster and adoptive parents, while at the same time expressly allowing these same potentially "unfit" individuals to serve as guardians. *Second*, because, as Defendants' experts concede, none of the statistics upon which Defendants rely involve same-sex couples, the statistics cannot be used to justify Act 1's blanket ban against all persons in same-sex relationships from adopting or fostering, particularly in light of the Supreme Court's decision in *Howard*. *See* Pls.' SJ Memo. at 37. *Third*, with respect to Act 1's blanket ban against cohabiting heterosexual couples, these averages do not come close to supporting a conclusion that Act 1 is "narrowly tailored to advance" the interests of children in the State's foster care system or meets the professional judgment of those in the child welfare

field, and indeed fall far short of supporting Defendants' argument that Act 1 has any rational basis (which is the wrong standard of review in any event). *See* Section VIII.C, *infra.* Defendants' unsupportable use of statistics does not undermine the clear evidence that Act 1 serves no child welfare purpose.

A. Act 1's declaration that cohabitors may serve as guardians entirely discredits any child welfare justification proffered by the Defendants and their experts.

Defendants point to differences in "statistical averages" relating to outcomes for children with cohabiting heterosexuals as compared with children of married couples to argue that cohabitors are potentially unfit parents and, thus, Act 1 promotes children's welfare. State Defs.' SJ Memo. at 50-68; Int.-Defs.' SJ Memo. at 39-53. Aside from what this unsupportable conclusion would say about the 40,000 cohabiting couples in Arkansas, *see* Expert Report of Dr. Letitia Anne Peplau ("Peplau Report") (Ex. 115) at 5, Defendants' claim itself points out the lack of any basis for Act 1: you cannot on the one hand claim that this class of people must be excluded by Act 1 because statistics show they are potentially unfit, while on the other hand allow the same cohabiting couple to care for and raise children as guardians. Thus, there is absolutely no credible basis for Defendants to suggest Act 1 is justified by a concern over the ability of cohabitors to care for children not only because the Act explicitly allows cohabitors to raise children as guardians, *but also because guardianship placement garners the least State oversight*.

A potential foster or adoptive parent is required by law to be subjected to a thorough assessment including an in-home visit. *See, e.g.*, Ark. Code Ann. § 9-9-212(b)(1)(A) (West 2009) (requiring home study of potential adoptive parent); Ark. Code Ann. § 9-27-337 (West 2009) (periodic review hearings by juvenile court held to evaluate suitability of placement). In contrast, a potential guardian (including a cohabiting guardian) is not legally

required to be subjected to the same assessment or, indeed, any assessment. Ark Code. Ann. § 28-65-203 (West 2009) (listing qualifications of guardians).

Along the same lines, if a child is placed with a cohabiting couple as a foster placement, caseworker specialists are required to conduct follow-up in person visits with the child in the foster home and to maintain regular communication with the child. *See* Pls.' SJ Memo. at 19 (describing generally the oversight by DHS of foster parent homes). In addition, a foster child is required to appear before an Arkansas judge who would assess the placement periodically, but at the very least once every six months. *See* Deposition of Connie Hickman Tanner ("Hickman Tanner Depo.") (Ex. 96) at 175:8-176:2; *id.* at 146:6-147:14 (courts often ask for more frequent reviews than every six months, sometimes reviewing cases as often as every 30 days); Deposition of Marilyn Counts ("Counts Depo.") (Ex. 90) at 100:11-22 ("Pulaski [county] is notorious for having reviews every three months."). The exact opposite is true if a child is placed with the same couple as guardians. There is no requirement that the child re-appear before a judge who can assess the placement. *See* Hickman Tanner Depo. (Ex. 96) at 126:25-127:21. There is no process by which DHS will re-assess the fitness of the couple or the placement.[32] *Id*. (admitting that guardianship closes the case and is a resolution to a permanency question, requiring no further review of the child's well-being).

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[32] The State argues that because the Child Maltreatment Act applies to "foster" parents, the Court should leap to a variety of conclusions, including that Act 1's exclusion of cohabitors from the pool of foster parents is a defensible reaction to the alleged danger they pose to children. State Defs.' SJ Memo. at 65. The State's argument makes no sense. The Child Maltreatment Act applies both to "foster parents" and to "guardians." If the State were right (it is not) that the inclusion of foster parents in the Child Maltreatment Act supports Act 1's exclusion of cohabitors from the pool of foster parents, then the inclusion of guardians in the Child Maltreatment Act would also require the exclusion of cohabitors from the pool of prospective guardians. To the contrary, Act 1 expressly permits children to be raised by cohabitors as their guardians. This

(Footnote Continued)

To categorically exclude cohabiting couples from being foster or adoptive parents and then to permit, in the same statute, cohabitors as guardians—with *less* State oversight—to care for children makes it impossible to credit any child welfare justification for Act 1. Where, as here, a court is presented with asserted justifications for a statute (the asserted child welfare justification for Act 1) that are undermined by the government's own actions (the statute expressly permits placement of children with cohabitors acting as guardians), the law must be struck down, even under rational basis review. In *Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464 (8th Cir. 1991), the court was presented with a similar situation and, applying rational basis review, rejected an asserted justification for a law that was frustrated by the government's own actions. In that case, a city said the purpose of excluding a church from an area zoned for commercial activity was to promote economic vitality. But the ordinance permitted other non-commercial entities to operate in the same zone. Accordingly, the court rejected the asserted purpose because it was frustrated by the other non-economic uses it permitted. Just as the city's asserted justification in *Cornerstone* was rejected, the Court here, too, should reject the Defendants' claim that Act 1 promotes the welfare of children.

B. The statistics offered by Defendants do not involve same-sex couples and thus provide no support for Act 1's exclusion of applicants in same-sex relationships.

Defendants' statistics also cannot be used to justify Act 1's blanket ban against all persons in same-sex relationships because the statistical averages relied upon by Defendants

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(*Footnote Continued*)

demonstrates that the State's arguments about the Child Maltreatment Act—just like its arguments about the tragic death of certain children in state care (State Defs.' SJ Memo. at 65-66)—are unfounded pretext. The State (and the voters) cannot have concluded that cohabitors pose a risk to children's welfare or they would not have enacted Act 1, which expressly permits cohabitors to be children's guardians.

relate exclusively to heterosexual couples. *See* Pls.' SJ Memo. at 37. Defendants offer no data on same-sex couples or their children. *Id.* (none of Defendants' experts claim expertise on the well-being of children raised by gay and lesbian parents). Defendants have come forward with no evidence to contradict the findings of the Court in *Howard*. In *Howard*, the Supreme Court unanimously found that the blanket exclusion of gay people, including gay couples, from fostering children is not rationally related to protecting the health, welfare and safety of children. *Howard*, 367 Ark. at 65, 238 S.W.3d at 7-8 ("[T]here is no correlation between the health, welfare, and safety of foster children and the blanket exclusion of any individual who is a homosexual or who resides in a household with a homosexual. . . . [T]here was no rational relationship between the regulation's blanket exclusion [of homosexuals] and the health, safety, and welfare of the foster children."). The Court further found that children of lesbian and gay parents are equivalently adjusted to children of heterosexual parents. *Id.* at 64, 238 S.W.3d at 7 (quoting *Howard*, 2004 WL 3200916, Findings of Fact ¶ 37). In fact, the *Howard* Court found that children raised by gay parents have no increased risk of problems in adjustment, psychological problems, or behavioral problems, and they are not prevented from forming healthy relationships with their peers or others. *Id.* (quoting *Howard*, 2004 WL 3200916, Findings of Fact ¶¶ 29-32). These findings are consistent with the undisputed testimony of Plaintiffs' experts who will testify that average outcomes for children of same-sex couples are equivalent to those of children raised by married heterosexual couples. *See* Pls.' SJ Memo. at 36-37. In short, Defendants have no "statistical" justification for Act 1 as it applies to same-sex cohabiting couples.

C. Defendants' "averages" do nothing to establish that Act 1 is constitutional under any standard of review.

Under strict scrutiny, which, as discussed above, is the applicable standard for most of Plaintiffs' claims, Act 1 can stand only if narrowly tailored to promote children's interests. The Defendants do not even attempt to argue that Act 1 is narrowly tailored. Nor could they given the following undisputed facts:

- The initial screening process and the other safeguards in place effectively screen out unsuitable parents. *See* Pls.' SJ Memo. at 17-22. The individualized screening process used for decades by Arkansas is "very thorough" and "effective," and Arkansas is "getting good homes." *Id.* at 20.

- The screening system works as well for same-sex couple applicants and heterosexual cohabiting applicants as it does for single or married couple applicants. *See* Pls.' SJ Memo. at 21. Even one of the Defendants' experts admitted the same. *See* Wilcox Depo. (Ex. 108) at 214:9-14 ("I don't think that there would be markedly different limitations for a case worker who would be interviewing a married, cohabiting, or single person in terms of his or her ability to ascertain what's going on, you know, in the lives of the people she's looking at.").

- The only responsible way to identify whether any applicant—whether married, cohabiting, single, gay or straight—would be a suitable adoptive or foster parent would be to individually screen him or her. *See* Pls.' SJ Memo. at 18-19, 38-39.

- Cohabitors can make good parents. There is undisputed expert testimony that the majority of children raised by cohabiting parents, like the majority of children raised by married couples and single parents, have positive outcomes. *See* Pls.' SJ Memo. at 38.

- As a result of Act 1, some children may be prevented from being placed with the family that is in their best interests or being placed with any family at all. *See* Pls.' SJ Memo. at 38. For some children, the best set of parents or the only available and qualified set of parents could be a same-sex or cohabiting heterosexual couple. *See id.*

- The professional consensus in the child welfare field, including the State agencies in Arkansas responsible for child welfare, is that blanket exclusions of cohabitors are contrary to the well-being of children. Pls.' SJ Memo. at 29-34.

These undisputed facts, along with undisputed evidence presented in Plaintiffs' Motion for Summary Judgment, establish that Act 1 is not narrowly tailored in any way.

Arkansas already individually screens all applicants for suitability to adopt and foster. Act 1 does not address a real or perceived flaw in the individualized review system used by Arkansas. That system worked as well for singles, married, and cohabitors. Even if that system was broken (it was not), there is no basis to argue that all cohabitors must be excluded to protect children's welfare (which is what the Defendants would have to prove to meet the narrow tailoring requirement) when it is undisputed that cohabitors can make good parents—and in fact, that most children raised by cohabitors have good outcomes.[33] Indeed, Act 1 itself, by allowing cohabitors to raise children as guardians, recognizes that cohabitors are not inherently unsuitable parents. And, there is certainly no basis whatsoever for the exclusion of same-sex couples. Because the undisputed evidence shows that Act 1 unnecessarily excludes many individuals who would make good parents, it does not meet the narrow tailoring requirement of strict scrutiny.

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[33] In support of Act 1, the State Defendants go on at some length about the Child Fatality Review and the heartbreaking death of three children, purportedly at the hands of cohabitors. State Defs.' SJ Memo. at 65-67. As noted above, because Act 1 was expressly drafted to allow cohabitors to act as guardians, there is no credibility to the suggestion that the statute was intended to keep cohabitors from acting as parents due to child abuse concerns or any other child welfare reason. Equally important, the Child Fatality Review does not support Defendants' flawed assumptions from the data. That report expressly acknowledges that the data cannot be read to mean that cohabitors or any other category of individual is likely to kill a child. In the State's own words, "*[w]hile much research has been done to find patterns among child fatalities, there is as yet no reliable predictive tool*." State Defs.' SJ Memo., Ex. 23 at 4. And, even this limitation on the report is ignored (as the State asks this Court to do), the statistics in the report do not justify Act 1. For example, the report states that with all of the children killed involving foster and/or adoptive parents the homes "had enough children in the homes to raise questions about the parents' ability to care for all of the children." *Id.* at 11. Also, of the cohabitors involved in abuse, two-thirds were men. *Id.* It is improper, as a matter of law, to cherry-pick cohabitor statistics from this report and ignore what the report says about the number of siblings in the home, men and other groups. As discussed above, the fact that the State excludes cohabitors when other groups have similar or worse average outcomes by itself means that Act 1 fails even rational basis review. *Cleburne*, 473 U.S. at 448-50.

In addition, the data on group averages offered by Defendants fails to justify Act 1 under any level of constitutional scrutiny—even rational basis review—because any purported link between the blanket exclusion of unmarried couples and promoting children's welfare is far too attenuated to meet even the rational basis standard. *Cleburne*, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."); *Romer* v. *Evans*, 517 U.S. 620, 635 (1996) (striking down amendment under equal protection rational basis review because "[t]he breadth of the amendment is so far removed" from the asserted justifications that it was "impossible to credit them"); *Eisenstadt* v. *Baird*, 405 U.S. 438, 448 (1972) (striking down ban on contraceptives to unmarried persons under equal protection rational basis review because the ban "has at best a marginal relation to the proffered objective" of deterring premarital sex); *Ester* v. *Nat'l Home Ctrs.*, 335 Ark. 356, 364-65, 981 S.W.2d 91, 96 (1998) (to satisfy rational basis review, there has to be the "possibility of a deliberate nexus with state objectives").[34] The undisputed facts discussed above along with the following facts show that these data do not justify Act 1's categorical exclusions (even under the rational basis test):

First, Defendants' statistics primarily compare how biological "children in intact married households" fare versus children who are not in these "intact" families. State Defs.' SJ Memo. at 50-63; Int.-Defs.' SJ Memo. at 39-54. Indeed, Dr. Wilcox and Defendants' other experts repeatedly trumpet that children from "intact married" families do better in social

[34] While mere over or underinclusiveness does not mean that a classification fails rational basis review, where, as here, the relationship between the classification and the objection is so tenuous, the requirements of equal protection are not met. *Id.* Moreover, contrary to Intervenor-Defendants' assertion, the undisputed testimony and evidence to be presented at trial, if necessary, shows that Act 1's failure to promote children's welfare is not a "debatable" question, Int.-Defs.' SJ Memo. at 38; there is no basis to believe the law could do anything to promote children's interests.

development, education, mental health, and a variety of other categories. State Defs.' SJ Memo. at 50. But, every time Defendants tout how well children do when they live with their married *biological* parents, it underscores how far afield their statistical argument is because *none of the children affected by Act 1 are going to live with their "intact" biological parents*, whether married or not. Rather, the children affected by Act 1 were taken from these biological families and now reside in State care. The State of Arkansas is not deciding whether to place a child with a married couple or a cohabiting couple. The choice for many children affected by Act 1 is a government institution (such as a group home or emergency shelter), or a same-sex or heterosexual cohabiting couple household that has been screened by the State. *See* Pls.' SJ Memo. at 7-9, 22-25. Even assuming the Defendants could appropriately rely on these group averages to exclude cohabitors from fostering and adopting (they cannot) the statistics would have to compare how children fare with cohabiting couples as compared with state care—that is a consequence caused by Act 1. The question in this case for children is not whether they will be placed with a cohabiting couple or with a married couple, but whether they will be placed with a cohabiting couple approved after individualized review or stay in state care. Here, there is undisputed expert testimony on this issue: that unless the particular needs of the child counsel against a family placement, placement with a properly screened cohabiting couple is far superior to leaving a child in a state home or resigning a child to "age out" of the system altogether. Faust Report (Ex. 113) ¶ 35; Lamb Report (Ex. 114) ¶ 41; Lamb Rebuttal Report (Ex. 117) ¶ 3; *see also* Pls.' SJ Memo. at 8-9 (describing the dismal outcomes for children who age out of the system).

Second, the irrationality of excluding a demographic group from adopting or fostering based on group averages is evident by the fact that the State does not exclude single

applicants, applicants who have low-income or low-education levels, or young adult applicants—all groups that "statistical averages" indicate have similar or poorer outcomes than those of cohabiting heterosexuals. *See, e.g.*, Osborne Rebuttal Report (Ex. 118) at 9. Indeed, if group membership were used to determine adoption or fostering eligibility, the child welfare system would grind to a halt as most or all of us would be excluded. For example, the evidence shows that Asians have lower rates of drug abuse and depression than all other ethnic and racial groups, Cochran Report (Ex. 112) at 2; Cochran Rebuttal Report (Ex. 116) at 2; men have twice the risk of drug abuse as women, Cochran Report (Ex. 112) at 2; people without a college degree have higher rates of relationship dissolution and raise children with poorer average outcomes than people with college degrees, Peplau Report (Ex. 115) at 4-5; Osborne Rebuttal Report (Ex. 118) at 9; and a child living in a married household is more likely to be sexually abused than a child living in a household of a lesbian couple because men are the predominant perpetrators of child sex abuse. *See* Worley Rebuttal Report (Ex. 120) ¶ 14. Thus, it is neither rational nor constitutional for the State to exclude all cohabitors from adopting or fostering when by its own logic, most if not all demographic groups would be presumptively unfit to serve as foster or adoptive parents.[35] The fact that the State excludes cohabitors when other groups have similar or worse average outcomes by itself means that Act 1 fails even rational basis review. *See*

[35] The irrationality of Act 1 is no better illustrated by the fact that it assumes that a cohabiting same-sex or heterosexual couple in a committed monogamous relationship of ten years is an unstable family for a child, but allows a single individual with multiple partners to apply to be a foster or adoptive parent. *See* Deposition of Cindy Young ("Young Depo.") (DHS 30(b)(6) witness) (Ex. 110) at 66:23-67:10 (a single foster parent can date as many people as he or she wants); *see also* Deposition of Dr. William Bradford Wilcox ("Wilcox Depo.") (Ex. 108) at 117:2-18 (admitting that Act 1 does not ban "a single parent who has 365 different sexual partners during the course of a year" from being a foster or adoptive parent, despite the revolving door of instability such a situation would create).

Cleburne, 473 U.S. at 448-50 (under rational basis test, government may not single out a group for disfavored treatment unless the group presents a "special threat to the [state's] legitimate interests"); *see also Cornerstone Bible Church*, 948 F.2d at 471-72 (in equal protection rational basis case, court held that exclusion of church from commercially zoned area not justified by objective of promoting economic vitality of that area when other non-commercial entities were allowed).

