

IN THE
SUPREME COURT OF ARKANSAS

THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, *et al.*

and

Appellants

FAMILY COUNCIL ACTION COMMITTEE, *et al.*

Intervenor-Appellants

v.

No. 10-840

SHEILA COLE, *et al.*

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY
SECOND DIVISION

THE HONORABLE CHRISTOPHER C. PIAZZA, CIRCUIT JUDGE

FAMILY COUNCIL ACTION COMMITTEE, ET AL.'S BRIEF

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**Pro Hac Vice Application Pending*

***Admitted Pro Hac Vice*

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[Addendum Maker’s Note: Intervenor-Defendants appeal the trial court’s ruling granting Plaintiffs’ Count 10 of their Complaint and invalidating Act 1. The State Defendants included in their addendum documents in the record that are material to deciding Count 10 of the Plaintiffs’ Complaint as a matter of law. Here, Intervenor-Defendants have included additional documents in the record essential for the Court to understand the facts in the record material to the rationality of Act 1, which the trial court invalidated in granting Plaintiffs’ relief on their Count 10.]

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Exhibit 62, J.E. Stets & A. Murray, The marriage license as a hitting license: Comparison of assaults in dating, cohabiting, and married couples, 4 Journal of Family Violence 33-52 (1989) (R. 7746).....	FCAC Add 615

Exhibit 63, James Chapman, Marriage is What Matters Most To Family Stability As Only 3% of Unmarried Couples Stay Together Until Their Child is 16, Mail Online UK, Jan. 21, 2010, available at <http://www.dailymail.co.uk/news/article-1244699/only-3-couplesstay-child-16-unmarried-study-reveals.html> (R. 7766) FCAC Add 634

Exhibit 64, Harry Benson, Married and Unmarried Family Breakdown: Key Statistics Explained, Bristol Community Family Trust (2010), available at <http://www.bcft.co.uk/2010%20Family%20policy,%20breakdown%20and%20structure.pdf> (R. 7771) FCAC Add 638

Exhibit 65, Susan L. Brown, Family Structure and Child Well-Being: The Significance of Parental Cohabitation, 66 Journal of Marriage and Family 351-367 (2004) (cited in Wilcox's Expert Report) (R. 7776) FCAC Add 642

Exhibit 66, Shannon E. Cavanaugh & Aletha C. Huston, Family Instability and Children's Early Problem Behavior, 85 Social Forces 551-581 (2006) (cited in Wilcox's Expert Report) (R. 7794) FCAC Add 659

Exhibit 67, Shannon E. Cavanaugh, Family Structure History and Adolescent Adjustment, 29 Journal of Family Issues 944-980 (2008) (cited in Wilcox's Expert Report) (R. 7827) FCAC Add 691

Exhibit 68, David Finkelhor et al., Sexually Abused Children in a National Survey of Parents: Methodological Issues, 21 Child Abuse and Neglect 1-9 (1997) (cited in Wilcox's Expert Report) (R. 7866) FCAC Add 729

Exhibit 69, Lingxin Hao & Guihua Xie, The Complexity and Endogeneity of Family Structure in Explaining Children’s Misbehavior, 31 Social Science Research 1-28 (2001) (cited in Wilcox’s Expert Report) (R. 7876).....	FCAC Add 738
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Exhibit 75, Arona Radhakrishna et al., Are Father Surrogates a Risk Factor for Child Maltreatment?, 6 Child Maltreatment 281-289 (2001) (cited in Wilcox’s Expert Report) (R. 7981)	FCAC Add 837

Exhibit 76, Patricia G. Schnitzer & Bernard G. Ewigman, Child Deaths Resulting from Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics, 116 Pediatrics e687-e693 (2005) (cited in Wilcox’s Expert Report) (R. 7991) FCAC Add 846

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 Exhibit 91, Deposition of Jerry Cox (excerpt) (R. 8420) See FCAC Abs 16

 Exhibit 92, Deposition of Libby Cox (excerpt) (R. 8438) See FCAC Abs 20

 Exhibit 93, Deposition of Sandi Doherty (excerpt) (R. 8449) See FCAC Abs 38

 Exhibit 95, Deposition of Milton Graham (excerpt) (R. 8494) See FCAC Abs 498

 Exhibit 97, Deposition of Janie Huddleston (excerpt) (R. 8523) See FCAC Abs 39

Exhibit 98, Deposition of Shannon Kutz (excerpt) (R. 8538).....	<i>See</i> FCAC Abs 41
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Exhibit 117, Rebuttal Expert Report of Michael E. Lamb (R. 9007).....	FCAC Add 897
Exhibit 140, Plaintiffs' Response to State Defendants' Interrogatories Regarding Dr. Cynthia Osborne, dated January 12, 2010 (R. 9283)	FCAC Add 902
Intervenors' Response to Plaintiffs' Motion for Summary Judgment (Mar. 1, 2010) (R. 9391)	<i>See</i> State Add 826
Exhibits in Support of Intervenors' Response to Plaintiffs' Motion for Summary Judgment:	
Exhibit 1, Deposition of Jeanette Adams (excerpt) (R. 9434).....	<i>See</i> FCAC Abs 8