Third, no matter how much Defendants disparage "cohabitors" as a single, undifferentiated group, cohabiting heterosexuals are a heterogeneous population. The spectrum includes young couples who are together because of an unplanned pregnancy, as well as long-term, stable couples who are unmarried for personal reasons (such as the potential loss of pension or social security survivor benefits). Osborne Rebuttal Report (Ex. 118) at 2-3; Wilcox Depo. (Ex. 108) at 112:22-113:4 (describing cohabitors as a "heterogeneous group"). The studies on which Defendants rely offer no basis to predict poor outcomes for children of cohabiting heterosexual couples who have made the decision to seek to foster or adopt children and then been approved by the individualized screening process. Instead, the group of cohabitors at issue here—those individuals who apply to foster and adopt children and who have been approved—are no less likely than married or single applicants to be suitable parents and no less likely than married couples to be in stable relationships. Plaintiffs' experts will testify at trial, should Plaintiffs' Motion for Summary Judgment be denied, that cohabiting couples who have decided to bring a child into their family through adoption or foster care are likely just as stable and able to raise healthy, well-adjusted children as married couples and singles. *See* Peplau Report (Ex. 115) at 5 ("The decision to bring a child into the family together is a serious investment in a relationship. Thus, cohabiting heterosexual couples who are seeking to foster or

adopt children would be expected to be those couples who are in stable committed relationships."); Lamb Report at (Ex. 114) ¶ 26 ("Children's outcomes are likely to be better when cohabiting parents actively seek to become parents together, including by adoption or fostering.").[36]

Fourth, even if statistical averages about cohabitors as a group were probative of any particular individual's suitability to be a parent, any differences in average outcomes do not establish a causal relationship between these differences and marital status. By way of example, although it can be shown that the sun rises in the east every day the courthouse is open for business, this does not mean that the courthouse opening is the cause of the sun rising. Similarly, as Plaintiffs' experts will testify, if Plaintiffs' Motion for Summary Judgment is denied, to the extent there are average disparities between married couples and cohabitors, marital status does not *cause* any of these disparities. Indeed, both Plaintiffs' and Defendants' experts acknowledge that other factors are the primary predictors of healthy child adjustment:

> [T]he main factors accounting for children's adjustment, including the adjustment of adopted and foster children, are the quality of a child's relationships with his or her parent(s), the quality of the relationship between the parents, and the availability of economic and social resources.

Lamb Report (Ex. 114) ¶10; Wilcox Depo. (Ex. 108) at 261:22-262:20; *see also* Osborne Rebuttal Report (Ex. 118) at 6-7 (the research shows that when married and cohabiting couples have similar socio-economic status, their children have similar outcomes). Indeed, even

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[36] Defendants' experts often rely on studies that do not even examine the risk associated with cohabitation, but rather, living with unrelated adults such as a step-father (married or unmarried). This is especially true with respect to the child abuse studies upon which they rely. *See* Osborne Rebuttal Report (Ex. 118) at 7-9; *see also id.* at 8 (for example, noting that one such study did not distinguish between married step-fathers and cohabiting boyfriends).

Defendants' experts do not dispute that when cohabiting parents marry, their children's outcomes do not on average improve. *See, e.g.*, Wilcox Depo. (Ex. 108) at 226:23-235:18. Put another way, there is nothing about the status of "marriage" that *per se* creates a child welfare benefit and that justifies the exclusion of cohabitors in Act 1.[37]

Fifth, it is irrational to categorically bar all cohabitors based on statistical averages about negative behavior and characteristics when DHS and CWARB routinely assess the suitability of all applicants, even those who have committed crimes, been convicted of drug use, or have previously engaged in other bad acts. As part of the alternative compliance and policy waiver procedures, DHS and CWARB have assessed and approved foster or adoptive placements with individuals who have been previously convicted of crimes, including DUI, burglary, gun charges, and battery. *See* Excerpts from Transcript of Child Welfare Agency Review Board Meeting, dated April 22, 2008 (Ex. 133) at 46:17-47:22 (Board approval of foster applicants convicted of third-degree assault); Excerpts from Transcript of Child Welfare Agency Review Board Meeting, dated August 31, 2004 (Ex. 132) at 37:1-43:16 (Board approval of foster

[37] As a fall back, the State argues it is allowed to "give categorical preference to marriage, and to married individuals, simply because of the State's legitimate interest in promoting the institution of marriage." State Defs.' SJ Memo. at 70. This argument misses the point in two fundamental respects. *First*, Act 1 does not give categorical preference to "marriage" or "married individuals." Rather, Act 1 allows singles to foster and adopt on the same terms as married individuals. Therefore, the "marriage" cases on which Defendants rely and the arguments they make have no applicability here. *Second*, the only legitimate purpose Act 1 could have is a child welfare benefit. Defendants cannot use Act 1 to promote marriage in a manner that has no child welfare purpose. *See* Huddleston Depo. (Ex. 97) at 66:1-7, 66:12-14 (the responsibility of DHS is to "promote the best interests of children" and not marriage). And, the caseworkers, child abuse investigators, policymakers, and other child welfare professionals at DHS, CWARB, and other state agencies identified as witnesses in this case overwhelmingly oppose the categorical bans created by Act 1 as being contrary to children's interests. Pls.' SJ Memo. at 29. Defendants cannot constitutionally promote marriage by punishing the citizens of the State of Arkansas who are most vulnerable—the children in its care.

applicants charged with theft of property, convicted of third-degree battery, and twice convicted of driving while intoxicated); Excerpts from Transcript of Child Welfare Agency Review Board Meeting, dated August 31, 2004 (Ex. 132) at 58:1-65:25 (Board approval of foster applicants convicted of felony domestic violence); Excerpts from Transcript of Child Welfare Agency Review Board Meeting, dated January 27, 2004 (Ex. 131) at 11:7-14:16 (Board approval of foster applicants convicted of first-degree battery and charged with rape); Deposition of Gary Gilliland ("Gilliland Depo.") (Ex. 94) at 185:9-201:20 (discussing various grants of alternative compliance to foster applicants conviction and charged with the previously described crimes); Arkansas DHS, List of Alternative Compliance Waivers, 2007 to 2009 (Ex.124).

These waivers and the waiver process demonstrate that the child welfare professionals at CWARB and DHS are qualified to determine the suitability of an applicant to meet the needs of a child, even when that applicant in the past may have engaged in negative behavior. *See also* Pls.' SJ Memo. at 20-22. In contrast, Act 1 automatically assumes that every single individual in a same-sex or cohabiting heterosexual relationship is an unsuitable parent, even when such an applicant has absolutely no record of criminal or other negative behavior. This is yet another reason why the classifications created by Act 1 are wholly irrational.

In the face of these facts, the State-Defendants resort to arguing that this Court is completely divested of the right to even review the State's purported justifications because once "any expert . . . [believes] that Act 1 promotes the best interest of children in the foster care system [that] proves that Act 1 is not arbitrary or irrational," the law must be approved under a rational basis standard. State Defs.' SJ Memo. at 46. The State is wrong as a matter of law. This Court retains the authority and duty to review Act 1 and must make its own assessment as to whether the putative evidence offered by Defendants is sufficient to support the constitutionality

of the statute. The mere fact that a party's proposed expert witness says something is not, by itself, enough to satisfy even rational basis review. Rational basis review must be grounded in factual reality. *See Romer*, 517 U.S. at 632-33, 635 (classification must be grounded in a "factual context"); *Heller* v. *Doe*, 509 U.S. 312, 321 (1993) (rational basis review must have "footing in the realities of the subject addressed by the legislation"); *Cleburne*, 473 U.S. at 448 ("mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for" unequal treatment of home for the mentally disabled); *Moreno*, 413 U.S. at 535-39 (rejecting "unsubstantiated" charge that hippies are more likely to commit fraud). As the Arkansas Supreme Court has put it, equal protection "requires that [a] classification rest on real and not feigned differences." *Smith* v. *State*, 354 Ark. 226, 235, 118 S.W.3d 542, 547 (2003).

That a defendant is able to find an expert witness to say something does not mean it has a basis in factual reality: the fact that an expert testifies that smoking cigarettes does not pose health risks would not mean that such an opinion is based in factual reality. Nor does the fact here that Defendants' experts opine that Act 1 promotes child welfare interests mean that such an opinion is based in factual reality. *See also Howard*, 2004 WL 3154530, at *6, 8 (refusing to credit expert witness's testimony that gay households are an inferior family structure in terms of promoting the interests of children). If all that was required under rational basis review was for the government to hire an expert witness willing to support its position, that would not be rational basis review; it would be no review at all.

IX. COUNTS 13 AND 14: ACT 1 IS UNCONSTITUTIONALLY VAGUE BECAUSE IT DOES NOT GIVE A PERSON OF ORDINARY INTELLIGENCE FAIR NOTICE OF WHO IS CATEGORICALLY BARRED FROM FOSTERING OR ADOPTING.

Act 1 prohibits fostering or adoption by an individual who is "cohabiting" with a "sexual partner." Act 1, however, does not define what living arrangements qualify as "cohabiting" or what relationships constitute having a "sexual partner." DHS and DCFS case workers—the individuals responsible for informing potential foster or adoptive parents whether they are disqualified under Act 1—have no common understanding as to what circumstances will disqualify an individual. For example, case workers do not know whether an individual who spends three nights per week at the home of a significant other is "cohabiting." *See* 71, *infra*. The term "sexual partner" presents even greater difficulty given the infinite spectrum of human relationships. Despite being faced with this claim, Defendants have declined in this litigation or through the promulgation of regulations to delineate what these terms mean—whether intimate partners who live together for three days a week, or four days a week, or do not engage in sexual relations are banned by Act 1. At a minimum, Act 1 will be enforced in an arbitrary manner, and perhaps, in a discriminatory manner. Moreover, the inability of a person of ordinary intelligence to determine whether he or she is barred from adopting or fostering will discourage qualified persons from applying to be an adoptive or foster parent.

Under Arkansas law, a statute is vague and violates the due process clause if it does not give a person of ordinary intelligence fair notice of what is prohibited. *See Arkansas Tobacco Control Bd.* v. *Sitton*, 357 Ark. 357, 366, 166 S.W.3d 550, 556 (2004) (affirming circuit court's finding of vagueness because statute "would allow the [Agency] to subjectively enforce the [statute] according to its own idea of what a 'trade discount' is and what a 'rebate' is"). *Cf. Landmark Novelties Inc.* v. *Ark. State Bd. of Pharmacy*, No. 08-543, 2010 WL 322266

(Ark. Jan. 28, 2010) (finding statute requiring pharmacies to report "suspicious transactions" involving pseudoephedrine not unconstitutionally vague because the statute defined "suspicious transactions" and the corresponding regulations set forth 25 additional factors for consideration). *See also Davis* v. *Smith*, 266 Ark. 112, 118, 583 S.W.2d 37, 41 (1979); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). A statute must not be so vague and standardless that it leaves officials free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis. *Ratliff* v. *Ark. DHS*, 104 Ark. App. 355, 362, 292 S.W.3d 870, 876-77 (Ark. App. 2009); *Griffen* v. *Ark. Judicial Discipline and Disability Comm'n*, 355 Ark. 38, 54-55, 130 S.W.3d 524, 534 (2003); *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999); *see also Walden* v. *Hart*, 243 Ark. 650, 654, 420 S.W.2d 868, 871 (1967) (finding unconstitutional act which gave appointed officials authority to designate "emergency vehicles" thus delegating legislative powers). The subject matter of the challenged law determines how stringently the vagueness test will be applied. *Craft* v. *City of Fort Smith*, 335 Ark. 417, 424-25, 984 S.W.2d 22, 26 (1998); *Village of Hoffman Estates* v. *Flipside*, 455 U.S. 489, 498-99 (1982). If the challenged law infringes upon a fundamental right, a more stringent vagueness test is appropriate. *Davis*, 266 Ark. at 116-17, 583 S.W.2d at 39-40 (applying heightened vagueness standard and finding statute terminating parental rights vague for failure to define "proper home"); *Craft*, 335 Ark. at 425, 984 S.W.2d at 26; *Village of Hoffman Estates*, 455 U.S. at 498-99.

The State Defendants and Intervenor-Defendants cite to various cases and dictionaries in which the terms "cohabiting" and "sexual partner" are defined. *See* State Defs.' SJ Memo. at 35-42; Int-Defs.' SJ Memo. at 65-72. For example, the State Defendants cite numerous dictionary definitions for "cohabiting" and conclude that the "common element of all

of these definitions is that cohabiting persons live together." State Defs.' SJ Memo. at 37. Although it may be commonly understood that "cohabit" means to "live together," such understanding does not assist persons of ordinary intelligence in determining whether any particular living situation, such as staying over five nights versus four nights per week, will disqualify them from fostering or adopting or is permitted. Indeed, DHS policies place no limitation on the number of nights that a romantic partner can spend the night in the home of a single foster or adoptive parent, *see* Young Depo. (Ex. 110) at 63:19-65:4, thereby leaving it up to individual caseworkers to determine—arbitrarily—what crosses the line. Indeed, what is missing from Defendants' motion is a coherent explanation for those charged with enforcing Act 1 as to how they will interpret and apply the statute.

The Supreme Court of Arkansas has made clear that a statute is void for vagueness when it permits officials to enforce it based on their own subjective beliefs about what is prohibited. In *Arkansas Tobacco Control Board ("ATCB")* v. *Sitton*, the Court held that the Unfair Cigarette Sales Act ("UCSA"), which prohibited cigarette retailers' use of "rebates" but permitted "trade discounts," was unconstitutionally vague. 357 Ark. at 359, 166 S.W.3d at 551. The ATCB's regulations defined the term "rebates" but did not define "trade discounts," and the statute did not define either term. *Id.* at 364-65, 166 S.W.3d at 555. The Supreme Court affirmed the Circuit Court's finding that the statute was void for vagueness, stating that upholding the law "would allow the ATCB to subjectively enforce the UCSA according to its own idea of what a 'trade discount' is and what a 'rebate' is." *Id.* at 366, 166 S.W.3d at 556. In reaching its conclusion, the Supreme Court noted that the ATCB Director testified that "[t]he law is interpreted by me as requiring the trade discount to appear on the invoice," and that if the

Director were to "change[] his opinion next month about what 'trade discount' and 'rebate' mean, the law on cigarette sales changes." *Id*.

Indeed, the uncontroverted evidence in this case establishes that DHS and DCFS officials and caseworkers are unable to determine when a potential foster or adoptive parent will be categorically barred from fostering or adopting under Act 1. *See* Deposition of Anne Wells ("Wells Depo.") (Ex. 107) at 85:23-86:5 (stating "I have no clue" how to determine whether a couple was cohabiting); Deposition of Libby Cox ("Cox Depo.") (Ex. 92) at 47:15-48:4 ("cohabiting" means living together, but cannot determine if spending one night a week in the same residence qualifies as living together); Deposition of Janie Huddleston ("Huddleston Depo.") (Ex. 97) at 61:6-62:1 (does not know the definition of "cohabiting" beyond living together); Deposition of Ed Appler ("Appler Depo.") (Ex. 84) at 95:17-23 (does not know how to define "cohabiting" or "sexual relation" beyond what is in the language of Act 1); Deposition of Cherylon Reid ("Reid Depo.") (Ex. 101) at 51:4-55:3 (not aware of any guidance DCFS provides to case workers to determine what is meant by "cohabitation" or "sexual partner"). Even a retired Arkansas Family Court judge could not be sure what living arrangement qualifies as "cohabiting" with a "sexual partner" for the purposes of Act 1. *See* Deposition of The Honorable Stephen Choate ("Choate Depo.") (Ex. 88) at 90:21-91:7 (does not know what the term "cohabiting" means). The Director of DHS suggested that one way an individual would know if Act 1 prohibits him from fostering or adopting would be to "consult with an attorney". *See* Deposition of John Selig ("Selig Depo.") (Ex. 104) at 67:13-25. The inability of those charged with enforcing the law to determine what behavior is prohibited renders the statute void for vagueness. *See Handy Dan Improvement Center, Inc.* v. *Adams*, 276 Ark. 268, 272-75, 633 S.W.2d 699, 701-03 (1982) (finding Sunday closing laws prohibiting sale of items such as

"clothing" and "jewelry" unconstitutionally vague because those responsible for enforcing the statute did not know which items were prohibited).

The few DHS and DCFS case workers who claimed they could define "cohabiting" with a "sexual partner" for the purposes of Act 1 all had different definitions, all but guaranteeing that Act 1 will be applied in an arbitrary manner. *See* Deposition of Monica Cauthen ("Cauthen Depo.") (Ex. 87) at 61:9-19 (cohabiting means spending at least four nights a week in the same residence, but not three); Deposition of Sandi Doherty ("Doherty Depo.") (Ex. 93) at 62:16-65:25 (cohabiting might mean spending four nights per week *every week* in the same residence, but "maybe it's a judgment call"); Deposition of Sydney Bruner ("Bruner Depo.") (Ex. 86) at 29:12- 31:4 (a couple is not cohabiting if they spend four nights per week together so long as they keep separate residences); Deposition of Milton Graham ("Graham Depo.") (Ex. 95) at 78:12-79:1 (Act 1 applies to any two unrelated adults living in the same household even if they are not in a sexual relationship); Deposition of John Zalenski ("Zalenski Depo.") (Ex. 111) at 139:10-143:25 (determining whether or not a couple is cohabiting depends on the arrangement); Deposition of Frances Waddell ("Waddell Depo.") (Ex. 106) at 65:18-68:7 (cohabiting means if "you go beyond those things that would consider other than come over, watch TV, come over for dinner, come over for a chat, then you go beyond those things" regardless of how many nights per week are spent at the same residence); Bruner Depo. (Ex. 86) at 29:12- 31:4 (fair to say that it is at the discretion of the DCFS case worker to determine if the relationship of the individuals constitutes "cohabiting" with a "sexual partner"). The differing and often contrary understandings of what is prohibited by Act 1 among those charged with enforcing the law demonstrates that the statute is unconstitutionally vague. *See Ark. Tobacco Control Bd.*, 357 Ark. at 366, 166 S.W.3d at 556.

Even Members of the Family Council, the organization that sponsored Act 1, provided different definitions as to what living arrangement qualifies as "cohabiting" with a "sexual partner." *See* Deposition of John Thomas ("Thomas Depo.") (Ex. 105) at 86:9-89:15 (Act 1 applies if a couple shares a residence and holds themselves out as a couple); Deposition of Jerry Cox ("J. Cox Depo.") (Ex. 91) at 13:9-20:13 (cohabiting individuals are individuals who have their primary place where they spend their time and consider home, irrespective of how many nights per week they sleep in the same residence).

Given the level of confusion among DHS and DCFS case workers concerning the meaning of Act 1, there is at a minimum a material dispute over whether Act 1 gives a person of ordinary intelligence fair notice as to what behavior is barred by the statute. The arbitrary manner in which Act 1 will be applied by DHS and DCFS renders the law unconstitutionally vague. *See Ark. Tobacco Control Bd.*, 357 Ark. at 362, 166 S.W.3d at 553. Moreover, qualified individuals who wish to foster or adopt in Arkansas will be dissuaded from applying out of a misunderstanding as to whether their living situation is prohibited. Those that do apply will be arbitrarily approved or turned away depending on which case worker handles their application. The constitutional guarantee of due process does not permit such a result, and the Defendants' motions should be denied.