Exhibit 2, Deposition of the Honorable Stephen Choate (excerpt) (R. 9439).....	<i>See FCAC Abs 14</i>
Exhibit 3, Deposition of Jerry Cox (excerpt) (R. 9447).....	<i>See FCAC Abs 16</i>
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Exhibit 10, Deposition of Phyllis Newton (excerpt) (R. 9505).....	<i>See FCAC Abs 44</i>
Exhibit 11, Deposition of Cassandra Scott (excerpt) (R. 9513).....	<i>See FCAC Abs 53</i>
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Exhibit 16, Deposition of John Zalenski (excerpt) (R. 9560).....	<i>See FCAC Abs 97</i>
Exhibit 17, Act 1 Flyer (R. 9571).....	<i>FCAC Add 926</i>

Exhibit 18, Cole v. Arkansas Order transferring case back to the Second Division (R. 9573)..... FCAC Add 927

Intervenors’ Reply in Support of Motion for Summary Judgment (Mar. 15, 2010) (R. 9617) *See State Add 890*

Exhibits in Support of Intervenors’ Reply in Support of Motion for Summary Judgment:

 Exhibit 1, Cochran Expert Report, Ex. B; S.D. Cochran, V.M. Mays, M. Alegria, A. Ortega, D. Takeuchi, Mental Health and Substance Use Disorders Among Latino and Asian American Lesbian, Gay, and Bisexual Adults, 75 Journal of Consulting and Clinical Psychology 785 (2007) (R. 9664)..... FCAC Add 928

 Exhibit 2, Cochran Expert Report, Ex. B; S.D. Cochran, J.G. Sullivan, V.M. Mays, Prevalence of Psychiatric Disorders, Psychological Distress, and Treatment Use Among Lesbian, Gay and Bisexual Individuals in a Sample of the U.S. Population, 71 Journal of Consulting and Clinical Psychology 53 (2003) (R. 9675) FCAC Add 938

 Exhibit 3, Cochran Expert Report, Ex. B; S.B. Burgard, S.D. Cochran, V.M. Mays, Alcohol and Tobacco Use Patterns Among Heterosexually and Homosexually Experienced California Women, 77 Drug and Alcohol Dependence 61 (2005) (R. 9685)..... FCAC Add 947

 Exhibit 4, Peplau Expert Report, Ex. A; L.A. Peplau, S.D. Cochran & V.M. Mays, A National Survey of the Intimate Relationships of African-American Lesbians and Gay Men: A Look at Commitment, Satisfaction, Sexual Behavior and HIV Disease, Ethnic and Cultural Diversity Among Lesbians and Gay Men 11 (B. Greene ed., Newbury Park: Sage Publications) (1997) (R. 9695)..... FCAC Add 957

Exhibit 5, Cochran Expert Report, Ex. A; S.D. Cochran & V.M. Mays, Burden of Psychiatric Morbidity Among Lesbian, Gay, and Bisexual Individuals in the California Quality of Life Survey, 118 Journal of Abnormal Psychology 647 (2009) (R. 9726) FCAC Add 985

Exhibit 6, L.A. Peplau & A.W. Fingerhut, The Close Relationships of Lesbians and Gay Men, 58 Annual Review of Psychology 405 (2007) (R. 9738) FCAC Add 997

Plaintiffs' Reply to the State Defendants' and Intervenor-Defendants' Responses to Plaintiffs' Motion for Summary Judgment (Mar. 15, 2010) (R. 9759)..... *See* State Add 936

Exhibits in Support of Plaintiffs' Reply to the State Defendants' and Intervenor-Defendants' Responses to Plaintiffs' Motion for Summary Judgment:

Exhibit 144, Deposition of Dr. Paul Deyoub (excerpt) (R. 9800)..... *See* FCAC Abs 25

Exhibit 146, Deposition of Dr. William Bradford Wilcox (excerpt) (R. 9829)..... *See* FCAC Abs 76

Exhibit 147, Plaintiffs' Response to State Defendants' Interrogatories Regarding Dr. Michael E. Lamb (R. 9842) FCAC Add 1017

Transcript of March 17, 2009 hearing (R. 10,018).....*See* State Abs 1

Transcript of April 8, 2010 hearing (R. 10,121)..... *See* FCAC Abs 499

I. INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL?

None.

II. BASIS OF SUPREME COURT JURISDICTION?

Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

- (1) Construction of Constitution of Arkansas
- (2) Death penalty, life imprisonment
- (3) Extraordinary writs
- (4) Elections and election procedures
- (5) Discipline of attorneys
- (6) Discipline and disability of judges
- (7) Previous appeal in Supreme Court
- (8) Appeal to Supreme Court by law

III. NATURE OF APPEAL?

- (1) Administrative or regulatory action
- (2) Rule 37
- (3) Rule on Clerk
- (4) Interlocutory appeal
- (5) Usury
- (6) Products liability
- (7) Oil, gas, or mineral rights
- (8) Torts
- (9) Construction of deed or will
- (10) Contract
- (11) Criminal

Intervenors, Family Council Action Committee and Jerry Cox, appeal from the final judgment in which the circuit court held Act 1 violated the due process and equal protection provisions of the Arkansas Constitution.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT?

No.

V. EXTRAORDINARY ISSUES.

- appeal presents issue of first impression,
- appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,
- appeal involves federal constitutional interpretation,
- appeal is of substantial public interest,
- appeal involves significant issue needing clarification or development of the law, or overruling of precedent.
- appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

VI. CONFIDENTIAL INFORMATION.

(1) Does this appeal involve confidential information as defined by Section III (A)(11) and VII (A) of Administrative Order 19?

Yes No

(2) If the answer is "yes", then does this brief comply with Rule 4-1(d)?

Yes No

II. JURISDICTIONAL STATEMENT

1. Whether the due process and equal protection provisions of the Arkansas Constitution requires the State to accord cohabitating adults the same privileges as married couples, specifically in the context of adoption and foster care. If not, whether Act 1's policy of preferring married couples and prohibiting cohabiting individuals (including cohabiting same-sex individuals) in the adoption and foster care context, is rationally related to a legitimate government interest.

2. I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following question(s) of legal significance for jurisdictional purposes:

- a. An issue of first impression
- b. An issue of substantial public interest
- c. A significant issue concerning the construction of a statute.


The Pulaski County Circuit Court, at the Appellees' urging, found that preventing cohabiting individuals from accessing children who are in the State's care is an undue burden on the Appellees' right to acts of adult sexual intimacy. This holding presents an issue of first impression for this Court: whether Arkansas's policy of preferring married couples and prohibiting cohabiting adults in its adoption and foster care program for children is an unconstitutional burden on the right to adult sexual intimacy. If this Court answers affirmatively, it will

need to overrule numerous cases, including decisions by this Court, that have broadly held that it is permissible to condition a divorced parent's custody of biological children upon an agreement not to cohabit. *See, e.g., Alphin v. Alphin*, 364 Ark. 332, 219 S.W.3d 160 (2005); *Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001); *Holmes v. Holmes*, 98 Ark. App. 341, 255 S.W.3d 482 (2007). The Court would also need to show how the logic of the rule that cohabiting adults must be allowed to foster and adopt the same as married couples does not mean that such adults must be generally given the same privileges as married couples, thus giving cohabiting adults a legal status substantially similar to married couples and violating Ark. Const. amend. 83 § 2.

This case further presents a matter of substantial public importance for several reasons. First, it concerns an unprecedented court-imposed rule requiring that—for the first time—the State must begin knowingly placing vulnerable children in a historically unstable and unhealthy family structure. Second, it concerns an initiated act which was passed pursuant to the people of Arkansas's constitutional authority and declared unconstitutional, thus implicating the democratic right of Arkansans to govern themselves. Third, it concerns the complex adoption process which has been created to ensure children's welfare.

This case also presents an issue of statutory construction because the circuit court construed Act 1 as targeted to harm homosexual cohabiters, even though the

statute plainly applies to all cohabiters equally and explicitly exists for children's welfare.



Martha M. Adcock

III. POINTS ON APPEAL AND PRINCIPAL AUTHORITIES

A. The circuit court erred in holding that Act 1 significantly burdens a fundamental right to private acts of sexual intimacy.

1. Adoption is a State-created public welfare system that exists to protect children, not fulfill adults.

Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004)

Davis-Lewallen v. Clegg, 2010 Ark. App. 627, ___ S.W.3d ___ (Sept. 22, 2010) (Slip Opinion)

2. The right identified in *Jegley* is not infringed by Act 1.

Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002)

Polston v. State, 360 Ark. 317, 201 S.W.3d 406 (2005)

3. Arkansas courts disfavor cohabitation in the presence of children and consistently condition even biological parents' custody of their children on an agreement not to cohabit.