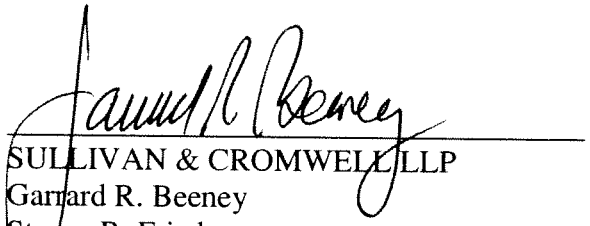
CONCLUSION

As stated in Plaintiffs' motion for summary judgment, the children in State care awaiting adoption or foster care placement are among those in society least able to protect themselves. Defendants, the State's own child welfare professionals, would do away with Act 1 because it harms those very children whose care has been entrusted to the State in place of the children's parents. Because Act 1 violates the due process rights of children in State care, impermissibly impinges on the fundamental right to intimate association, denies the right to

exercise parental authority, denies children their right to equal protection of the laws, and is unconstitutionally vague, Plaintiffs respectfully ask that their motion be granted, that the Court declare Act 1 unconstitutional and immediately unenforceable, and that State Defendants' and Intervenor-Defendants' motions be denied.

Dated: March 1, 2010

RESPECTFULLY SUBMITTED,



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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was served by e-mail pursuant to agreement among the parties on the following on the 1st day of March, 2010:

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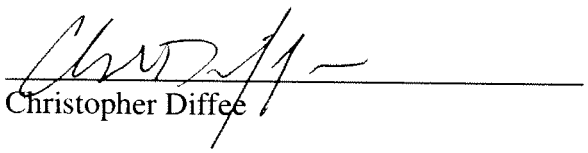

Christopher Diffee

Appendix A

PLAINTIFFS' RESPONSE TO INTERVENORS' STATEMENT OF MATERIAL FACTS

Intervenors' Material Facts	Plaintiffs' Response
1. FCAC is a state-wide grassroots organization dedicated to promoting, protecting and strengthening the family. (FCAC MSJ Ex. 54, Cox MTI Aff. ¶ 7.)	***Undisputed***.
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.)	***Undisputed.***
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.)	***Undisputed.***
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.)	***Undisputed.***
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.)	***Undisputed.***
6. On November 4, 2008, a majority of Arkansas voters approved Act 1, which became effective on January 1, 2009.	***Disputed.*** Only 36.42% of individuals registered to vote voted in favor of Act 1; 27.39% of individuals registered to vote voted against Act 1. *See* Arkansas Secretary of State website (Ex. 125), http://www.sosweb.state.ar.us/elections/elections_pdfs/registered_voters/2009/regvoter1209.pdf (providing number of registered voters); http://www.votenaturally.org/electionresults/index.php?elecid=181 (custom reports for contests taking place in general election, including Act 1).
7. Act 1 reads in pertinent part: BE IT ENACTED BY THE PEOPLE OF THE STATE OF ARKANSAS:	***Undisputed.***

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.)	***Undisputed.***
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.)	***Undisputed.***
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.)	***Disputed***. With the exception of convictions for certain serious felonies, the Child Welfare Agency Review Board has the authority to waive any of its minimum licensing standards in order to serve the best interests of the child. *See* Separate Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment ("Sep. Statement")[1] (Appendix ("App.") B) ¶ 91. As part of its policy waiver process, DHS routinely individually assesses and approves foster or adoptive placements with applicants who have been previously convicted of crimes, including DUI, burglary, gun charges, and battery. *See* Excerpts from Transcript of Child Welfare Agency Review Board Meeting, dated April 22, 2008 (Ex. 133) at 46:17-47:22 (Board approval of foster applicants convicted of third-degree assault); Excerpts from Transcript of Child Welfare Agency Review Board Meeting, dated August 31, 2004 (Ex. 132) at

[1] The Separate Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment, attached hereto for the Court's convenience as Appendix B, was submitted to the Court as Exhibit 7 to Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment, on February 9, 2010. All exhibits referenced in Appendix B are part of the record and are not resubmitted.

	37:1-43:16 (Board approval of foster applicants charged with theft of property, convicted of third-degree battery, and twice convicted of driving while intoxicated); Excerpts from Transcript of Child Welfare Agency Review Board Meeting, dated August 31, 2004 (Ex. 132) at 58:1-65:25 (Board approval of foster applicants convicted of felony domestic violence); Excerpts from Transcript of Child Welfare Agency Review Board Meeting, dated January 27, 2004 (Ex. 131) at 11:7-14:16 (Board approval of foster applicants convicted of first-degree battery and charged with rape); Deposition of Gary Gilliland (Ex. 94) at 185:9-201:20 (discussing various grants of alternative compliance to foster applicants conviction and charged with the previously described crimes); Arkansas DHS, List of Alternative Compliance Waivers, 2007 to 2009 (Ex. 124).
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.)	***Disputed.*** DHS has the authority to waive many policy requirements. *See supra* ¶ 10. ***Immaterial.*** Act 1 does not exclude transient roomers or boarders – it excludes all cohabiting heterosexual couples and same-sex couples even if those couples are in stable loving relationships. *See* Plaintiffs' Brief in Opposition ("Pls.' Opp. to Mots. for SJ") at 61-64; *see also* Plaintiffs' Summary Judgment Memorandum of Law ("Pls.' SJ Memo.") at 26-29.
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, 55:24-56:16, 56:23-57:3; 57:21-58:19.)	***Disputed.*** Prior to 2005, neither DHS nor CWARB policies prohibited cohabiting couples from serving as foster or adoptive parents. Deposition of Cindy Young ("Young Depo.") (Ex. 110) at 103:8-14, 118:17 (DHS 30(b)(6) witness); *id.* at 148:7-152:10 (two-year marriage requirement contained in Pub 30 does not implicitly prohibit cohabitating couples). Furthermore, the State defendants are aware of cohabiting adults in intimate same-sex relationships who are unmarried and who have served as foster parents in this State. *See Howard* v. *CWARB*, No. CV 1999-9881,

	2004 WL 3200916, at *1 (Ark. Cir. Ct. December 29, 2004) (Findings of Fact and Conclusions of Law); *Dep't of Human Servs. and Child Welfare Review Bd.* v. *Howard*, 367 Ark. 55, 65, 238 S.W.3d 1, 6-7 (Ark. 2006). In addition, the State defendants have approved the placement of children with adults who are in cohabiting same-sex relationships**.** *See* Deposition of Anne Wells (Ex. 107) at 48:2-53:7 (placement of child with grandmother cohabiting with same-sex partner deemed in child's best interest from child development and mental health standpoints, and the grandmother's status as a cohabiter and as a lesbian were not negative factors); Deposition of Sandi Doherty (Ex. 93) at 26:17-29:1 (same); Deposition of Shannon Kutz ("Kutz Depo.") (Ex. 98) at 49:20-51:22 (recalling a favorable home study on a same-sex cohabiting couple placement) (DHS 30(b)(6) witness); *id.* at 67:16-20 (DHS recommended Sheila Cole because she was the best placement option for WH); *id.* at 109:24-114:4 (gave favorable home study assessment even though same-sex cohabiting couple); *id.* at 117:18-123:17, 124:6-127:25 (conducted home studies and recommended placements with same-sex couples); *see also* Letter from C. Jorgensen to C. Sun dated November 25, 2009 (Ex. 136) at 2 ("Defendants have indeed approved 'placements' with homosexuals, including homosexual couples. . . . The State Defendants are aware of cases where the State Defendants have approved or recommended placements into guardianship or custodial arrangements in ICPC cases involving homosexual couples . . . ."). Email from S. Hough to L. McGee dated May 26, 2009 (Ex. 129) (COLE-DHS 00032838-40) at 1 (discussing 2-3 cases where judge granted custody to relative cohabiting in a same-sex relationship); *see also* Letter from C. Jorgensen to S. Friedman dated February 2, 2010 (Ex. 138) (one file underlying Hough email sent by

	mail). Email from M. Mitchell to L. McGee dated May 20, 2009 (Ex. 128) (STATE 10183-10185) (discussing placements with relatives cohabiting in same-sex relationships); *see also* Letter from C. Jorgensen to S. Friedman dated January 26, 2010 (Ex. 137) at 4 (underlying file unavailable). *See also* ICPC Relative Home Study (Ex. 134) (STATE 12324-12338) (approving ICPC homestudy for same-sex cohabiting relative). The State defendants have approved the placement of children with adults who are in cohabiting heterosexual relationships. *See* Deposition of Cassandra Scott (Ex. 103) at 28:17-31:23, 39:17-40:13 (placement of children with grandmother cohabiting with boyfriend deemed in children's best interests); *see also* Letter from C. Jorgensen to S. Friedman dated January 26, 2010 (Ex. 137) at 4 (underlying docs currently being redacted). Deposition of Jeannette Adams (Ex. 83) at 15:22-16:2 (recommended placement with cohabiting couples); Kutz Depo. (Ex. 98) at 109:24-114:4 (gave favorable assessment where cohabiting relative placements) (DHS 30(b)(6) witness); *id.* at 117:18-123:17, 124:6-127:25 (conducted home studies and recommended placements with cohabiting heterosexual couples); Deposition of Deborah Roark (Ex. 102) at 23:20-24:8 (DHS has made placements with cohabiting couples). Email from M. Mitchell to L. McGee dated May 20, 2009 (Ex. 128) (STATE 10183-10185) (discussing 2 placements with relatives cohabiting in intimate relationship); *see also* Arkansas DHS Home Study of S.S. by Patti Dean, DCFS Supervisor (Ex. 123) (STATE 10219-10221) at 10221 (indicating applicant cohabitating with gentleman in long-term relationship) ("At this time the department does not have any concerns with the home or the stability of the home."); Letter from C. Jorgensen to S. Friedman dated January 26,

	2010 (Ex. 137) at 4 (only 1 file available). *See also* Email from J. Munsell to L. Peacock dated October 20, 2008 (Ex. 126) (Cole-DHS 00014541-14542) (referencing waiver granted to cohabiting couple).
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.)	***Disputed***. An executive directive was issued in 2005 barring foster placements with cohabiting individuals, but it did not bar adoptive placements. *See* Sep. Statement (App. B) ¶¶ 100, 103. In addition, that executive directive was never promulgated according to the requirements of the Administrative Procedure Act and, thus, was invalid. *See* Sep. Statement (App. B) ¶¶ 102, 104.
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.)	***Disputed.*** Prior to the executive directive issued by Roy Kindle in 2005, DHS did not have a policy ban on cohabiting couples from serving as foster or adoptive parents. *See* Young Depo. (Ex. 110) at 118:17, 152:1-7 (DHS 30(b)(6) witness).
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.)	***Undisputed.***
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.)	***Undisputed.***
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.)	***Disputed.*** Plaintiffs' experts will testify that same-sex couples are no more likely to sexually abuse children than married biological parents. Expert Report of Dr. Michael Lamb ("Lamb Report") (Ex. 114) at ¶¶ 34, 35; *see also Howard*, 2004 WL 3200916, at *3 (Findings of Fact No. 47). Further, Intervenors

	misstate the testimony of Plaintiffs' expert Dr. Karen Worley. Dr. Worley testified that being without biological parents increased the risk of child sex abuse and not, as Intervenors suggest, that sex abuse occurs more frequently in cohabiting biological homes as opposed to married biological homes. Deposition of Karen Worley ("Worley Depo.") (Ex. 109) at 81:22-23. ***Immaterial.*** As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21. In addition, plaintiffs will offer expert testimony that comparisons of two biologically related married parent families to cohabiting parents who are not both biologically related to the child does not allow for conclusions about the impact of cohabitation or marital status since it is known that living in step-families (married or cohabiting) is correlated with poorer outcomes. Rebuttal Report of Dr. Cynthia Osborne ("Osborne Rebuttal Report") (Ex. 118) at 4, 7. Indeed, studies on child outcomes that have taken step-parent status into consideration have found no statistically significant differences between cohabiting step-families and married step-families. *Id.* at 7.
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. 15 155:8-14, 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).)	***Disputed.*** Plaintiffs will offer expert testimony that same-sex cohabiting couples are no more likely to abuse their children than married or single parents. Lamb Report (Ex. 114) at ¶¶ 34-36; *Howard*, 2004 WL 3200916, at *3 (Findings of Fact No. 46). They will also offer expert testimony that rates of abuse in heterosexual cohabiting and single parent homes are comparable. Lamb Report (Ex. 114) at ¶ 36. Further, Intervenors misstate the testimony of Plaintiffs' expert Dr. Karen Worley. Dr. Worley testified that being

	without biological parents increased the risk of child sex abuse and not, as Intervenors suggest, that sex abuse occurs more frequently in cohabiting biological homes as opposed to married biological homes. Worley Depo. (Ex. 109) at 81:22-23. Dr. Worley also testified that any presence of a man in the home, not cohabitation or marriage, increases the risk of sex abuse because men are the primary perpetrators of child sex abuse. *Id.* at 88:6-11. ***Immaterial.*** As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21.
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.)	***Disputed.*** Plaintiffs will offer expert testimony that same-sex couples and married heterosexual couples have equivalent rates of good quality relationships with their children. Lamb Report (Ex. 114) at ¶¶ 28-31; *Howard*, 2004 WL 3200916, at *3 (Findings of Fact Nos. 29-34, 37-40). They will offer further expert testimony that with respect to heterosexual couples, while on average the quality of the parent-child relationship is statistically higher in married versus cohabiting parent families, you cannot predict the quality of the parent-child relationship in an individual family based on marital status. Deposition of Michael Lamb ("Lamb Depo.") (Ex. 99) at 105:12-17. ***Immaterial.*** To the extent Defendants' assertion relates to average differences between married and cohabiting parents, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21.

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.)	***Immaterial.*** As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21. In addition, Plaintiffs will offer expert testimony that while the break up rate of same-sex couples is somewhat higher than that of married couples, sexual orientation is not as strong a predictor of relationship dissolution as other demographic characteristics such as race, education, income and the partners' ages. Expert Report of Dr. Letitia Anne Peplau ("Peplau Report") (Ex. 115) at 4. Moreover, Plaintiffs' will offer expert testimony that heterosexual cohabitors are a diverse group, including those in long-term committed relationships and young people in dating relationships who live together temporarily during the college years, and the studies tend to lump them together. Peplau Report (Ex. 115) at 4 ; Deposition of Cynthia Osborne ("Osborne Depo.") (Ex. 100) at 105:2-15, 111:9-112:14.
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.)	***Immaterial.*** Arkansas does not limit adoption and fostering to those who are economically well off. Furthermore, as explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21. Also, Act 1 explicitly recognizes that cohabitors can be appropriate parents for children as guardians, who do not receive the board payments provided to foster and adoptive parents. *See* Pls.' Opp. to Mots. for SJ at 40-41, 51-55.
22. On average, married couples received more social support from their parents than cohabiting couples. (FCAC MSJ Ex. 20, Lamb Dep. 15 126:17-25.)	***Disputed.*** Plaintiffs will offer expert testimony that cohabiting couples can have more support from their relatives than married couples**.** Rebuttal Expert Report of Dr. Letitia Anne

	Peplau ("Peplau Rebuttal Report") (Ex. 119) at 2. ***Immaterial.*** Even if such average disparity existed, as explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21.
23. Married fathers are more likely to support their children financially than cohabiting fathers. (FCAC MSJ Ex. 49, Deyoub Expert Report 8.)	***Disputed.*** Plaintiffs will offer expert testimony disputing that the scientific research supports the assertion that married fathers are more likely to support their children financially than cohabiting fathers. *See* Affidavit of Dr. Cynthia Osborne ("Osborne Aff.") (Ex. 82). Further, none of Dr. Deyoub's opinions relate to children raised by same-sex couples. Sep. Statement ¶ 114-15. ***Immaterial.*** As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21.
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.beft.co.uk/2010%20Family%20policy,%20breakdown%20	***Disputed.*** Plaintiffs will offer expert testimony although the study claims that marriage is the single biggest predictor of family stability, it does not provide data from which one can reach this conclusion. Osborne Aff. (Ex. 82). Moreover, the expert testimony will show that this data tells you nothing about how marriage compares to other factors that predict family stability. *Id.* Plaintiffs will further offer expert testimony that this report itself acknowledges that "[m]ajor reports published in the last year . . . challenge this view, arguing that other background factors affect child outcomes more than either marriage or family breakdown.**"** *See* Harry Benson, Married and Unmarried

and%20structure.pdf.)	Family Breakdown: Key Statistics Explained, Bristol Community Family Trust(2010) (Ex. 142) at 1, *available at* http://www.beft.co.uk/2010%20Family%20policy,%20breakdown%20 and%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 551-5811 (2006).)	***Disputed.*** Plaintiffs will offer expert testimony that "[w]ith respect to family stability, single parenthood is the family structure that is the least likely to be stable." Osborne Rebuttal Report (Ex. 118) at 9. ***Immaterial.*** Even if this were true, as explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21.
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.)	***Immaterial.*** As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21. Moreover, plaintiffs will offer expert testimony that studies show that on average, cohabiting heterosexuals have similar or better mental health than single heterosexuals. Rebuttal Expert Report of Dr. Susan D. Cochran ("Cochran Rebuttal Report") (Ex. 116) at 2.
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.)	***Immaterial.*** As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21. In addition, plaintiffs will present expert testimony that the vast majority of cohabiting couples do not report domestic

	violence in their relationship. Peplau Report (Ex. 115) at 5. Plaintiffs will also offer expert testimony that cohabiting couples "can be as effectively screened for domestic violence as married heterosexual couples" because "[t]he factors that are known to predict violence or lack of violence between partners in married heterosexual couple relationships are generally the same as those that predict violence or lack of violence between partners in same-sex and heterosexual cohabiting couples."). *Id.*
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 Export Report ¶ 25; FCAC MSJ Ex. 20, Lamb Dep. at 100:3-102:2.)	***Disputed.*** Plaintiffs will offer undisputed expert testimony that average outcomes for children of same-sex couples are the same as those of married biological parents. Lamb Report (Ex. 114) ¶ 29; *Howard*, 2004 WL 3200916, at *3 (Findings of Fact Nos. 29-34, 37-40). ***Immaterial.*** As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21. In addition, plaintiffs will offer expert testimony that comparisons of two biologically related married parent families to cohabiting parents who are not both biologically related to the child does not allow for conclusions about the impact of cohabitation or marital status since it is known that living in step-families (married or cohabiting) is correlated with poorer outcomes. Osborne Rebuttal Report (Ex. 118) at 4, 7. Indeed, studies on child outcomes that have taken step-parent status into consideration have found no statistically significant differences between cohabiting step-families and married step-families. *Id.* at 7.
29. Belonging to a married two biological parent family is associated with lower levels of school suspension and	***Disputed.*** To the extent Defendants' assertion includes same-sex cohabiting couples, Plaintiffs will offer expert testimony that

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.)	children raised by same-sex couples do just as well educationally as children raised by married heterosexual couples. Lamb Report (Ex. 114) at 6; *Howard*, 2004 WL 3200916, at *3 (Findings of Fact Nos. 29-34, 37-40). ***Immaterial.*** As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21. In addition, Plaintiffs experts will testify that comparisons of two biologically related married parent families to cohabiting parents who are not both biologically related to the child does not allow for conclusions about the impact of cohabitation or marital status since it is known that living in step-families (married or cohabiting) is correlated with poorer outcomes. Osborne Rebuttal Report (Ex. 118) at 4, 7. Indeed, studies on child outcomes that have taken step-parent status into consideration have found no statistically significant differences between cohabiting step-families and married step-families. *Id.* at 7.
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.)	***Disputed.*** Plaintiffs will present expert testimony that this average difference is "statistically significant" but extremely small. Osborne Depo. (Ex. 100) at 50:10-52:19 (once these factors are accounted for, the difference between married steps and cohabiting steps on the delinquency measurement is .68 on a scale of 0 to 45). ***Immaterial.*** As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21.