Alphin v. Alphin, 364 Ark. 332, 219 S.W.3d 160 (2005)

Holmes v. Holmes, 98 Ark. App. 341, 255 S.W.3d 482 (2007)

4. The circuit court's holding is impracticable and, if faithfully followed, would violate the Arkansas Constitution.

Ark. Const. amend. 83 § 2

5. While the State may not infringe fundamental rights, it is not required to subsidize them.

Ysursa v. Pocatello Educ. Ass'n, ___ U.S. ___, 129 S.Ct. 109 (2009)

Harris v. McRae, 448 U.S. 297 (1980)

B. The circuit court erred by intimating that Act 1 violated equal protection principles.

Coffelt v. Bryant, 238 Ark. 363, 381 S.W.3d 731 (1964)

C. The circuit court correctly held that Act 1 is rationally related to a compelling government interest.

1. For Act 1 to be upheld, it need only be conceivably rationally related to a legitimate government purpose.

Phillips v. Town of Oak Grove, 333 Ark. 183, 968 S.W.2d 600 (1998)

Rose v. Ark. State Plant Bd., 363 Ark. 281, 213 S.W.3d 607 (2005)

2. Even without reference to empirical evidence, there are many conceivable rational bases supporting Act 1.

3. The empirical evidence shows that Act 1 is rationally related to protecting child welfare.

IV. TABLE OF AUTHORITIES

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Andrea J. Sedlak, et al., <i>Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress</i> , Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families, available at http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl_incid/nis4_report_congress_full_pdf_jan2010.pdf	Arg 28
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VI. STATEMENT OF THE CASE

On November 4, 2008, the people of Arkansas passed Initiated Act 1. They passed the law to protect children entrusted to the State's care, doing this by channeling the children into adoptive or foster homes led by a married father and mother while prohibiting their placement in cohabiting environments. The full text of the codified act, Ark. Code Ann. §§ 9-8-301 to 9-8-306, reads:

9-8-301. Finding and declaration.

The people of Arkansas find and declare that it is in the best interest of children in need of adoption or foster care to be reared in homes in which adoptive or foster parents are not cohabiting outside of marriage.

9-8-302. Public policy.

The public policy of the state is to favor marriage as defined by the constitution and laws of this state over unmarried cohabitation with regard to adoption and foster care.

9-8-303. Definition.

As used in this subchapter, "minor" means an individual under eighteen (18) years of age.

9-8-304. Adoption and foster care of minors.

(a) A minor may not be adopted or placed in a foster home if the individual seeking to adopt or to serve as a foster parent is cohabiting with a sexual partner outside of a marriage that is valid under the Arkansas Constitution and the laws of this state.

(b) The prohibition of this section applies equally to cohabiting opposite-sex and same-sex individuals.

9-8-305. Guardianship of minors.

This subchapter will not affect the guardianship of minors.

9-8-306. Regulations.

The Director of the Department of Human Services or the successor agency or agencies responsible for adoption and foster care shall promulgate regulations consistent with this subchapter.

On December 30, 2008, the Appellees and other parties sued to enjoin the enforcement of Act 1 based on various state and federal constitutional grounds. The Family Council Action Committee (“FCAC”), the Arkansas-based public-interest organization that sponsored Act 1, and FCAC’s president, Jerry Cox, were granted leave to intervene as defendants.

After the parties submitted cross-motions for summary judgment, the Pulaski County Circuit Court granted the Defendants summary judgment on the federal law claims and dismissed with prejudice all but one of the state law claims. Only Count 10 of the complaint survived. The Appellees, homosexual adults in sexual cohabiting relationships, were the only parties to Count 10, and thus are the only Plaintiffs to this appeal.

In its sole decision for the Plaintiffs, the circuit court found Act 1 violated the Arkansas Constitution’s requirement of due process for cohabiting adults and its guarantee of equal protection for same-sex cohabiting adults. The circuit court entered its final order and judgment on May 10, 2010. FCAC timely filed its notice of appeal on May 14, 2010. The State Defendants also timely filed their notice of appeal on the same day.

ARGUMENT

This case is about the welfare of children in the State's care. The people of Arkansas—supported by the consensus of social science, the judgment of Arkansas courts, millennia of accumulated common sense, and the majority of states—think that a family led by married parents provides the optimal environment for children. While not always a possibility, this “gold standard” for family structures is always the goal. The people of Arkansas—supported by the same authorities—think that a cohabiting environment is generally an unstable and unhealthy place to nurture young, impressionable citizens.

Based on this judgment, after debate and consideration, the people of Arkansas enacted a law to protect children who are entrusted to the State's care. The law, Act 1, does this by affirming long-standing State policy requiring that such children will be placed with married parents as often as possible and, with a narrow exception for guardianship, not be placed with cohabiting adults.

The Appellees, who lost the democratic debate, now have turned to Arkansas courts to declare that Act 1 harms the rights of adults. Persuaded by the Appellees, the circuit court held that, while Act 1 was rationally related to a compelling interest in protecting children, it violated the Arkansas Constitution by making adults choose between cohabiting and getting a child from the State. The circuit court was also troubled because, although Act 1 does not distinguish

between heterosexual adults or homosexual adults on its face and indeed allows both to foster and adopt children as singles, homosexual adults were prevented by the Arkansas Constitution from marrying. Thus, cohabiting homosexual adults could not adopt or foster children even if they wished to get married. But instead of declaring the definition of marriage unconstitutional—a difficult task both because the definition is itself enshrined in the Constitution and because the Appellees failed to challenge it—the circuit court invalidated Act 1.

The circuit court's ruling conflicts with the purpose of the State's adoption system, controlling Arkansas cases, the Arkansas Constitution, and common sense—all of which affirm the primacy of children's needs than adults' wants. This Court should reverse the judgment below and uphold the sounder judgment of the people of Arkansas about how to protect children in the State's care.

Standard of Review

Questions of law like statutory construction are reviewed *de novo*. *Rose v. Ark. State Plant Bd.*, 363 Ark. 281, 288, 213 S.W.3d 607, 614 (2005). When considering a statute's constitutionality, the court must presume constitutionality and uphold the statute unless the challenger can clearly show otherwise. *Barclay v. First Paris Holding Co.*, 344 Ark. 711, 718, 42 S.W.3d 496, 500 (2001).

Since the circuit court granted summary judgment for the Appellees, the Court must view any facts in the light most favorable to the Appellants. *Benton*

County v. Overland Dev. Co., Inc., 371 Ark. 559, 564, 268 S.W.3d 885, 88-89 (2007). Summary judgment should be denied “if, under the evidence, reasonable men might reach different conclusions from th[e] undisputed facts.” *Id.* (citation omitted).

I. The circuit court erred in holding that Act 1 significantly burdens a fundamental right to private acts of sexual intimacy between adults under the due process clause of the Arkansas Constitution.

Relying on *Jegley v. Picado*’s finding that the Arkansas Constitution protects “all private, consensual, noncommercial acts of sexual intimacy between adults,” 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002), the circuit court held that Act 1 violated the “fundamental right to privacy guaranteed to all citizens of Arkansas.” (State Add. 1008) The court based this ruling on its perception that “the Act significantly burdens non-marital relationships and acts of sexual intimacy between adults because it forces them to choose between becoming a parent and having any meaningful type of intimate relationship outside of marriage.” (*Id.*) Thus, the court found that exercise of the posited right requires complete access to the privilege of adoption.

But nowhere did the court attempt to explain how *Jegley*—which invalidated a criminal law prohibiting adult private sexual conduct—entailed a right to cohabitation. Nor did it show how *Jegley* applies to a civil law regulating the public, state-created, and child-focused act of adoption. The court was required to

do both because “the doctrine of judicial self-restraint requires [courts] to exercise the utmost care” when interpreting or extending non-textual constitutional rights. *Ark. Dep’t of Corr. v. Bailey*, 368 Ark. 518, 532, 247 S.W.3d 851, 861 (2007) (internal quotations and citation omitted).

Part of the required restraint should have been analysis showing that the Appellees’ claim was “deeply rooted” in “history and tradition.” *Linder v. Linder*, 348 Ark. 322, 342, 72 S.W.3d 841, 851 (2002). And such a showing would have been impossible given Arkansas precedent describing cohabitation as an “illicit sexual relationship” that is presumed “detrimental to...children,” and accordingly conditioning *biological* parents’ custody of *their children* upon non-cohabitation. *Thigpen v. Carpenter*, 21 Ark. App. 194, 198, 730 S.W.3d 510, 513 (1987).

Further, the court failed to reckon with the consequences of the rule it was creating, most significantly that faithful observance of the logic undergirding it would affix all marital privileges to cohabiting adults and give them a legal status substantially similar to married couples in violation of Ark. Const. amend. 83 § 2. Finally, the court’s holding that Act 1 is an impermissible burden on cohabiter’s rights ignores the State’s prerogative to refuse to subsidize certain activities—even if those activities are fundamental rights.

A. Adoption is a State-created public welfare system that exists to protect children, not fulfill adults.

The Appellees concede, as they must, that there is no fundamental right to adopt or provide foster care. *See* (State Add. 637, 958) (characterizing adoption as a “privilege”); *see also Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989) (“[T]here is no fundamental right to adopt.”). Unlike biological parentage, which precedes and transcends formal recognition by government, adoption is wholly a creature of the State. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977); Ark. Code Ann. § 9-9-215(a)(2). Thus, adoption proceedings are governed entirely by statute. *Swaffar v. Swaffar*, 309 Ark. 73, 78, 827 S.W.2d 140, 143 (1992).