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.)	***Disputed.*** While Plaintiffs do not dispute that average child outcomes are higher among married parent families than some other family structures including cohabiting parent families, they do dispute that marriage causes good child outcomes or "improves" child outcomes. Indeed, even Defendants' experts do not dispute that research shows that when cohabiting heterosexual couples transition to marriage, their children's outcomes aren't any higher than those whose parents remain cohabiting**.** *See* Osborne Rebuttal Report (Ex. 118) at 7; *see also* Wilcox Depo. (Ex. 108) at 226:23-235:18 (you do *not* see improved child outcomes as a result of the parents' marriage). ***Immaterial.*** As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21.
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.)	***Disputed.*** Plaintiffs will offer expert testimony that children of same-sex couples are as emotionally healthy as children raised by married heterosexual couples. Lamb Report (Ex. 114) at 6; *Howard*, 2004 WL 3200916, at *3 (Findings of Fact Nos. 29-34, 37-40). ***Immaterial.*** As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21.
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,	***Disputed.*** Plaintiffs will offer expert testimony that children in cohabiting parent families have comparable levels of school problems as children in single parent families. Osborne Rebuttal Report (Ex. 118) at 8 (Manning and Lamb (2003) study on school problems shows

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).)	"children in cohabiting step-families have similar outcomes compared to children in single mother families, once background characteristics are accounted for"); *id.* (Nelson, Clark, and Acs (2001) study "found no differences between teens in cohabiting and single parent families with regard to emotional and behavioral problems or levels of school engagement"); Osborne Depo. (Ex. 100) at 36:13-20 (children living with a single mother are no different than children living with a cohabiting mother and stepfather in terms of school suspension or expulsion). ***Immaterial.*** As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21.
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).)	***Disputed.*** Plaintiffs will offer expert testimony that outcomes for children in cohabiting families are similar to outcomes for children raised by single parents. *See* Osborne Rebuttal Report (Ex. 118) at 3, 7-9; Plaintiffs' Response to State Defendants' Interrogatories Regarding Dr. Cynthia Osborne (Ex. 140) at Nos. 9, 10, 15; Lamb Report (Ex. 114) at 5. ***Immaterial***. As explained in Plaintiffs' memorandum of law, disparities in average outcomes of heterosexual cohabiting couples as a group and heterosexual married couples as a group do not justify the blanket exclusion of all cohabiting couples. *See* Pls.' Opp. to Mots. for SJ at Sections VIII.B-C; Sep. Statement (App. B) ¶¶ 116-21.

Appendix B

SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Undisputed Material Facts	**Supporting Evidence**
1. In promulgating minimum licensing standards, the Child Welfare Agency Review Board ("CWARB") policies must be consistent with promoting the health, safety, and welfare of children in the State's care.	Ark.Code Ann. § 9-28-405(c)(1)(A); *see also* Deposition of Ed Appler ("Appler Depo.") (Ex. 9) at 38:20-25 (CWARB 30(b)(6) witness); Deposition of Gary Gilliland ("Gilliland Depo.") (Ex. 23) at 134:18-24 (CWARB 30(b)(6) witness).
2. In addition to abiding by the minimum licensing standards set forth by the CWARB, the Department of Human Services ("DHS") may also create its own policies regarding the eligibility of applicants to be foster and adoptive parents, so long as the policies are promulgated lawfully pursuant to the Administrative Procedures Act.	Ark. Code Ann. §§ 25-15-203 – 25-15-204; Deposition of Cindy Young ("Young Depo.") (Ex. 43) at 21:22-23:6 (DHS 30(b)(6) witness); Deposition of John Selig ("Selig Depo.") (Ex. 34) at 44:2-12.
3. On any given day, DHS and CWARB are responsible for approximately 3,800 children in the State's child welfare system.	Arkansas DHS, 2009 Statistical Report ("2009 DHS Statistical Report") (Ex. 53), http://www.state.ar.us/dhs/AnnualStatRpts/ASR%202009.pdf, at DCFS-19; Deposition of Janie Huddleston ("Huddleston Depo.") (Ex. 25) at 28:10-11.
4. The foster care system includes children of all ages and ethnicities, and from all geographic areas in the State.	2009 DHS Statistical Report (Ex. 53) at DCFS-13 – DCFS-18.
5. Many enter the system with siblings, or with medical, emotional, or other needs.	2009 DHS Statistical Report (Ex. 53) at DCFS-32.
6. Some stay in the child welfare system for a relatively short period of time because they are reunified with their biological parents or find permanency with relatives or adoptive parents, while others stay in the system for years and still others will never be placed in a foster home or with an adoptive family.	2009 DHS Statistical Report (Ex. 53) at DCFS-13 (length of foster stay); *id.* at DCFS-28 (providing reasons children exited foster care and indicating whereas 594 children in foster care were adopted in 2009, a little less than half that number—248 children—aged out of the system in the same year); *id.* at DCFS-23 (879 children were in foster care for more than 36 months).
7. Of these children in the State's care, approximately 2,200 are living in	2009 DHS Statistical Report (Ex. 53) at DCFS-19.

homes with foster or pre-adoptive parents.	
8. The remaining 1,600 or so children who do not have a foster or adoptive parent home live in State-run or contracted residential group homes, emergency shelters, or other institutional facilities.	2009 DHS Statistical Report (Ex. 53) at DCFS-19; *see also* Huddleston Depo. (Ex. 25) at 31:6-15.
9. Defendants are not currently meeting the needs of all children in the State's care.	Deposition of John Zalenski ("Zalenski Depo.") (Ex. 44) at 43:16-23 (DHS 30(b)(6) witness); Deposition of Mona Davis ("Davis Depo.") (Ex. 19) at 128:17-129:5, 340:2-10 ("The state cannot meet their needs as a whole. . . . And we recruit foster homes because we have children that are entering the system that many times we don't have either a foster home that can meet their individualized needs or we don't have a foster home placement at all for them . . . .") (DHS 30(b)(6) witness).
10. Presently, there are over 500 children in State custody awaiting adoption.	2009 DHS Statistical Report (Ex. 53) at DCFS-33.
11. Even assuming that each adoptive home would be a fit and willing placement for a child currently awaiting adoption, there are more than twice as many children awaiting adoption as there are available adoptive homes (228).	2009 DHS Statistical Report (Ex. 53) at DCFS-33.
12. The availability of one additional adoptive home does not mean that one additional child will be adopted because there is not a 1-1 match between applicants and candidates; many applicants will only adopt infants, not the many older children waiting for placement or children with special needs.	Deposition of Marilyn Counts ("Counts Depo.") (Ex. 14) at 127:1-128:22 (DHS 30(b)(6) witness); Deposition of Deborah Roark ("Roark Depo.") (Ex. 31) at 78:16-79:7 (lack of receptiveness to teenagers); *id*. at 80:9-81:6 (describing difficulty of placing children with medical needs due to the special training required of foster parents); Deposition of Monica Cauthen ("Cauthen Depo.") (Ex. 12) at 10:18-24 (describing the difficulty of placing "older children" and children with "severe medical or behavioral issues"); *id.* at 36:18-37:23; Huddleston Depo. (Ex. 25) at 76:17-77:5 (describing the difficulty of finding sufficient foster families to "address the

	needs of older children in foster care"); *id.* at 76:17-77:5 (describing the lack of sufficient foster families willing to take children with behavioral issues); Doherty Depo. (Ex. 21) at 43:24-45:16 (tough to place children include those that have been sexually abused, juvenile aggressors, those with severe disabilities, delinquents, those with low IQs who have developmental needs, the 12 to 15 age group, and those with more than one problem area); Deposition of Jeanette Adams ("Adams Depo.") (Ex. 8) at 57:15-25 (difficult to place older children or those with behavioral or medical special needs).
13. Due to a lack of placement options, some children have been and may continue to be unable to be adopted at all and have and will instead reach the age of majority without ever getting a permanent family.	Zalenski Depo. (Ex. 44) at 83:17-19 (noting that approximately 200 children age out of foster care annually in Arkansas) (DHS 30(b)(6) witness); Counts Depo. (Ex. 14) at 131:19-22 (DHS 30(b)(6) witness); Davis Depo. (Ex. 19) at 117:21-118:1 (DHS 30(b)(6) witness); *see also* Cauthen Depo. (Ex. 12) at 18:13-15 (has seen children age out of the system); 2009 DHS Statistical Report (Ex. 53) at DCFS-28 (whereas 594 children in foster care were adopted in 2009, a little less than half that number—248 children—aged out of the system in the same year).
14. In 2009, 248 children "aged out" of the system, meaning that they reached the age of majority and left State care with no person to provide them with economic, emotional or other support.	2009 DHS Statistical Report (Ex. 53) at DCFS-28.
15. Aging out of the system is harmful to children, as those children face significant difficulties in establishing their independence and supporting themselves, they exhibit an increased likelihood of homelessness, dropping out of high school, mental health issues, substance abuse, and early pregnancy, among other consequences.	Zalenski Depo. (Ex. 44) at 22:24-23:5, 27:9-17 (DHS 30(b)(6) witness); *id.* at 25:19-23 (when kids age out of group care, "they're just really sadly lacking in the fundamental life skills that they need in order to make their way in the world. And then, you know, we turn them loose. It's not good."); Selig Depo. (Ex. 34) at 40:20-43:18 (discussing reasons children age out of foster care, including the lack of a suitable foster or adoptive home); Doherty

	Depo. (Ex. 21) at 55:13-56:3 (with respect to some children who transition out of state care without a permanent placement, "I think they're probably more involved with law enforcement, with illegal acts. … I think they're very transient. Always searching and looking and nowhere to be. And they don't have [a] substantial way to support themsel[ves] financially. The education is very limited. So I think [there's] a lot of negative to it.").
16. Neither FCAC nor defendant Cox has any role or experience in finding placements for children in the state system, matching those children's unique needs to available foster or adoptive parents, or screening applicants as to their suitability to be foster and adoptive parents.	Deposition of Jerry Cox ("J. Cox Depo.") (Ex. 15) at 119:15-120:3 (Cox has never "spoken to any child in state care" before) (FCAC 30(b)(6) witness); *id*. at 124:3-20 (Cox has "no understanding at all" regarding what DHS does to evaluate the suitability of prospective applicants to be foster and adoptive parents, or if the individualized screening process in any way fails to properly serve the best interests of a child); Deposition of John Thomas ("John Thomas Depo.") (Ex. 37) at 45:13-15 (Thomas knows "very little" regarding the DHS process of individualized review) (FCAC 30(b)(6) witness); *id*. at 59:18-60:6 (Thomas does not work in "the area of children in state care").
17. As with the CWARB, it is the obligation of DHS to act in the best interests of children in State care when promulgating and enforcing its policies and that the only legitimate purpose of Act 1 could be the promotion of child welfare.	*See* Ark. Code Ann. § 9-28-1002(a); Ark. Code Ann. § 9-28-405(c)(1)(A); J. Cox Depo. (Ex. 15) at 20:9-20, 103:10-13 (FCAC 30(b)(6) witness); Thomas Depo. (Ex. 37) at 10:18-24, 11:5-10 (agreeing that "the only issue in the case with respect to the basis of Act 1 is what's in the best interest of children"); Huddleston Depo. (Ex. 25) at 55:2-19 (the interests of children is the "paramount interest of DHS" and DHS has an obligation to change any policy that is inconsistent with the best interests of children); Appler Depo. (Ex. 9) at 146:5-18 (CWARB 30(b)(6) witness) (stating that the CWARB could not pass laws inconsistent with its duty to promote the health, safety and

	welfare of children); Selig Depo. (Ex. 34) at 22:5-23:12; Zalenski Depo. (Ex. 44) at 133:11-21 (DHS 30(b)(6) witness); *see also* State Defendants' Answer to Plaintiffs' Third Amended Complaint, dated January 27, 2010 ("State Defendants' Third Answer") (Ex. 73) at ¶ 1; Answer to Plaintiffs' Amended Complaint by Intervenors Family Council Action Committee and Jerry Cox, dated March 31, 2009 ("FCAC Answer") (Ex. 51) at ¶ 1.
18. Some children in state care enter the system because the child has been abused or neglected by his or her biological parents.	Arkansas DHS, DCFS Family Services Policy and Procedure Manual ("DHS Manual") (Ex. 54), last revised November 2009, at http://www.arkansas.gov/dhs/chilnfam/masterpolicy.pdf, at 15-41; Deposition of Kandi Tarpley ("Tarpley Depo.") (Ex. 36) at 10:7-12, 11:9-14, 22:25-23:9, 23:22-24:9; Deposition of Phyllis Newton ("Newton Depo.") (Ex. 29) at 17:23-18:15; Deposition of Cassandra Scott ("Scott Depo.") (Ex. 33) at 13:2-22.
19. Others come into State care because the child's parent may be unable to care for the child.	Deposition of Frances Waddell ("Waddell Depo.") (Ex. 39) at 28:4-20; DHS Manual (Ex. 54) at 183-85.
20. Still other children come into DHS custody because of their parents' death and the lack of any relatives or other individuals willing or able to take custody of the child.	2009 DHS Statistical Report (Ex. 53) at DCFS-27 (77 children entering foster care in 2009 due to death of parents); *see* Davis Depo. (Ex. 19) at 167:25-168:2 (DHS 30(b)(6) witness).
21. By express legislative mandate, once a child enters DHS custody, the State assumes an ethical and legal obligation to act in that child's individual best interests.	Ark. Code Ann. § 9-28-1002(a) ("The General Assembly acknowledges that society has a responsibility, along with foster parents and the Department of Human Services, for the well-being of children in foster care."); Huddleston Depo. (Ex. 25) at 55:2-19 (the interests of children is the "paramount interest of DHS" and DHS has an obligation to change any policy that is inconsistent with the best interests of children); Selig Depo. (Ex. 34) at 21:19-23:12; *see also* FCAC Answer (Ex. 51) at ¶ 1.
22. Each foster child in State care is entitled to certain basic rights, including the right "[t]o be	Ark. Code Ann. § 9-28-1002(b).

cherished by a family of his or her own;" the right "[t]o be nurtured by foster parents who have been selected to meet his or her individual needs;" the right "[t]o have individualized care and attention;" and the right "[t]o have a stable, appropriate placement if he or she is placed in foster care."	
23. Upon entering the foster care system, the State makes an assessment of that child's chances of returning to his or her family, and develops a permanency plan for each individual child.	Deposition of Connie Hickman Tanner ("C. Hickman Tanner Depo.") (Ex. 24) at 125:13-126:24; Deposition of Shannon Kutz ("Kutz Depo.") (Ex. 26) at 70:4-21 (DHS 30(b)(6) witness).
24. While reunification with the biological parents is often the initial goal for all foster children, for many children, that is impossible or not in their best interests.	Deposition of Cecile Blucker ("Blucker Depo.") (Ex. 11) at 83:5-25 (DHS 30(b)(6) witness); Doherty Depo. (Ex. 21) at 50:1-16; C. Hickman Tanner Depo. (Ex. 24) at 125:24-126:11; *see also* Ark. Code Ann. § 9-27-338.
25. In most cases, the permanency goal for that child becomes adoption and DHS seeks to find an adoptive placement in the child's best interest.	*See* Selig Depo. (Ex. 34) at 26:17-27:5; *see also* Young Depo. (Ex. 43) at 44:1-23 (DHS tries to find adoptive parents so children won't "languish in foster care") (DHS 30(b)(6) witness); Cauthen Depo. (Ex. 12) at 66:18-20 (purpose of finding adoptive parents is so that children "don't grow up orphans").
26. Adoption, in stark contrast to guardianship or foster care, creates a "forever family" that provides the child with legal, financial, and emotional benefits unique to the parent-child relationship.	Blucker Depo. (Ex. 11) at 83:19-84:14 (DHS 30(b)(6) witness); Appler Depo. (Ex. 9) at 121:22-25 (adoption "gives greater strength of permanency, thus helping the child's mental health, making a child feel more loved, more secure") (CWARB 30(b)(6) witness); Kutz Depo. (Ex. 26) at 19:25-21:1 (permanent placement in an adoptive family is especially important for younger children, to give the children greater stability) (DHS 30(b)(6) witness); *see also* Selig Depo. (Ex. 34) at 26:17-27:5; Young Depo. (Ex. 43) at 41:25-42:17 (when reunification is not possible, adoption is generally the preferred permanent placement) (DHS 30(b)(6) witness); *id.* at 44:1-23 (DHS tries to find