The guiding principle of all Arkansas adoption and child custody matters is protecting the best interests of the child. Ark. Code Ann. § 9-9-214(c); *Davis-Lewallen v. Clegg*, 2010 Ark. App. 627, ___ S.W.3d ___ (Sept. 22, 2010) (Slip Opinion) (“In any proceeding involving the welfare of a young child, the paramount consideration is the best interest of the child.”). The intended beneficiary of adoption is the adopted child, not the adopting adult. *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804, 810 n.6 (11th Cir. 2004).

Thus, placement decisions cannot be judged by the case law on which Appellees rely about government benefit schemes. (State Add. 796) While the focus in those cases is on equality of access to a fungible good, adoption exists to

protect impressionable children under state care who cannot be treated like a commodity and given mechanically to all takers. *Lofton*, 358 F.3d at 810. Instead, the state, standing in the shoes of the parents that children have lost, “bears the high duty of determining what adoptive home environments will best serve all aspects of the child’s growth and development.” *Id.*

To make this determination, Arkansas’s adoption rules mandate that the State investigate and consider factors like religion, finances, residency, morals, health, family structure, criminal history, and age. *See, e.g.*, Ark. Code Ann. §§ 9-9-102(c), 9-9-210(a), 9-9-212, 9-9-214(b), 9-9-501(8); (FCAC Add 4662, DHS Standards of Approval). Many of the State’s intrusive questions must be answered by all adults, and occasionally even children, in the potential home. Ark. Code Ann. § 9-9-212(b)(5). Not only would the State be unable to discriminate on those factors in almost any other context, it cannot even conduct such an intrusive inquiry until a person allows it by seeking to adopt. *In re Op. of the Justices*, 129 N.H. 290, 299, 530 A.2d 21, 27 (1987). But inquiry and judgment are permissible here because of the State’s “responsibility in the foster care and adoption contexts to provide for the welfare of the children affected by placement decisions.” *Id.* at 297, 530 A.2d at 25.

In doing all this, “the state’s overriding interest is not providing individuals the opportunity to become parents, but rather ... providing [children] a secure

family environment.” *Lofton*, 358 F.3d at 811. Accordingly, like most states,¹ Arkansas has long had policies against making an adoptive placement with cohabiters to avoid the high risk and instability associated with that environment. (FCAC Abs 56-57, 137-138) Indeed, it has never knowingly made licensed foster care or adoptive placements with cohabiters. (FCAC Abs 130, 134)

In sum, adoption and foster care in Arkansas are public acts that treat children as individuals rather than benefits and elevate their interests above the desires, and even some of the rights, of interested adults.

B. The right identified in *Jegley* is not infringed by Act 1.

Jegley v. Picado invalidated an Arkansas statute that criminalized a particular form of same-sex sexual behavior while allowing precisely the same type of conduct for opposite-sex couples. 349 Ark. at 638, 80 S.W.3d at 353. This Court found that such discrimination infringed the fundamental State right to privacy that “protects all private, consensual, noncommercial acts of sexual intimacy between adults.” *Id.* at 632, 80 S.W.3d at 350. *Jegley* did not, though, require the State to allow public sex, *id.* at 640, 80 S.W.3d at 355 (Brown, J., concurring), nor confer public recognition or support of adults’ sexual choices.

¹ See Lynn D. Wardle, *Comparative Perspectives on Adoption of Children by Cohabiting, Nonmarital Couples and Partners*, 63 Ark. L. Rev. 31, 51-61 (2010) (noting that most state—and most international—adoption laws align with Act 1).

Instead, it simply ordered the government out of the “bedrooms of [consenting adults’] homes.” *Id.* at 638, 80 S.W.3d at 354; *accord Polston v. State*, 360 Ark. 317, 332, 201 S.W.3d 406, 414 (2005) (declining to extend *Jegley* beyond protecting adults’ right to privacy in their own homes).

Act 1 does nothing to regulate private acts of sexual intimacy between adults. An adoptive or foster parent may engage in any legal form of adult sexual intimacy without offending Act 1. This includes heterosexual, homosexual, and non-marital sexual acts. All Act 1 does is prevent an adoptive parent from using the State to bring a child into a home where that parent lives with an unrelated sexual partner.

In fact, none of the Appellees are categorically prevented from becoming eligible to adopt or foster a child. (FCAC Add 685, 687) They are free to choose to comply with any of the prerequisites essential to becoming an adoptive or foster parent, most of which—like parenthood itself—require giving up adult privacy to provide safe and optimum environments for children.