	adoptive parents so children won't "languish in foster care"); Cauthen Depo. (Ex. 12) at 66:18-20 (purpose of finding adoptive parents is so that children "don't grow up orphans"); 42 U.S.C. § 216(c); 38 U.S.C. §§ 1313, 1542; Ark. Code Ann. § 28-9-214; *id.* § 28-65-401; DHS Manual, (Ex. 54) Policy 1A.
27. For children who need foster placements, under DHS policy and federal law, DHS caseworkers must place children in the least restrictive, most family-like setting possible.	DHS Manual (Ex. 54) at 62; *see also* Deposition of Anne Wells ("Wells Depo.") (Ex. 41) at 67:4-13 (discussing efforts to keep kids within the community as opposed to an institutional setting); Young Depo. (Ex. 43) at 41:19-22 (DHS 30(b)(6) witness); Davis Depo. (Ex. 19) at 128:10-11, 282:20-283:8 (DHS 30(b)(6) witness); Deposition of Beki Dunagan ("Dunagan Depo.") (Ex. 22) at 11:14-22, 17:20-18:7.
28. Unless there is a specific circumstance of the child that would counsel otherwise, children are best served by placements with families and not institutions, and as such, placements in group homes or institutions are less desirable than placements with families.	Zalenski Depo. (Ex. 44) at 37:3-5 ("But if a family setting is what a child needs and goes into a group care setting, then – and it's not right, then it's detrimental.") (DHS 30(b)(6) witness); Blucker Depo. (Ex. 11) at 105:15-21 (placing a child with a foster family as opposed to residential facility is more likely to lead to permanence) (DHS 30(b)(6) witness); Counts Depo. (Ex. 14) at 27:14-23 ("We think that children do better in families.") (DHS 30(b)(6) witness); Davis Depo. (Ex. 19) at 17:24-18:16, 69:7-12 ("Generally, because we believe that the most family-like setting is – is optimal and that, you know, that that's more restrictive than the family-like setting, so we really like to look at those settings before we get to group home settings, to see if children can do well in a family setting.") (DHS 30(b)(6) witness); Dunagan Depo. (Ex. 22) at 14:15-19:4; Appler Depo. (Ex. 9) at 115:20-116:5 (family "creates greater emotional stability" than group home where staff come and go) (CWARB 30(b)(6) witness); Young Depo. (Ex. 43) at 40:3-11, 41:19-22 (family setting is preferred) (DHS 30(b)(6) witness); Wells Depo. (Ex. 41) at 91:9-24 (noting benefits

	of foster family home and, in contrast, that a facility "disperses that sense of identity and psyche"); Tarpley Depo. (Ex. 36) at 27:8-14, 32:3-11 ("When unable to find a foster home, we turn to emergency shelters" and children are harmed "because there's a shortage of foster care. Children are moved often, have to spend time in hospitals, residential facilities").
29. Unless there is a specific circumstance of the child that would counsel otherwise, DHS also strives to keep sibling groups together, to place children with relatives, and to avoid "out-of-county" placements, meaning placements outside of the child's home town.	Doherty Depo. (Ex. 21) at 56:9-57:6; Young Depo. (Ex. 43) at 78:1-20 (DHS 30(b)(6) witness).
30. The preferences for maintaining sibling groups and for placements with relatives reflect the understanding that children benefit from the "sense of responsibility and a bond and a feeling and love for that child" that are already established with family members.	Wells Depo. (Ex. 41) at 75:10-12; Davis Depo. (Ex. 19) at 99:7-12 ("we feel like that – that relationship is – is as close as a relationship as some kids will have, and that to make sure that their emotional needs and their mental health needs and their – are met. That they keep those connections. We believe that family connections are important, so.") (DHS 30(b)(6) witness); Dunagan Depo. (Ex. 22) at 19:5-20:10; Adams Depo. (Ex. 8) at 59:10-20 (keeping siblings together "provides a little bit of extra stability"); Doherty Depo. (Ex. 21) at 52:17-53:14; Young Depo. (Ex. 43) at 78:13-20 ("that's to maintain those family ties, stability, permanency") (DHS 30(b)(6) witness); Deposition of Cherylon Reid ("Reid Depo.") (Ex. 30) at 23:5-12 ("I mean, all research shows that siblings who remain together have that continuity, they have a sense of identity. There is a real strong connection, and it's a lifelong connection."); Cauthen Depo. (Ex. 12) at 14:8-12.
31. Avoiding out-of-county placements whenever possible helps the child maintain regular contact with his biological family when	Davis Depo. (Ex. 19) at 20:16-20 ("we believe that children do better when they're in familiar circumstances. And it's very traumatic when they are removed from

	reunification is the goal, and maintain continuity with his school, his community, and any medical or psychological treatment that the child may be receiving.	their homes, so the more things we can keep familiar to them, we believe that that's best for children.") (DHS 30(b)(6) witness); *id.* at 126:20-128:22 (out-of-county placements make visitation and reunification more difficult); Davis Depo. (Ex. 14) at 126:23-128:4 ("We believe that keeping children in familiar environments helps lessen the trauma of the removal. Keeping them in close proximity so that you can have visits with family members . . . . It helps them, you know, know that the parents aren't far away, and that they're kind of close. Helps alleviate some fears and just emotionally helps them handle the trauma of being removed.") (DHS 30(b)(6) witness); *id.* at 132:1-133:19; Selig Depo. (Ex.34) at 23:13-25:24 (shortages in available placements make it more difficult for children to be placed in reasonable geographic proximity of their original parents, which makes visitation and reunification harder to achieve); Reid Depo. (Ex. 30) at 27:9-28:22 (same); Doherty Depo. (Ex. 21) at 56:9-58:25 (same); *id.* at 56:14-15 ("We like to keep [children] as close to family as possible" because of continuity in their school, visitation by their biological families, comfort with their communities, and preexisting relationships with their primary care providers); Dunagan Depo. (Ex. 22) at 11:14-14:16(out-of-county placements means DHS must spend more time transporting children); Roark Depo. (Ex. 31) at 8:3-10:19 (out-of-county placements make visitations more difficult for staff); Appler Depo. (Ex. 9) at 116:6-14 (CWARB 30(b)(6) witness); *see also* Young Depo. (Ex. 43) at 48:15-49:20 (DHS 30(b)(6) witness); Wells Depo. (Ex. 41) at 82:2-5 (out-of-county placements make it almost impossible for DHS to arrange for family therapy); Deposition of Eldon Schulz ("Schulz Depo.") (Ex. 32) at 27:17-28:22 (out-of-county placements

	make continuity of medical treatment difficult or impossible to maintain).
32. The cornerstone of the State's obligations to act in the best interests of children in its care is to make placement decisions based on the individual emotional, medical, and other needs of that child.	Zalenski Depo. (Ex. 44) at 38:1-21 (placement decisions must based on an individualized assessment of the best interests of the child) (DHS 30(b)(6) witness); Appler Depo. (Ex. 9) at 50:5-51:5 (same) (CWARB 30(b)(6) witness); Davis Depo. (Ex. 19) at 46:3-15, 105:1-4 (DHS 30(b)(6) witness); *see also* Cauthen Depo. (Ex. 12) at 9:22-25 ("We make sure that the family can meet the—meet the needs of the child."); Dunagan Depo. (Ex. 22) at 71:12-14.
33. There is no one type of parent or home structure that is the best fit for every child because each child has individual needs and each parent and home offers different benefits.	Zalenski Depo. (Ex. 44) at 38:20-23, 39:11-12 ("there's no single optimal family structure that would be best suited to every child") (DHS 30(b)(6) witness); Counts Depo. (Ex. 14) at 25:21-26:6 (DHS 30(b)(6) witness); Davis Depo. (Ex. 19) at 35:18-20, 36:22-37:3 ("the family structure depends on what the child's needs are, the individualized needs of that child.") (DHS 30(b)(6) witness); *id.* at 63:7-12 (no one type of home that is ideal for every child); Dunagan Depo. (Ex. 22) at 69:6-72:14; Deposition of Denise Thormann ("Thormann Depo.") (Ex. 38) at 54:5-13 ("there's not just a clear-cut ideal family circumstance for every child"); Appler Depo. (Ex. 9) at 105:6-15 (no CWARB policy preference for a particular family structure) (CWARB 30(b)(6) witness).
34. DHS strives to recruit a broad pool of potential foster and adoptive applicants and only by doing so can the State increase the likelihood of finding placements for children in its care that meet those children's individual needs.	Zalenski Depo. (Ex. 44) at 34:11-15 (DHS has a need for appropriate placements, not just any placement) (DHS 30(b)(6) witness); *id.* at 42:14-43:11 (DHS will "never stop recruiting" because it is "impossible that there would be a one-to-one correspondence where you would have 100 foster families and 100 children and that would work out."); *see also* Huddleston Depo. (Ex. 25) at 72:5-73:5 (noting that there could be a one-to-one match and there would still not be enough homes for older children); Davis Depo.

	(Ex. 19) at 36:9-21 (same) (DHS 30(b)(6) witness).
35. Defendants acknowledge that a married couple is not necessarily the ideal placement for every child.	Selig Depo. (Ex. 34) at 56:1-5 (you cannot determine whether a placement is suitable for a particular child simply because of the marital status of the parents); *id.* at 62:1-12 (same); Zalenski Depo. (Ex. 44) at 39:7-12 (DHS 30(b)(6) witness); Wells Depo. (Ex. 41) at 83:23-84:9; Dunagan Depo. (Ex. 22) at 69:22-72:14; *see also* Young Depo. (Ex. 43) at 77:1-5 (which placement is best would "depend on the needs of the child") (DHS 30(b)(6) witness); Appler Depo. (Ex. 9) at 90:4-6 (no CWARB policy preferring married couple applicants over single applicants) (CWARB 30(b)(6) witness); Thomas Depo. (Ex. 37) at 36:21-39:2 (FCAC 30(b)(6) witness); Counts Depo. (Ex. 14) at 26:1-6 (single parent may be ideal) (DHS 30(b)(6) witness); Doherty Depo. (Ex. 21) at 34:3-5(same); Appler Depo. (Ex. 9) at 51:6-52:5 (he's seen children "thriving" in families headed by same-sex couples and cohabiting heterosexual couples) (CWARB 30(b)(6) witness); Kutz Depo. (Ex. 26) at 86:20-23 (DHS believes that it is in plaintiff W.H.'s best interests to be adopted by plaintiff Cole, who is in a same-sex cohabiting relationship) (DHS 30(b)(6) witness); Doherty Depo. (Ex. 21) at 26:17-29:1 (best interest of child to be placed with grandmother cohabiting with same-sex partner); Scott Depo. (Ex. 33) at 28:17-31:23, 33:13-20 (best interest of child to be placed with grandmother cohabiting with her boyfriend of 20 years); *id.* at 38:19-39:2 (admitting that placement with a cohabiting couple could be in the best interests of a child); Deposition of Teri Ward ("Ward Depo.") (Ex. 40) at 36:9-15 (admitting placement with same-sex couple may be in best interests of child); Roark Depo. (Ex. 31) at 42:3-9 (stating placement with cohabiting couple may be in child's best interest); *id.* at 70:25-71:25 (admitting

	placement with single individual may be in child's best interest); Thomas Depo. (Ex. 37) at 36:21-37:11 (agreeing that for some children, the best placement may not be with a married mother and father) (FCAC 30(b)(6) witness).
36. Neither DHS nor the CWARB have policies preferring placement of a child with a married couple.	Young Depo. (Ex. 43) at 77:1-5 (which placement is best would "depend on the needs of the child") (DHS 30(b)(6) witness); Appler Depo. (Ex. 9) at 90:4-6 (no CWARB policy preferring married couple applicants over single applicants) (CWARB 30(b)(6) witness).
37. There are individuals who are cohabiting in an intimate same-sex relationship with an unmarried partner who can provide safe, stable, and appropriate homes for children that are in the best interests of those children, and in some cases may be the ideal placement.	Wells Depo. (Ex. 41) at 78:6-15; Appler Depo. (Ex. 9) at 51:6-52:5 (he's seen children "thriving" in families headed by same-sex couples and cohabiting heterosexual couples) (CWARB 30(b)(6) witness); Doherty Depo. (Ex. 21) at 26:17-29:1 (best interest of child to be placed with grandmother cohabiting with same-sex partner); Scott Depo. (Ex. 33) at 38:19-39:2 (admitting that placement with a cohabiting couple could be in the best interests of a child); Ward Depo. (Ex. 40) at 32:17-33:5 (it is possible Act 1 will exclude otherwise suitable parents); *id.* at 35:24-36:7, 36:9-15 (admitting placement with same-sex couple may be in best interests of child); Roark Depo. (Ex. 31) at 42:39 (stating placement with cohabiting couple may be in child's best interest; Huddleston Depo. (Ex. 25) at 65:15-25 (believes Act 1 will result in rejection of suitable homes); Newton Depo. (Ex. 29) at 20:15-18; Deposition of Scott Tanner ("S. Tanner Depo.") (Ex. 35) at 40:3-12; Adams Depo. (Ex. 8) at 43:16-25, 103:19-23; Dunagan Depo. (Ex. 22) at 134:20-135:3 (would support placement with cohabiting couple); Thormann Depo. (Ex. 38) at 45:18-21 (same-sex couples can make good relative placements); Deposition of Libby Cox ("L. Cox Depo.") (Ex. 16) at 49:24-50:9 (same-sex couple may be better parents than married couple); *see also* Kutz

	Depo. (Ex. 26) at 53:1-10.
38. DHS believed it was in Plaintiff W.H.'s best interest to be adopted by Plaintiff Sheila Cole.	Kutz Depo. (Ex. 26) at 86:20-23 (DHS believes that it is in plaintiff W.H.'s best interests to be adopted by plaintiff Cole, who is in a same-sex cohabiting relationship) (DHS 30(b)(6) witness); *see also* Order, *Arkansas DHS v. Caldwell*, dated January 13, 2009 (Ex. 71).
39. There are individuals who are cohabiting in an intimate heterosexual relationship with an unmarried partner who can provide safe, stable, and appropriate homes for children that are in the best interests of those children, and in some cases may be the ideal placement.	Wells Depo. (Ex. 41) at 78:6-15; Appler Depo. (Ex. 9) at 51:6-52:5 (he's seen children "thriving" in families headed by same-sex couples and cohabiting heterosexual couples) (CWARB 30(b)(6) witness); Ward Depo. (Ex. 40) at 32:17-33:5 (it is possible Act 1 will exclude otherwise suitable parents); *id.* at 35:24-36:7 (placement with cohabiting couple may be in child's best interest); Scott Depo. (Ex. 33) at 28:17-31:23, 33:13-20 (best interest of child to be placed with grandmother cohabiting with her boyfriend of 20 years); *id.* at 38:19-39:2 (admitting that placement with a cohabiting couple could be in the best interests of a child); Roark Depo. (Ex. 31) at 42:3-9 (stating placement with cohabiting couple may be in child's best interest); *see also* Newton Depo. (Ex. 29) at 20:15-18; S. Tanner Depo. (Ex. 35) at 40:8-12; Adams Depo. (Ex. 8) at 43:16-25, 103:19-23; Dunagan Depo. (Ex. 22) at 134:20-135:3 (would support placement with cohabiting couple); Kutz Depo. (Ex. 26) at 145:14-19 (believing that those homes, with cohabiting heterosexual couples, that she approved were appropriate placements) (DHS 30(b)(6) witness); Huddleston Depo. (Ex. 25) at 65:15-25 (believes Act 1 will result in rejection of suitable homes); L. Cox Depo. (Ex. 16) at 50:10-12 (cohabiting couples can make good parents).
40. Prior to any child being placed with a foster or adoptive parent, the prospective foster or adoptive parent undergoes a lengthy screening process to determine the	Counts Depo. (Ex. 14) at 35:6-40:23, 47:19-56:9, 111:18-116:5 (DHS 30(b)(6) witness); Cauthen Depo. (Ex. 12) at 38:23-39:24; Dunagan Depo. (Ex. 22) at 74:3-76:13. *See generally* DHS Manual (Ex. 54)

safety and stability of the home that is being offered. The multiple step screening process includes: i) an initial inquiry meeting between the applicant(s) and DHS; ii) an in-home consult with the applicant(s) and a social worker; iii) background FBI and state criminal and child maltreatment central registry checks for all applicants and all adults and teenagers living the household; iv) 30 hours of training over 10 weeks and CPR and first aid classes for all applicants; v) physical examinations for all applicants and all adults and teenagers living in the household; and vi) a written home-study, which requires at least 2 visits, during which a caseworker inspects the physical premises, gathers information about the history of the applicant, and conducts separate interviews of the applicant and all other persons living in the home	at 138-48; Arkansas DHS, DCFS, Adoption/Foster Home Study Application (Ex. 76) (STATE 1563-1572).
41. Prior to placement, the homestudy and other supporting materials are reviewed by a DHS supervisor, who can require that the caseworker obtain any additional evidence about the home that was not addressed in the case file.	Counts Depo. (Ex. 14) at 88:4-88:22 (DHS 30(b)(6) witness).
42. As part of the screening process outlined above, all applicants who apply to foster and adopt are screened to assess their fitness as parents, including their relationship stability (if the applicants are in a relationship), the risk of abuse, and their overall suitability to serve as foster parents for vulnerable children.	*See generally* DHS Manual (Ex. 54) at 146 (requiring stability in married couples who apply to foster); *id.* at 145 (requiring prospective family members to satisfy the approval process based on DCFS Standards for Approval of Family Foster Homes); Adams Depo. (Ex. 8) at 12:4-13:16; Roark Depo. (Ex. 31) at 22:9-23:8.
43. Under DHS policies and CWARB minimum licensing standards, there is no specific income required to be a foster parent.	Young Depo. (Ex. 43) at 57:11-16 (DHS 30(b)(6) witness); Appler Depo. (Ex. 9) at 59:25-60:3 (CWARB 30(b)(6) witness).

44. Under DHS policies and CWARB minimum licensing standards, there is no disease other than tuberculosis that automatically disqualifies an applicant.	Young Depo. (Ex. 43) at 50:23-51:19 (DHS 30(b)(6) witness); Appler Depo. (Ex. 9) at 57:20-59:9 (CWARB 30(b)(6) witness).
45. Under DHS policies and CWARB minimum licensing standards, there is no physical disability that automatically disqualifies an applicant.	Young Depo. (Ex. 43) at 59:25-60:3 (DHS 30(b)(6) witness); Appler Depo. (Ex. 9) at 56:10-57:19 (CWARB 30(b)(6) witness).
46. Under DHS policies and CWARB minimum licensing standards, there is no limit on the number of times that an applicant can have divorced or remarried.	Young Depo. (Ex. 43) at 69:13-70:5 (DHS 30(b)(6) witness); Appler Depo. (Ex. 9) at 91:4-12 (CWARB 30(b)(6) witness).
47. Under DHS policies and CWARB minimum licensing standards, there is no literacy requirement.	Counts Depo. (Ex. 14) at 62:19-21 (DHS 30(b)(6) witness).
48. Other than the bans created by Act 1 and standards regarding certain felony convictions, child welfare professionals in the State are entrusted to evaluate these and other demographic characteristics of the would-be foster and adoptive parent on an individualized basis to determine whether such characteristics play a positive, negative, or no role at all in their ability to meet the needs of a particular child.	Young Depo. (Ex. 43) at 47:13-25 (DHS 30(b)(6) witness); *see also* Blucker Depo. (Ex. 11) at 74:7-17 (need to look at the "whole picture" of an applicant, and not just their race, gender, sexual orientation, or marital status, to determine whether he or she would be a suitable parent) (DHS 30(b)(6) witness).
49. In assessing applicants who are in relationships, consistent with accepted social work standards, DHS does not make assumptions about the applicants' parenting ability based on their marital status.	Young Depo. (Ex. 43) at 80:22-81:19 (DHS 30(b)(6) witness); *id.* at 78:21-81:19; Selig Depo (Ex. 34) at 56:1-5 (cannot determine if a placement is better or worse for a child just based on the marital status of the couple in the home); Zalenski Depo. (Ex. 44) at 104:7-19 (can't assume married couples are stable because "all marriage relationships are different") (DHS 30(b)(6) witness); *id.* at 165:11-20 (can't assume that there is the presence of substance abuse or violence in the home just because a single parent has a boyfriend); Adams Depo. (Ex. 8) at 67:1-13 (marital status does not determine whether or not a couple

	will abuse children or have a stable relationship); Appler Depo. (Ex. 9) at 60:25-62:19 (under good social work principles, you cannot assume that a married couple is stable or that an unmarried couple is automatically unstable) (CWARB 30(b)(6) witness); Kutz Depo. (Ex. 26) at 122:13-16, 139:18-140:13 (caseworkers cannot automatically assume that solely because prospective parents are not legally married, they will be bad parents because this "would be a stupid assumption") (DHS 30(b)(6) witness); Scott Depo. (Ex. 33) at 36:12-19 (no category of people exists for which a home study need not be conducted to assess suitability to parent, including married couples).
50. Rather, the stability of any particular relationship, married or unmarried, must be assessed individually.	Thormann Depo. (Ex. 38) at 55:19-56:5, 58:6-10; Scott Depo. (Ex. 33) at 36:19-24 (an individualized assessment, even of married couples, is critical to determine fitness and suitability to parent); *see also* Tarpley Depo. (Ex. 36) at 31:17-22 ("I don't think that gay or straight has any bearing on what kind of parent you can be. I think each person needs to be assessed by the rules and the procedures that there are in place"); Newton Depo. (Ex. 29) at 28:2-15 ("I just don't think marital status has anything to do with whether or not someone could be a good parent."); Appler Depo. (Ex. 9) at 60:19-62:19 (CWARB 30(b)(6) witness).
51. Under DHS policies, caseworker specialists are required to conduct follow-up in-person visits with the child in the foster home and to maintain regular communication with the child.	DHS Manual (Ex. 54) at 146-47; *see also* Kutz Depo. (Ex. 26) at 13:16-14:12, 31:20-34:8 (DHS 30(b)(6) witness); Dunagan Depo. (Ex. 22) at 93:11-97:16.
52. As part of that follow-up evaluation, the child's experience is closely monitored to ensure that the placement is a good fit and that the foster or pre-adoptive parents are not abusing or neglecting the child.	Kutz Depo. (Ex. 26) at 32:9-14, 35:4-19 (DHS 30(b)(6) witness); Dunagan Depo. (Ex. 22) at 93:11-97:16.

53. The child's experience also is monitored by a juvenile court, which conducts periodic review hearings, often every three to six months to evaluate the suitability of the placement.	Ark. Ann. Code § 9-27-337; *see also* C. Hickman Tanner Depo. (Ex. 24) at 146:6-147:14; Counts Depo. (Ex. 14) at 100:11-22 (Pulaski County courts evaluate every 3 months) (DHS 30(b)(6) witness).
54. Similar safeguards ensure that adoptive placements are good and appropriate fits for children, and prior to any adoption the court must hold a hearing to assess the home study and DHS's recommendations and to determine independently whether the adoption is in the child's best interest.	*See* Counts Depo. (Ex. 14) at 91:3-96:12, 100:11-22 (DHS 30(b)(6) witness); Honorable Stephen Choate ("Choate Depo.") (Ex. 13) at 45:1-8 (discussing the Permanency Planning Hearing).
55. Along with the child's caseworker, there are a number of other child welfare professionals involved in placement decisions regarding the child, including the child's attorney ad litem, the child's CASA advocate, and a DHS attorney from the Office of Chief Counsel, and in the case of adoptions, also a DHS adoption specialist, a DHS adoption supervisor, and ultimately a court that must decide whether to grant the adoption decree.	Counts Depo. (Ex. 14) at 99:14-104:18 (DHS 30(b)(6) witness); *see also* Wells Depo. (Ex. 41) at 43:9-15 (sometimes psychologist or psychiatrist is also involved); Roark Depo. (Ex. 31) at 71:15-19 (therapists sometimes make placement recommendations).
56. The State Defendants agree that the initial screening process and the other safeguards in place effectively screen out unsuitable parents.	Selig Depo. (Ex. 34) at 58:24-59:6 (screening process is "thorough" and "effective"); Appler Depo. (Ex. 9) at 96:23-97:2 (Arkansas's home study evaluation requirements are "more comprehensive than most of the states I have ever seen") (CWARB 30(b)(6) witness); Blucker Depo. (Ex. 11) at 24:22-23 (Arkansas's process is working, "[w]e are getting good homes) (DHS 30(b)(6) witness); Huddleston Depo. (Ex. 25) at 40:1-41:3 (screening process is "very thorough" and she would not make any changes to it); Dunagan Depo. (Ex. 22) at 81:18-83:6 (safeguards in place to ensure safety).
57. The Defendants believe that individualized review or screening process currently in place is	Arkansas DCFS Statewide Outline Assessment (Ex. 57) at 157-58 (2007) (stating in this federal submission that the

thorough and effectively addresses those foster or adoption situations that may threaten the health, safety or welfare of the child at issue.	standards for foster homes and institutions was determined to be a strength); Counts Depo. (Ex. 14) at 50:4-11 (extensive screening process allows case workers to "really learn [their] families") (DHS 30(b)(6) witness); *id.* at 119:8-11 (assessment and screening process for adoptive placements is thorough); Blucker Depo. (Ex. 11) at 24:22-23 ("So our process is working. We are getting good homes.") (DHS 30(b)(6) witness); Zalenski Depo. (Ex. 44) at 137:25-138:6 (screening process is effective regardless of marital status) (DHS 30(b)(6) witness); Selig Depo. (Ex. 34) at 58:24-59:6 (screening process is "thorough" and "effective"); Appler Depo. (Ex. 9) at 96:23-97:2 (home study screening process is "more comprehensive . . . than most of the states I have ever seen") (CWARB 30(b)(6) witness); Ward Depo. (Ex. 40) at 31:12-18 (no reason to doubt DCFS ability to screen); Huddleston Depo. (Ex. 25) at 40:1-41:3 (screening process is "very thorough" and she would not change it); Choate Depo. (Ex. 13) at 87:6-7 (adoptive parents are thoroughly vetted); Adams Depo. (Ex. 8) at 72:5-14.
58. Moreover, the State has certified to the federal government that these processes are in accord with nationally recognized child welfare practices.	Arkansas DCFS Statewide Outline Assessment (Ex. 57) at 157-58 (2007).
59. The Defendants believe Arkansas's screening process can effectively assess the suitability of individuals in cohabiting heterosexual or same-sex relationships as prospective foster and adoptive parents in accordance with nationally recognized child welfare practices.	Appler Depo. (Ex. 9) at 66:9-25, 85:24-86:13, 93:17-95:16, 148:10-150:1 (CWARB 30(b)(6) witness); Counts Depo. (Ex. 14) at 77:6-20 (qualities assessed are the same for everyone) (DHS 30(b)(6) witness); Davis Depo. (Ex. 19) at 138:8-25 ("in assessing any kind of stability for any purposes, you are going to assess the same way") (DHS 30(b)(6) witness); *id.* at 187:3-14, 194:7-16 (does not think assessment would differ based on sexual orientation); *id.* at 353:23-354:20 (no social work principle suggests assessment would

	be less effective with same-sex couples or cohabiting heterosexual couples) (DHS 30(b)(6) witness); Dunagan Depo. (Ex. 22) at 125:18-126:1 (no doubts about her ability to assess same-sex couple); Adams Depo. (Ex. 8) at 64:2-10 (screening process could be used to screen out cohabiting couples who should not be placement); Huddleston Depo. (Ex. 25) at 40:1-8, 40:16-23, 41:2-42:8; Zalenski Depo. (Ex. 44) at 100:12-18 (sexual orientation does not impact assessment) (DHS 30(b)(6) witness); *id.* at 109:4-12 (marital status does not impact assessment); *id.* at 137:25-138:6 (same); Wells Depo. (Ex. 41) at 72:5-11 (not more difficult to screen cohabiting heterosexuals or same-sex couples than it is to screen married or single applicants); Doherty Depo. (Ex. 21) at 33:10-34:18 (home studies are equally effective screening tool regardless of the marital status of the individuals being assessed); Scott Depo. (Ex. 33) at 49:10-13 (cohabiting applicants can be screened for stability through the home study process); *see also* Tarpley Depo. (Ex. 36) at 30:8-31:22 (individual assessments – whether of married or cohabiting couples, straight or gay – are crucial to determining whether someone is capable of being a good parent); Defendants' Responses to Plaintiffs' First Set of Interrogatories, dated March 13, 2009 (Ex. 59) at 9-10.
60. There is no evidence that placements with individuals in cohabiting same-sex relationships have led to worse outcomes for children in Arkansas than placements with singles or married couples.	Defendants' Responses to Plaintiffs' First Set of Interrogatories, dated March 13, 2009 (Ex. 59) at 2 (stating that "State Defendants have no records or statistics" regarding the previously stipulated fact from *Howard* that DCFS is "not aware of any child or children whose health, safety and/or welfare has been endangered by the fact that his or her legal parent, foster parent or other adult household member was a 'homosexual'").
61. None of the Defendants nor any of their agents is aware of any child or	*See, e.g.*, Letter from C. Jorgensen to C. Sun dated Nov. 25, 2009 (Ex. 67) at 3

children whose health, safety or welfare has been endangered by the fact that his or her legal parent or foster parent is cohabiting in a same-sex intimate relationship with an unmarried partner.	(unaware of child endangerment due to homosexuality of foster parent); *Howard v. CWARB*, No. CV 1999-9881, 2004 WL 3200916, at *1 (Ark. Cir. Ct. December 29, 2004) (Findings of Fact and Conclusions of Law); Defendants' Responses to Plaintiffs' First Set of Interrogatories, dated March 13, 2009 (Ex. 59) at 2 (stating that "State Defendants have no records or statistics" regarding the previously stipulated fact from *Howard* that DCFS is "not aware of any child or children whose health, safety and/or welfare has been endangered by the fact that his or her legal parent, foster parent or other adult household member was a 'homosexual'").
62. None of the Defendants nor any of their agents is aware of any child or children having been removed from a legal or foster parent's home because the child's health, safety or welfare was endangered by the fact that his or her legal parent or foster parent is cohabiting in a same-sex intimate relationship with an unmarried partner.	*See, e.g.*, Letter from C. Jorgensen to C. Sun dated Nov. 25, 2009 (Ex. 67) at 4 (unaware of removal due to homosexuality of foster parent). Defendants' Responses to Plaintiffs' First Set of Interrogatories, dated March 13, 2009 (Ex. 59) at 2 (stating that "State Defendants have no records or statistics" regarding the previously stipulated fact from *Howard* that DCFS is "not aware of any child or children whose health, safety and/or welfare has been endangered by the fact that his or her legal parent, foster parent or other adult household member was a 'homosexual'").
63. There is no reason to believe that any particular cohabiting applicant is more likely to commit abuse than any particular married couple applicant or any particular single individual applicant.	Wells Depo. (Ex. 41) at 74:3-9; Newton Depo. (Ex. 29) at 20:23-22:9 ("I have not seen a correlation [between cohabitation and abuse]."); Adams Depo. (Ex. 8) at 67:1-9 (marital status does not determine whether couple will abuse children); Appler Depo. (Ex. 9) at 83:5-13 (abuse) (CWARB 30(b)(6) witness); Ward Depo. (Ex. 40) at 22:22-24:7 (no reason to believe majority of cohabitors engage in abuse); *id.* at 26:6-27:1; Deposition of Duretta Beall ("Beall Depo.") (Ex. 10) at 54:13-55:9; Deposition of Pam Davidson ("Davidson Depo.") (Ex. 18) at 26:6-11; *see also* Kutz Depo. (Ex. 26) at 122:13-16 (does not automatically assume that cohabiting

	couples are more likely to engage in abuse because that would not be doing her job) (DHS 30(b)(6) witness); Counts Depo. (Ex. 14) at 20:7-22:1 (abuse allegations involve all different kinds of family structures) (DHS 30(b)(6) witness); Davis Depo. (Ex. 19) at 28:24-30:19 (abuse allegations involve all types of family structures) (DHS 30(b)(6) witness).
64. There is no reason to believe that any particular cohabiting applicant is more likely to abuse drugs than any particular married couple applicant or any particular single individual applicant.	Appler Depo. (Ex. 9) at 84:7-15 (CWARB 30(b)(6) witness); Kutz Depo. (Ex. 26) at 122:9-12 (DHS 30(b)(6) witness); Zalenski Depo. (Ex. 44) at 165:11-20 (DHS 30(b)(6) witness); *see also* Thormann Depo. (Ex. 38) at 56:6-8.
65. There is no reason to believe that any particular cohabiting applicant is more likely to engage in domestic violence than any particular married couple applicant or any particular single individual applicant.	Appler Depo. (Ex. 9) at 109:21-25 (CWARB 30(b)(6) witness); Wells Depo. (Ex. 41) at 72:19-24; Kutz Depo. (Ex. 26) at 122:13-21 (DHS 30(b)(6) witness); *see also* Thormann Depo. (Ex. 38) at 55:22-56:5.
66. There are insufficient foster and adoptive homes to meet the needs of children entrusted to the State's care.	2009 DHS Statistical Report (Ex. 53) at DCFS-33 (518 children currently awaiting adoption but only 228 adoptive homes available); State Defendants' Third Answer (Ex. 73) at ¶ 84; Deposition of Julie Munsell ("Munsell Depo.") (Ex. 28) at 7:23-28:1; Blucker Depo. (Ex. 11) at 63:25, 64:25-65:12 ("it is critical that we have an abundance of foster homes to truly meet the needs of the foster children that we have coming into this state so that we can really address their needs") (DHS 30(b)(6) witness); Zalenski Depo. (Ex. 44) at 33:20-22 (DHS 30(b)(6) witness); Counts Depo. (Ex. 14) at 26:9-16, 127:1-2 (shortage regarding adoptive parents) (DHS 30(b)(6) witness); Davis Depo. (Ex. 19) at 16:3-13, 19:25-20:3 (not enough placements) (DHS 30(b)(6) witness); *id.* at 340:2-10 (cannot meet the needs of children because need more homes); Huddleston Depo. (Ex. 25) at 28:3-12 ("We have about 3,800 foster children in care on any given day. And 1,200—I think as of this week, 1,263 foster homes."); *id.* at 30:3-13, 33:10-13 (need for

	more suitable homes); Adams Depo. (Ex. 8) at 57:9-14; Roark Depo. (Ex. 31) at 7:20-22; L. Cox Depo. (Ex. 16) at 35:11-17; Selig Depo. (Ex. 34) at 29:2-5; Wells Depo. (Ex. 41) at 59:8-11, 80:22-25; Doherty Depo. (Ex. 21) at 37:3-15; Tarpley Depo. (Ex. 36) at 26:18-27:4; Appler Depo. (Ex. 9) at 115:2-11 (recognizing "need to increase the pool of foster homes") (DHS 30(b)(6) witness); Choate Depo. (Ex. 13) at 8:4-6 (stating that finding suitable foster parents is an ongoing problem in Arkansas); *see also Howard v. CWARB*, No. CV 1999-9881, 2004 WL 3200916, at *2 (Ark. Cir. Ct. December 29, 2004) (Findings of Fact and Conclusions of Law).
67. The shortage is heightened by the fact that not every potential foster home or adoptive home is suitable for every child in DHS care.	*See, e.g.*, Doherty Depo. (Ex. 21) at 34:7-10 ("you have to match the needs of that child with the home that you're providing"); *see also* Sep. Statement at ¶ 12, *supra*.
68. Most potential foster and adoptive parents will not accept every child.	Counts Depo. (Ex. 14) at 108:16-109:3 (DHS 30(b)(6) witness); Waddell Depo. (Ex. 39) at 51:21-52:3; Dunagan Depo. (Ex. 22) at 100:15-102:13; *see also* Huddleston Depo. (Ex. 25) at 35:1-2.
69. Some applicants will not accept teenagers, children with serious medical needs, or sibling groups.	Counts Depo. (Ex. 14) at 127:16-128:22 (DHS 30(b)(6) witness); Roark Depo. (Ex. 31) at 78:16-79:7 (lack of receptiveness to teenagers), *id*. at 80:9-81:6 (describing difficulty of placing children with medical needs due to the special training required of foster parents); Cauthen Depo. (Ex. 12) at 10:18-24 (describing the difficulty of placing "older children" and children with "severe medical or behavioral issues"); Huddleston Depo. (Ex. 25) at 76:23-77:5 (describing the difficulty of finding sufficient foster families to "address the needs of older children in foster care").
70. Other applicants may be willing to accept children with some behavioral problems, but not necessarily those with significant problems.	Doherty Depo. (Ex. 21) at 43:22-45:13; Cauthen Depo. (Ex. 12) at 10:18-24, 36:18-37:23; Huddleston Depo. (Ex. 25) at 76:17-77:5 (describing the lack of sufficient foster families willing to take children with behavioral issues); Adams Depo. (Ex. 8) at