Rejecting a claim that Florida’s adoption policy violated adult privacy rights, the Eleventh Circuit distinguished *Lawrence v. Texas*, 539 U.S. 558 (2003), a case that, like *Jegley*, struck down a law banning homosexual sodomy based on privacy rights. *Lofton*, 358 F.3d at 817. The court noted that, regarding access to adoption, “[t]he relevant state action is not criminal prohibition, but grant of a statutory

privilege. And the asserted liberty interest is not the negative right to engage in private conduct without facing criminal sanctions, but the affirmative right to receive official and public recognition.” *Id.* The court also pointed out that *Lawrence*—like *Jegley*—dealt only with adults and not minors. *Id.*

What Appellees are seeking is not the right to be left alone in their own private bedrooms, but a public stamp of approval in the form of a child entrusted to them by the State. But just because the State may not ban acts of sexual intimacy does not mean it must provide official recognition and support for people who choose to engage in sexual intimacy through a cohabiting relationship. *See, e.g.,* Section (I)(E), *infra*. Thus, *Jegley*’s conclusion about private adult rights does not control this case about public protection of children’s needs.

C. Arkansas courts disfavor cohabitation in the presence of children and consistently condition even biological parents’ custody of their children on an agreement not to cohabit.

Contrary to the circuit court’s finding that fundamental rights are infringed if cohabiters are denied access to children in the State’s care, Arkansas courts have steadfastly refused in child custody cases to allow even *biological* parents to subject their children to those environments. “[A] parent’s unmarried cohabitation with a romantic partner, or a parent’s promiscuous conduct or lifestyle, in the presence of a child cannot be abided.” *Alphin v. Alphin*, 364 Ark. 332, 341, 219 S.W.3d 160, 165-66 (2005). “[E]xtramarital cohabitation in the presence of

children has *never* been condoned in Arkansas [and] is contrary to the public policy of promoting a stable environment for children.” *Id.* (emphasis added; quotation marks omitted). Arkansas courts will even order an unrelated sexual partner to leave a child’s home as a condition for the parent’s continued custody. *Taylor v. Taylor*, 345 Ark. 300, 303, 47 S.W.3d 222, 224 (2001).

Arkansas’s categorical prohibition is so firm that it is unnecessary “to prove that illicit sexual conduct on the part of the custodial parent is detrimental to the children. Arkansas courts have presumed that it is.” *Thigpen*, 21 Ark. App. at 198, 730 S.W.2d at 513. Nor do requirements of due process mandate an individualized showing that cohabitation harms the child. *Id.*

Jegley has not affected the State’s commitment to protecting children from cohabiting households, undermining the Appellees’ argument that *Jegley* requires access to custody of children in State care. *See Alphin, supra* (decided three years after *Jegley*); *Holmes v. Holmes*, 98 Ark. App. 341, 255 S.W.3d 482 (2007) (five years). Further, the State’s rule against custody by a cohabiting parent, like Act 1, does not discriminate on whether the cohabitation is heterosexual or homosexual. “[I]t [i]s no more appropriate for a custodial parent to cohabit with a lover of the same sex than with a nonspousal lover of the opposite sex.” *Thigpen*, 21 Ark. App. at 199, 730 S.W.2d at 514. And that Arkansas limits marriage to opposite-sex

couples does not mean that an exception to the cohabitation rule must be made for same-sex cohabiters. *Holmes*, 98 Ark. App. at 349, 255 S.W.3d at 488.

The standard for both custody and adoption determinations is the same: protecting the best interests of the child. And the purpose of the cohabitation rule created by Arkansas courts and affirmed by Act 1 is to serve those interests. If biological parents' custody of *their own children* may be conditioned on a categorical cohabitation restriction, *strangers* to adoptive children certainly cannot claim that their acts of sexual intimacy are infringed if they are denied access to adoptive or foster children.

D. The circuit court's requirement that cohabitating adults must be treated equally to married couples and be able to adopt is impracticable and would itself violate the Arkansas Constitution.

The circuit court ruled that Act 1 forces Appellees "to choose between becoming a parent and having any meaningful type of intimate relationship outside of marriage." (State Add. 1008) This rule could logically require that *all* Arkansas programs, benefits, or laws that in some way are unavailable to cohabiters would be similarly unconstitutional. Laws that would be most threatened by this rule are those that implicate married couples.