	57:15-25 (difficult to place older children or those with behavioral or medical special needs).
71. Even in a world where there were the same number of available foster or approved adoptive parents as there were children in need of placements, there would still not necessarily be a suitable home for every child.	Huddleston Depo. (Ex. 25) at 72:23-73:5; Blucker Depo. (Ex. 11) at 63:25-65:14 (DHS 30(b)(6) witness); Zalenski Depo. (Ex. 44) at 42:14-43:15 (DHS 30(b)(6) witness); Counts Depo. (Ex. 14) at 127:1-13 (DHS 30(b)(6) witness).
72. Because there is a shortage of adoptive families, some children eligible for adoption will experience long delays for adoption, or never be placed with a permanent family at all.	Selig Depo. (Ex. 34) at 40:20-43:18 (discussing reasons children age out of foster care, including the lack of a suitable foster or adoptive home); Zalenski Depo. (Ex. 44) at 83:17-19 (noting that approximately 200 children age out of foster care annually in Arkansas) (DHS 30(b)(6) witness); Counts Depo. (Ex. 14) at 131:19-22 (DHS 30(b)(6) witness); Davis Depo. (Ex. 19) at 117:21-118:1 (DHS 30(b)(6) witness); *see also* Cauthen Depo. (Ex. 12) at 18:13-15 (has seen children age out of the system); 2009 DHS Statistical Report (Ex. 53) at DCFS-28 (whereas 594 children in foster care were adopted in 2009, a little less than half that number—248 children—aged out of the system in the same year); *id.* at DCFS-23 (879 children were in foster care for more than 36 months).
73. The shortage of foster parents means that some children get placed in a residential group home or in emergency shelters, instead of with a foster family, even though those children are suitable for placement with a family.	*See* Zalenski Depo. (Ex. 44) at 36:6-37:6 (DHS 30(b)(6) witness); Blucker Depo. (Ex. 11) at 105:15-21 (placement with foster family is more likely to lead to permanency) (DHS 30(b)(6) witness); Counts Depo. (Ex. 14) at 27:14-23 (prefer families to group homes) (DHS 30(b)(6) witness); Davis Depo. (Ex. 19) at 126:7-12 (children may stay in group home because no suitable placement due to shortage) (DHS 30(b)(6) witness); Roark Depo. (Ex. 31) at 14:5-25 (placement in emergency shelter or group home due to unavailable placements); L. Cox Depo. (Ex. 16) at 43:11-15; Tarpley Depo. (Ex. 36) at 27:8-14, 32:3-11 (“When unable to find a foster

	home, we turn to emergency shelters" and children are harmed "because there's a shortage of foster care. Children are moved often, have to spend time in hospitals, residential facilities"); Doherty Depo. (Ex. 21) at 37:12-15 (admits to more restrictive placements due to shortage); Huddleston Depo. (Ex. 25) at 30:6-9 (children may be placed in emergency shelter).
74. Although group homes may do their best to attempt to replicate a family home setting, many remain very institutional in feel with "cement block walls" and "painted concrete floors."	Gilliland Depo. (Ex. 23) at 48:17-18 (CWARB 30(b)(6) witness).
75. Although many group homes have "house parents," as opposed to "shift staff," it remains a challenge in a group home to provide a child with the parental and interpersonal connections needed to succeed in life.	Dunagan Depo. (Ex. 22) at 14:5-19:4.
76. In some instances, children have had to spend the night at DHS offices due to a shortage of available foster placements.	Selig Depo. (Ex. 34) at 19:22-20:1; Roark Depo. (Ex. 31) at 13:14-17; Tarpley Depo. (Ex. 36) at 27:15-28:6.
77. Due to a lack of placement options, DHS has had to place children in a different county than the one from which they were removed.	Davis Depo. (Ex. 19) at 16:3-13, 129:1-5 (DHS 30(b)(6) witness); Dunagan Depo. (Ex. 22) at 12:8-12, 132:8-20; Cauthen Depo. (Ex. 12) at 12:21-13:21; Roark Depo. (Ex. 31) at 8:3-11; Reid Depo. (Ex. 30) at 27:9-15; Huddleston Depo. (Ex. 25) at 30:10-12; Selig Depo. (Ex. 34) at 23:13-25:24; Doherty Depo. (Ex. 21) at 56:9-57:6.
78. Children are also separated from their siblings because there are not enough foster families willing to take in groups of children, which causes those children harm.	*See* Davis Depo. (Ex. 19) at 99:16-100:8 (DHS policy to keep siblings together, but shortage makes it impossible) (DHS 30(b)(6) witness); Dunagan Depo. (Ex. 22) at 19:5-20:18 (Well, the children are upset. I mean, children coming into foster care, some of them are very emotional and they're scared."); Cauthen Depo. (Ex. 12) at 11:21-12:15; Huddleston Depo. (Ex. 25) at 34:17-22; Reid Depo. (Ex. 30) at 22:24-

	24:3 (stating it is best practice to keep siblings together but not always possible because of shortage); Doherty Depo. (Ex. 21) at 40:17-21, 43:22-44:1.
79. Due to the shortage, children may be placed with a parent who is less well-equipped to deal with the child's emotional or medical needs.	Huddleston Depo. (Ex. 25) at 51:1-15 (expressing need for more homes who can take children with mental health needs); Davis Depo. (Ex. 19) at 211:23-212:17 (DHS 30(b)(6) witness).
80. Due to a lack of placement options, Defendants have placed children in homes where the legally permissible number of foster children has been exceeded.	Dunagan Depo. (Ex. 22) at 99:8-100:24; Gilliland Depo. (Ex. 23) at 91:23-92:5 (CWARB 30(b)(6) witness); Roark Depo. (Ex. 31) at 10:20-13:13.
81. Poor matches increase the risk of disruption and multiple placements, which are harmful and make future foster placements more likely to fail.	Doherty Depo. (Ex. 21) at 43:3-22; Davis Depo. (Ex. 19) at 212:22-213:6 (increasing the number of foster parents would give a greater likelihood that the first placement for a child would be an appropriate fit) (DHS 30(b)(6) witness).
82. Multiple placements are harmful and make future foster placements more likely to fail, and lead to failed emotional bonds because children who are moved repeatedly become unable to trust and depend on their foster parent.	Blucker Depo. (Ex. 11) at 65:3-8 ("Because when we talk about safety, permanency, and well-being of children, that permanency piece is huge. It is making sure that where you place them is going to be a permanent placement for them and that they're not moving through the system, because you do damage to children when you're moving them through.") (DHS 30(b)(6) witness); Zalenski Depo. (Ex. 44) at 28:4-7 (chances of finding permanent family for child with three or more placements are cut in half) (DHS 30(b)(6) witness); *id.* at 29:9-24 ("So anytime a child's relationship with caregiving adults is disrupted, it accumulates as serious developmental harm. So when they're removed from a family, regardless of how fragile that family may be, it is going to – it is going to affect – it's going to have an impact on the – you know, the child's ability to attach, to form lasting relationships, to develop trust, to do all of those things that people absolutely need in order to get through – to get through the world. When that happens multiple times,

	then a child really, you know, can become seriously disturbed."); Davis Depo. (Ex. 19) at 210:2-211:1, 336:10-15 (DHS 30(b)(6) witness); Dunagan Depo. (Ex. 22) at 105:10-106:8; Adams Depo. (Ex. 8) at 70:23-71:6 ("I mean, it just looks like it's very disruptive for them and unsettling. . . . It just, you know, kind of maybe leads them to feeling like they really don't belong anywhere."); Doherty Depo. (Ex. 21) at 43:3-18 (multiple placements are not indicative of positive child welfare outcomes); *see also* Schulz Depo. (Ex. 32) at 27:17-28:22 (medical harm to children caused by multiple placements and out-of-county placements).
83. Multiple placements for children in State care are one of the consequences of the shortage of available foster homes.	Davis Depo. (Ex. 19) at 16:3-13, 69:13-20, 209:16-210:1 (in FY 2008, 19% of children experienced 3 or more placements within 18 months of entering State care) (DHS 30(b)(6) witness); *id.* at 212:22-213:6; Dunagan Depo. (Ex. 22) at 105:4-107:15; Doherty Depo. (Ex. 21) at 43:19-22; Huddleston Depo. (Ex. 25) at 62:11-25.
84. Due to the shortage of foster parents, some foster children in the juvenile detention system are kept in juvenile detention longer than their sentence requires.	Choate Depo. (Ex. 13) at 118:3-18 (because of the shortage of available homes, he has had to keep children in juvenile detention for longer than necessary, in order to allow the DCFS workers time to find a placement); S. Tanner Depo. (Ex. 35) at 24:16-25:1, 30:2-33:20 (majority of kids who need foster placements after release from DYS facilities stay past their release date due to lack of available foster placement and describing one situation in particular.
85. The inability of DHS to find them foster placements can have disastrous consequences to their efforts to rehabilitate.	S. Tanner Depo. (Ex. 35) at 22:19-24:1, 26:8-29:3 (discussing consequences to children not released on time).
86. Act 1 was proposed only after a successful challenge in the courts of this State of an administrative ban against gay persons, and those living with gay persons, from serving as foster parents.	*See Dep't of Human Servs. and Child Welfare Review Bd.* v. *Howard*, 367 Ark. 55, 65, 238 S.W.3d 1, 7 (Ark. 2006).

87. In its comprehensive Findings of Fact and Conclusions of Law issued after the trial on the merits, the Circuit Court specifically rejected each of the purported rationales behind the ban, including finding that: (i) "Being raised by gay parents does not increase the risk of problems in the adjustment of children; (ii) "There is no evidence that gay people, as a group, are more likely to engage in domestic violence than heterosexuals; and (iii) "There is no evidence that gay people, as a group, are more likely to sexually abuse children than heterosexuals."	*Howard* v. *CWARB*, No. CV 1999-9881, 2004 WL 3200916 (Ark. Cir. Ct. December 29, 2004).
88. Following *Howard*, the State legislature rejected efforts to enact a ban on gay men and lesbians fostering children.	*See* Ark. S.B. 959, 86th Gen. Assem., Reg. Sess., 2007.
89. Act 1 bars DHS and other child welfare agencies in the State from evaluating gay couples and unmarried heterosexual couples as potential foster or adoptive parents, regardless of their ability to parent or any prior relationship to the child.	A.C.A. § 9-8-304.
90. Act 1 prevents a placement of a child with such person even if the State would have concluded that such placement is in the best interests of a child.	A.C.A. § 9-8-304.
91. With the exception of convictions for certain serious felonies, the CWARB has the authority to waive any of its minimum licensing standards in order to serve the best interests of the child.	Appler Depo. (Ex. 9) at 70:2-71:15 (CWARB 30(b)(6) witness); Selig Depo. (Ex.34) at 52:2-11 (waivers are used when doing so is in the best interests of the child); Gilliland Depo. (Ex. 23) at 105:25-106:1-18 (there are alternative compliance requests for would-be foster or adoptive parents and for employees) (CWARB 30(b)(6) witness).
92. Unlike other regulations, the categorical exclusions of Act 1 cannot be waived by the State even	Appler Depo. (Ex. 9) at 91:19-93:2 (exclusions in Act 1 cannot be waived) (CWARB 30(b)(6) witness); *see also* Joint

if doing so would be in the best interests of a child.	Stipulation and Order re: Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order, dated January 12, 2009 (Ex. 65) at 2.
93. Act 1 provides no exception for relatives of the child.	Zalenski Depo. (Ex. 44) at 145:21-146:11 (DHS 30(b)(6) witness); *see also* Thormann Depo. (Ex. 38) at 53:11-13 (unaware of any exceptions under Act 1 for relative placements).
94. The State also says that Act 1 requires automatic removal of a foster child from a cohabiting household without any consideration of the child's wellbeing in that home even if the placement has proven to be "perfect" for those involved.	*See, e.g.*, Zalenski Depo. (Ex. 44) at 145:21-146:11 (DHS 30(b)(6) witness); Doherty Depo. (Ex. 21) at 53:15-23.
95. Only one other state in American bans individuals in cohabiting relationships from adopting or fostering; forty-eight do not.	*See* Utah Code Ann. § 78B-6-117 (2008).
96. The categorical bans created by Act 1 do not serve a child welfare purpose.	Blucker Depo. (Ex. 11) at 26:6-23, 68:7-70:19 (no interest that DHS can identify that supports Act 1), 73:24-76:10 (personally believes in individual assessment and not categorical bans; believes this is in line with her desire to do what is best for children) (DHS 30(b)(6) witness); Appler Depo. (Ex. 9) at 26:4-14 (can't imagine what interests CWARB would have that supports Act 1's exclusion of committed gay couples from adopting or fostering), 27:3-12, 89:10-19, 104:1-21 (no interest that CWARB can identify that may be or is furthered by Act 1), 105:16-106:5 (sees no relationship between Act 1 and the promotion of marriage or family stability, or the prevention of child abuse) (CWARB 30(b)(6) witness); Zalenski Depo. (Ex. 44) at 136:17-22 ("[Cohabitation] was not categorically a reason to disqualify a person or a household from being a foster parent.") (DHS 30(b)(6) witness); *id.* at 146:19-23; Newton Depo. (Ex. 29) at 28:2-15 (marital status is not determinative of parenting abilities); Reid Depo. (Ex. 30) at

	29:2-34:14, 38:8-39:10 (Act 1 may not be in best interests of child and could harm a child in DHS custody); Choate Depo. (Ex. 13) at 25:1-13 (does not believe categorical ban serves best interests of children); Selig Depo. (Ex. 34) at 56:15-58:1, 71:25-72:4; Huddleston Depo. (Ex. 25) at 65:15-25 (believes Act 1 will result in rejection of suitable homes, contributing to shortage, and thus, is contrary to children's best interests); Counts Depo. (Ex. 14) at 72:2-20 (does not support a cohabitation ban, and instead believes that applicants should be individually assessed) (DHS 30(b)(6) witness); *id.* at 117:23-118:5 (based on her social work experience, she can identify no child-welfare purpose served by categorically excluding cohabiting individuals from fostering or adopting); L. Cox Depo. (Ex. 16) at 49:22-52:15 (automatically barring cohabiting couple does not serve the best interests of children); Tarpley Depo. (Ex. 36) at 29:24-31:22 (does not support Act 1's categorical exclusion of unmarried couples adopting: "I think each person needs to be assessed by the rules and the procedures that there are in place, and we are in need of people who are qualified to take care of kids."), *id.* at 31:18-22; Roark Depo. (Ex. 31) at 81:22-82:16, 83:23-24 (does not support automatic ban on same-sex couples and cohabiting couples because the State has "different children with different needs and we need foster homes"); Adams Depo. (Ex. 8) at 62:3-64:9 (in her professional opinion, individualized review is preferable to a categorical ban on cohabiting applicants); Davidson Depo. (Ex. 18) at 30:12-15; S. Tanner Depo. (Ex. 35) at 94:16-95:8; Thormann Depo. (Ex.38) at 54:17-55:18; Ward Depo. (Ex. 40) at 19:19-20:7; Kutz Depo. (Ex. 26) at 139:18-25 (assuming that a heterosexual couple were bad parents simply because they were unmarried "would be a stupid assumption"); Wells

	Depo. (Ex. 41) at 46:13-22 (marital status is not a primary indicator of risk to child safety); E-mail from R. Adams to T. Whitlock, dated October 22, 2008 (COLE-DHS 00016506-07) (Youth Advisory Board also opposed Act 1 because it would restrict the number and range of potential homes available to foster children and thus be "detrimental to the welfare of foster youth in Arkansas").
97. Act 1 is contrary to best practices in the child welfare field.	Appler Depo. (Ex. 9) at 93:3-7 (Act 1 inconsistent with best practices in the social work field) (CWARB 30(b)(6) witness); Zalenski Depo. (Ex. 44) at 145:21-146:23 (Act 1 is contrary to best practices in the social work field) (DHS 30(b)(6) witness); Doherty Depo. (Ex. 21) at 48:1-49:10, 53:15-23 (personally believes Act 1's exclusion of relative placements due to cohabitation is inconsistent with best practices); Munsell Depo. (Ex. 28) at 41:25-42:6; Davis Depo. (Ex. 19) at 53:17-54:15 (DHS 30(b)(6) witness); Kutz Depo. (Ex. 26) at 53:21-54:19, 139:18-140:13 (bad social work practice to automatically assume that an applicant couple would be unsuitable parents solely because they are unmarried) (DHS 30(b)(6) witness); Thormann Depo. (Ex. 38) at 54:21-55:15; Blucker Depo. (Ex. 11) at 26:1-23 (DHS 30(b)(6) witness); Wells Depo. (Ex. 41) at 88:15-89:1 (cohabitation ban is contrary to best practices and the state "need(s) all the foster parents that we possibly can"); Wells Depo. (Ex. 41) at 88:15-89:1; *see also* E-mail from R. Adams to T. Whitlock, dated October 22, 2008 (COLE-DHS 00016506-07) (Youth Advisory Board also opposed Act 1 because it would restrict the number and range of potential homes available to foster children and thus be "detrimental to the welfare of foster youth in Arkansas").
98. Witnesses from the Crimes Against Children Division of the Arkansas State Police do not believe that Act	Davidson Depo. (Ex. 18) at 25:12-26:18 (in her experience, marital status and sexual orientation irrelevant to whether someone

1 is necessary or furthers the health, safety or welfare of children in State care.	was likely to be a perpetrator of child abuse); *id.* at 30:7-15 (based on 30 years experience, no basis to exclude cohabiting heterosexual and same-sex couples); Beall Depo. (Ex. 10) at 40:21-41:20 (cannot identify any basis for categorical bans created by Act 1); *id.* at 54:6-55:5 (would have to assess a same-sex or cohabiting heterosexual couple specifically before determining whether they would pose a risk of abuse); Ward Depo. (Ex. 40) at 19:19-20:7 (in her professional opinion, no basis upon which to categorically exclude cohabitors from adopting or fostering); Newton Depo. (Ex. 29) at 20:19-21:1 (marital status of potential foster or adoptive parents has no bearing on the risk of child abuse); *id.* at 20:23-21:7, 21:14-22:9, 22:22-23:7, 28:6-15 ("I just don't think that marital status has anything to do with whether or not someone could be a good parent"); Thormann Depo. (Ex. 38) at 54:17-56:20 (professional judgment that there is no basis for excluding all gay couples and cohabiting heterosexual couples from adopting); *id.* at 54:21-55:15 (nothing inherently bad about cohabitors that make them bad parents).
99. Every major professional organization dedicated to child welfare opposes such bans as contrary to the interests of children, including the Child Welfare League of America ("CWLA"), the National Association of Social Workers, and the North American Council on Adoptable Children.	*See* Expert Report of Judith K. Faust (Ex. 45) ¶¶ 25-28.
100. After the trial court decision in *Howard*, in 2005, Roy Kindle issued an executive directive ("Kindle ED") banning individuals living in unmarried cohabiting relationships from fostering children.	Executive Directive, Issuance No. FSPP 2005-01 ("Kindle ED") (Ex. 65); Huddleston Depo. (Ex. 25) at 20:24-21:3; State Defendants' Third Answer (Ex. 73) ¶ 68.
101. Prior to 2005, neither DHS nor CWARB policies prohibited	Appler Depo. (Ex. 9) at 87:21-24 (unaware of policy prohibiting cohabitation prior to

cohabiting couples from serving as foster or adoptive parents.	Act 1) (CWARB 30(b)(6) witness); Young Depo. (Ex. 43) at 103:8-14, 118:17 (DHS 30(b)(6) witness); *id.* at 148:7-152:10 (three-year marriage requirement contained in Pub 30 does not implicitly prohibit cohabitating couples).
102. All DHS or CWARB policies that affect eligibility to become foster or adoptive parents must be promulgated according to the Administrative Procedures Act.	Young Depo. (Ex. 43) at 25:9-18, 107:11-22 (DHS 30(b)(6) witness); Huddleston Depo. (Ex. 25) at 9:19-22, 10:7-17; *see also* Administrative Procedures Act, ARK. CODE ANN. §§ 25-15-203 – 25-15-204 (West 2009).
103. The Kindle ED affected eligibility of individuals to serve as foster parents.	Kindle ED (Ex. 65); *see also* ¶ 101, *supra*.
104. From the time the Kindle ED was issued until approximately summer 2008, DHS took no steps to promulgate the Kindle ED and, therefore, it was invalid policy during that time.	Young Depo. (Ex. 43) at 22:6-23:3, 105:21-24, 108:5-109:19 (DHS 30(b)(6) witness); Huddleston Depo. (Ex. 25) at 10:18-11:15 (ED must be promulgated and, if not, such ED is invalid); *id.* at 19:2-22:3; Selig Depo. (Ex. 34) at 72:11-25.
105. In 2008, Cindy Young decided to initiate the promulgation process for the Kindle ED.	*See* Young Depo. (Ex. 43) at 105:21-106:17; 108:19-109:19 (DHS 30(b)(6) witness); Witness Outline, Aug. 15, 2008, Young Depo. Ex. 40, (Ex. 75) at 1 (timeline indicates rule filing on Aug. 15, 2008 and revised filing on Sept. 19, 2008); State Defendants' Third Answer (Ex. 73) at ¶ 69 (filed a revised ruling Sept. 19, 2008).
106. On October 2, 2008, DHS held a public hearing on the policy underlying the Kindle ED, specifically the policy banning cohabiting heterosexual or same-sex couples from fostering children in State care.	State Defendants' Third Answer (Ex. 73) at ¶ 69; DCFS, Public Hearing on Exclusion of Cohabitating Adults Serving as Foster Parents, October 2, 2009 (Ex. 58) (STATE 1744-1814); October 2, 2009, Speaker Sign-in Sheet (Ex. 70) (State 1815-1820); Young Depo. (Ex. 43) at 102:2-103:5, 158:13-21 (DHS 30(b)(6) witness); Huddleston Depo. (Ex. 25) at 19:1-9; Munsell Depo. (Ex. 28) at 38:15-16; *see also* Administrative Code 25-15-201.
107. During that hearing, numerous witnesses, including many professionals in the field of foster care and adoptions, testified that a categorical ban on unmarried	DCFS, Public Hearing on Exclusion of Cohabitating Adults Serving as Foster Parents, October 2, 2009 (Ex. 58) (STATE 1744-1814); October 2, 2009, Speaker Sign-in Sheet (Ex. 70) (State 1815-1820);

cohabiting adults fostering children, such as that now included in Act 1, was inconsistent with the best practices for the placement of children, and was contrary to the best interests of children in state care.	*see also* State Defendants' Third Answer (Ex. 73) at ¶ 70 (numerous individuals testified at hearing); Young Depo. (Ex. 43) at 116:14-117:12 (DHS decided not to continue with promulgation based on comments at hearing) (DHS 30(b)(6) witness).
108. Following the hearing, and consistent with the advice of these professionals and other witnesses with experience with the foster care system, DHS determined that categorically banning unmarried cohabiting adults from serving as foster parents did not serve the best interests of children in state care.	Young Depo. (Ex. 43) at 116:14 -117:12, 138:5-11, 156:1-10, 158:13-21 (DHS 30(b)(6) witness); Munsell Depo. (Ex. 28) at 40:2-8, 41:4-7 ("Based on those meetings, it was communicated to me that the objective was to look at households with trained, qualified professionals on a case-by-case basis and make the decision in the best interest of the child."); *id.* at 41:8-42:6; Zalenski Depo. (Ex. 44) at 139:1-6, 170:19-24 (DHS 30(b)(6) witness); Selig Depo. (Ex. 34) at 74:12-21; DHS Media Release, dated October 9, 2008 ("Media Release") (Ex. 56).
109. Following the October hearing, DHS decided not to continue with the promulgation of the policy prohibiting cohabiting couples from serving as foster parents.	Media Release (Ex. 56); *see also* Young Depo. (Ex. 43) at 116:14-117:12, 134:18-135:13 (DHS 30(b)(6) witness); Huddleston (Ex. 25) Depo. at 27:1-29:25; Selig Depo. (Ex. 34) at 73:21-75:11, 83:19-84:24, 136:1-3; Munsell Depo. (Ex. 28) at 41:25-42:6; Zalenski Depo. (Ex. 44) at 135:23-136:22, 139:1-6, 170:19-24 (DHS 30(b)(6) witness).
110. Following the October hearing, DHS decided to eliminate the cohabitation ban and to promulgate new policy permitting individualized review of cohabiting heterosexual and same-sex couples as potential foster parents, but because Act 1 passed shortly after that decision, DHS was unable to implement its rescission of its internal cohabitation ban. But for Act 1, the cohabitation ban would have been reversed.	*See* Huddleston Depo. (Ex. 25) at 27:12-23 (DHS in process of proposing new policy to permit individualized review of cohabiting individuals); Zalenski Depo. (Ex. 44) at 137:20-24 ("we need to remove some of the barriers to participating in caring for children, and that – that was much better determination made on a case-by-case basis than on a judgment about a particular living arrangement") (DHS 30(b)(6) witness); Young Depo. (Ex. 43) at 134:18-136:18 (DHS 30(b)(6) witness); Selig Depo. (Ex. 34) at 73:21-76:19 (DHS decided to remove restrictions and give caseworkers more discretion in determining eligibility, but Act 1 was passed before the

	new policy could be promulgated); *id*. at 135:18-136:5.
111. Because the minimum licensing standards did not define a two-parent home, DHS believed it could eliminate the ban on cohabiting couples without CWARB changing the licensing standards.	Munsell Depo. (Ex. 28) at 42:15-43:17.
112. Average outcomes for children of same-sex couples are no different than those raised by married couples and as explained by plaintiffs' experts, decades of scholarship show that "children raised by same-sex couples are no more likely to have adjustment problems than children of married heterosexual couples."	Expert Report of Michael Lamb ("Lamb Report") (Ex. 46) at ¶ 29; *Howard*, 367 Ark. at 65, 238 S.W.3d at 7.
113. Wilcox has no opinion as to whether "a blanket exclusion of same-sex couples would be appropriate for foster and adoptive [parents]."	Deposition of William Bradford Wilcox ("Wilcox Depo.") (Ex. 42) at 201:8-13.
114. Deyoub admits that his opinions about outcomes for children raised by same-sex couples are based on studies involving heterosexual cohabiting individuals.	Deyoub Depo. (Ex. 20) at 18:20-21:20; *see also id.* at 32:13-33:7 (unable to identify any study showing outcomes of children raised by same-sex couples are poorer than average outcomes for children of married couples).
115. None of Defendants' expert witnesses claim any expertise on the well-being of children raised by gay and lesbian parents.	*See* Deyoub Depo. (Ex. 20) at 74:21-75:4 (conceding he does not consider himself to be an expert on the development of children of gay parents); Wilcox Depo. (Ex. 42) at 206:12-21 (admitting that he is not an expert on outcomes for children of gay couples); Deposition of Jennifer Roback Morse ("Morse Depo.") (Ex. 27) at 224:4-18 (testifying that she "not prepared to stake [her] professional reputation on the outcomes of those studies one way or the other").
116. Both sides' experts agree that cohabiting heterosexual couples can and do make good parents.	*Compare* Lamb Report (Ex. 46) ¶¶ 23-31; Faust Report (Ex. 45) ¶¶ 29-31; *with* Deyoub Depo. (Ex. 20) at 91:6-22, 144:8-15 (admitting that some cohabiting couples

	are good parents); Morse Depo. (Ex. 27) at 65:14-21, 187:22-188:8 (admitting that some cohabiting couples make suitable parents); Wilcox Depo. (Ex. 42) at 79:23-80:7 (some cohabiting couples can raise well-adjusted kids); *id.* at 178:23-179:7 (some cohabiting placements for foster children would result in a good child welfare outcome).
117. Both sides' experts agree that as a result of Act 1, some children may be prevented from being placed with the family that is in their best interests, and for some children, the best set of parents could be a same-sex or cohabiting heterosexual couple.	*See* Wilcox Depo. (Ex. 42) at 185:24-186:6 (admitting to the possibility that Act 1 prevents placement of children with families with whom it would be in their best interests); *id.* at 206:22-207:4 (admitting to the possibility that the best placement for a particular child is with a same-sex cohabiting couple); Morse Depo. (Ex. 27) at 61:3-62:5; 200:3-11, 208:1-25; Deyoub Depo. (Ex. 20) at 91:6-22; Faust Report (Ex. 45) ¶¶ 41, 44.
118. There is undisputed expert testimony that the majority of children raised by cohabiting parents, like the majority of children raised by married couples and single parents, have positive outcomes.	*Compare* Rebuttal Expert Report of Cynthia Osborne ("Osborne Rebuttal Report") (Ex. 48) at 10 ("the studies show that the majority of children in cohabiting parent families do just as well as their peers in married parent families"); Lamb Report (Ex. 46) at ¶ 24 ("Most children raised in nontraditional families, including families headed by heterosexual cohabiting couples, adjust perfectly well.") *with* Wilcox Depo. (Ex. 42) at 92:9-93:7 (unable to provide any evidence that the majority of children in cohabiting outcomes experience negative outcomes); Morse Depo. (Ex. 27) at 78:13-16, 250:3-251:12. *See also* Wilcox Depo. (Ex. 42) at 91:2-4 (Regarding negative outcomes for children raised by cohabiting parents: "Now, it is the case when you look at any given outcome that we are talking about, it's a minority of the kids."); *id.* at 134:22-23 (Regarding whether most cohabiting couples pose a risk to foster or adoptive children: "I can't say definitively if it would be a majority or not."); *id.* at 188:5-8 ("I'm not aware of any current evidence that would suggest that on one

	outcome the majority of kids in cohabiting households are maladjusted."); *id.* at 188:13-189:1, 248:24-249:2 (admitting that a majority of cohabiting heterosexuals do not engage in sexual infidelity, do not engage in domestic violence, and do not abuse children).
119. Defendants' experts agree that statistical averages cannot tell us anything about any particular applicant.	*See, e.g.*, Morse Depo. (Ex. 27) at 261:19-21; Wilcox Depo. at 19:10-24:14, 66:20-23, 109:3-6 (stating that to determine whether a couple had a stable relationship, he would have to assess them individually); Deyoub Depo. at 35:24-36:16 (agreeing that "social science research couldn't tell you anything about the particular child . . . and the particular parents").
120. None of Defendants' experts have expertise in child-welfare systems to qualify them to contradict the professional opinions of DHS, DCFS, CWARB and Professor Faust.	*See, e.g.*, Morse Depo. (Ex. 27) at 210:16-22 (admitting lack of familiarity with child welfare practice and screening process); Deyoub Depo. (Ex. 20) at 104:9-107:13 (betraying lack of familiarity with screening process by stating—contrary to the testimony of all DHS witnesses—that DHS caseworkers do not look at "the qualities in an adoptive or foster parent" and that married couples are not screened for relationship stability); Wilcox Depo. (Ex. 42) at 131:8-14, 132:3-5.
121. Both sides' experts and the FCAC agree that all applicants, regardless of their relationship status, must be screened to assess whether they will be suitable foster or adoptive parents.	Wilcox Depo. (Ex. 42) at 244:22-245:11 ("I think that individual assessment coupled with some basic parameters … is a pretty good stab at trying to make a placement. So, the combination of having a case worker, you know, meet a couple, talk to them, get letters from their references, and also see that they can meet some basic, you know, criteria, is the best we can do."); *id.* at 214:9-14 ("I don't think that there would be markedly different limitations for a case worker who would be interviewing a married, cohabiting, or single person in terms of his or her ability to ascertain what's going on, you know, in the lives of the people she's looking at."); *id.* at 19:10-24:14, 66:20-23, 109:3-6 (stating that to determine whether a couple

	had a stable relationship, he would have to assess them individually); Deyoub Depo. (Ex. 20) at 35:24-36:16 (discussing his prior testimony in a child custody dispute, and agreeing that "social science research couldn't tell you anything about the particular child . . . and the particular parents"); Morse Depo. (Ex. 27) at 267:6-7 ("you would have to investigate each individual on each of those dimensions"); *id.* at 38:24-39:12, 54:8-14 (admitting that the only way to determine which cohabiting couples in Arkansas have poor relationship quality would be to "interview them all" and that averages "tell you nothing about any individual couple"); *see also* Thomas Depo. (Ex. 37) at 20:24-21:9 (describing how he would assess stability of home by interviewing the couple and other close family members) (FCAC 30(b)(6) witness); *id.* at 55:25-56:9 (in order to determine if placement is suitable you need to know couple "[a]s best you can"); J. Cox Depo. (Ex. 15) at 124:17-20 (admitting he has no reason to believe that the individual review process does not work to determine the best interest of a child) (FCAC 30(b)(6) witness); Rebuttal Expert Report of Judith Faust ("Faust Rebuttal Report") (Ex. 47) at ¶ 3.
122. Jennifer Roback Morse believes if cohabiting couples who want to foster or adopt move out of Arkansas to do so because of Act 1, that should be considered a *benefit* to children in other states who then gain parents.	Expert Report of Jennifer Roback Morse (Ex. 50) at 5 ("This loss would be a gain to the children in states in which these individuals eventually adopt children.").
123. Excluding individuals who would otherwise be approved to adopt or foster children increases the expense of the child welfare system to DHS and State taxpayers.	*See* Selig Depo. (Ex. 34) at 30:22-31:6; *see also* Davis Depo. (Ex. 19) at 129:23-130:10 (stating that out-of-county placements have higher costs associated with transportation expenses for family visits, medical visits and caseworker visits) (DHS 30(b)(6) witness); Deposition of Greg Crawford ("Crawford Depo.") (Ex. 17) at 27:13-20 (stating that one of DCFS's

	big expenses are the transportation expenses associated with bringing foster children to appointments) (DHS 30(b)(6) witness); *id.* at 190:22- 193:19 (discussion of costs after adoption and how some children qualify for adoption subsidies, but some will not; State does not cover medical expenses of adopted children as it does for children in State care); *id.* at 193:16-19 (admitting costs to State after child is adopted is less than costs to State while child in State care); Wells Depo. (Ex. 41) at 65:25-66:14 (residential treatment localities are very expensive); Blucker Depo. (Ex. 11) at 110:2-17 (residential treatment localities are more expensive than foster care) (DHS 30(b)(6) witness).
124. The State is aware of cohabiting adults in intimate same-sex relationships who are unmarried and who have served as foster parents in this State.	*See Howard v. CWARB*, No. CV 1999-9881, 2004 WL 3200916, at *1 (Ark. Cir. Ct. December 29, 2004) (Findings of Fact and Conclusions of Law); *Dep't of Human Servs. and Child Welfare Review Bd. v. Howard*, 367 Ark. 55, 65, 238 S.W.3d 1, 6-7 (Ark. 2006); Letter from C. Jorgensen to C. Sun dated November 25, 2009 (Ex. 67) at 3 (admitting homosexuals may have served as foster parents prior to *Howard*).
125. The Defendants have evaluated and approved cohabiting adults in intimate same-sex relationships to serve as placements in this State.	Wells Depo. (Ex. 41) at 48:2-53:7 (placement of child with grandmother cohabiting with same-sex partner deemed in child's best interest from child development and mental health standpoints, and the grandmother's status as a cohabiter and as a lesbian were not negative factors); Doherty Depo. (Ex. 21) at 26:17-29:1 (same); Kutz Depo. (Ex. 26) at 49:20-51:22 (recalling a favorable home study on a same-sex cohabitation placement) (DHS 30(b)(6) witness); *id.* at 67:16-20 (DHS recommended Sheila Cole because she was the best placement option for WH); *id.* at 109:24-114:4 (gave favorable assessment where suspected same-sex cohabiting couple and for cohabiting relative placements); *id.* at 117:18-123:17, 124:6-127:25 (conducted

	home studies and recommended placements with same-sex couples) (DHS 30(b)(6) witness); *see also* Letter from C. Jorgensen to C. Sun dated November 25, 2009 (Ex. 67) at 2 ("Defendants have indeed approved 'placements' with homosexuals, including homosexual couples. . . . The State Defendants are aware of cases where the State Defendants have approved or recommended placements into guardianship or custodial arrangements in ICPC cases involving homosexual couples . . . ."). Email from S. Hough to L. McGee dated May 26, 2009 (Ex. 63) (COLE-DHS 00032838-40) at 1 (discussing 2-3 cases where judge granted custody to relative cohabiting in a same-sex relationship); *see also* Letter from C. Jorgensen to S. Friedman dated February 2, 2010 (Ex. 69) (one file underlying Hough email sent by mail). Email from M. Mitchell to L. McGee dated May 25, 2009 (Ex. 61) (STATE 10183-10185) (discussing placements with relatives cohabiting in same-sex relationships); *see also* Letter from C. Jorgensen to S. Friedman dated January 26, 2010 (Ex. 68) at 4 (underlying file unavailable). *See also* ICPC Relative Home Study (Ex. 64) (STATE 12324-12338) (approving ICPC homestudy for same-sex cohabiting relative).
126. The Defendants have evaluated and approved cohabiting adults in heterosexual intimate relationships to serve as placements in this State.	Scott Depo. (Ex. 33) at 28:17-31:23, 39:17-40:13 (placement of children with grandmother cohabiting with boyfriend deemed in children's best interests); *see also* Letter from C. Jorgensen to S. Friedman dated January 26, 2010 (Ex. 68) at 4 (underlying docs currently being redacted). Adams Depo. (Ex. 8) at 15:22-16:2 (recommended placement with cohabiting couples); Kutz Depo. (Ex. 26) at 109:24-114:4 (gave favorable assessment where cohabiting relative placements)

	(DHS 30(b)(6) witness); *id.* at 117:18-123:17, 124:6-127:25 (conducted home studies and recommended placements with cohabiting heterosexual couples); Roark Depo. (Ex. 31) at 23:20-24:8 (DHS has made placements with cohabiting couples). Email from M. Mitchell to L. McGee dated May 25, 2009 (Ex. 61) (STATE 10183-10185) (discussing 2 placements with relatives cohabiting in intimate relationship); *see also* Arkansas DHS Home Study of S.S. by Patti Dean, DCFS Supervisor (STATE 10219-10221) at 10221 (indicating cohabitating with gentleman in long-term relationship) ("At this time the department does not have any concerns with the home or the stability of the home."); Letter from C. Jorgensen to S. Friedman dated January 26, 2010 (Ex. 68) at 4 (only 1 file available). *See also* Email from J. Munsell to L. Peacock dated October 20, 2008 (Ex. 60) (Cole-DHS 00014541-14542) (referencing placement with couple).
127. Same-sex couples cannot marry under Arkansas law.	Ark. Const. Amend. 83, § 1; *see also* Ark. Code Ann. § 9-8-304 (2009).