Because of its essential role in both creating and ordering society, marriage has always been accorded uniquely privileged legal status nationwide. *Lindley*, F.2d at 132. Arkansas provides a bevy of provisions to support and encourage

marriage, many of which are exclusive to married couples. These benefits include, to name a few, intestate succession laws, Ark. Code Ann. § 28-9-214(2), homestead exemption laws, Ark. Code Ann. § 28-39-201, covenant marriage status, Ark. Code Ann. § 9-11-801, divorce protections, Ark. Code Ann. § 9-12-309, 315, and tax benefits, Ark. Code Ann. § 28-49-117.

The circuit court's ruling can be used to mandate that cohabiters must, for instance, receive tax benefits available to married couples, otherwise, a cohabiter's rights would be violated under the State Constitution. If the State may not regulate access to *children*—whose interests it has broad discretion to protect by discriminating among applicants—it will be hard-pressed to discriminate between cohabiters and married couples concerning government benefits.

Not only would this warp state policy to encourage less stable relationships, it would be impracticable. Many of the legal protections and benefits afforded marriage exist precisely because of the stable, official, and public nature of the relationship. (Indeed, these qualities help make married couples the preferred placement for children under Act 1.) But cohabitation is, by its nature, unstable, unofficial, and private. Thus, for example, cohabiters could not divorce since they have never legally bound themselves to one another in the first place.

Even if the circuit court's ruling was not impracticable, it would still be unconstitutional. Removing all the so-called “burdens” on non-marital

relationships to avoid “forcing” cohabiters to choose between obtaining a government benefit and cohabiting ultimately means giving cohabiters all the benefits of marriage itself. And that result *does* violate the Arkansas Constitution.

Under Ark. Const. amend. 83 § 2, “[l]egal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized....” Granting cohabiters—“unmarried persons”—all or most of the rights and protections afforded marriage would give them a legal status which would at least be “substantially similar to marital status.” The circuit court’s construction of Act 1, then, erroneously and absurdly attacks the very constitution it is purporting to uphold. *Nucor Corp. v. Kilman*, 358 Ark. 107, 122, 186 S.W.3d 720, 729 (2004) (noting that this Court will not allow “interpretations that defy common sense [or] produce absurd results”).

E. While the State may not infringe fundamental rights, it is not required to subsidize them.

As noted above, the Appellees improperly analogize the adoption of children to accessing government benefits. But even if the analogy is accurate, their claim would still fail. That the Appellees have a right to private acts of sexual intimacy does not mean that the State must subsidize or promote that right by giving them access to the privilege of adoption. Yet this is precisely what the Appellees argue that the State must do. (State Add. 958)

“A legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right[.]” *Ysursa v. Pocatello Educ. Ass’n*, _ U.S. _, 129 S. Ct. 1093, 1098 (2009) (citations and quotations omitted). This is because there is a “basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.” *Harris v. McRae*, 448 U.S. 297, 315 (1980).

It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or to send their children to private schools ... Nothing in the Due Process Clause supports such an extraordinary result.

Id. at 318 (internal citations omitted). The prerogative to choose whether to subsidize rights is particularly strong where a legislature is “constructing a complex social welfare system that necessarily deals with the intimacies of family life.” *Califano v. Jobst*, 434 U.S. 47, 54 n.11 (1977).

Courts have upheld laws that directly impact a fundamental right by withholding government support for the exercise of the right itself. For instance, a law may discontinue welfare benefits to a person when the person gets married without infringing the fundamental right to marriage. *See, e.g., Jobst*, 434 U.S. at 54 (finding that terminating welfare benefits for disabled individuals upon marriage is permissible). Because the government is only refusing to subsidize the

right and not barring it, no infringement or “penalty” occurs. *Harris*, 448 U.S. at 317 n.19. Further, government may permissibly create a subsidy policy specifically to discourage the exercise of a right by encouraging citizens to choose alternative actions. *Id.* at 314. (holding that government may make “a value judgment favoring [a preferred alternative] over [a fundamental right] and implement[] that judgment by the allocation of public funds.”) (citations and quotations omitted).

Thus, even if Arkansas’s refusal to put vulnerable children into a class of homes that are generally recognized as unstable *did* implicate Appellees’ right to sexual intimacy, it would not violate that right. That the State may not ban adults’ private sexual intimacy does not mean either that it must subsidize or promote adult intimacy with access to foster children or that it cannot prefer married couples as caretakers for them.

In sum, there is no fundamental right in the Arkansas Constitution that requires the State to allow children to be fostered or adopted by cohabiting adults.

II. The circuit court erred by intimating that Act 1 violated equal protection principles.

The Appellees grounded their State equal protection claim solely on the allegation that Act 1 violated their fundamental rights. (State Add. 960) They did not and could not allege that they were a suspect class deserving of heightened protection, since this Court has held that homosexuals are not a suspect class,

Jegley, 349 Ark. at 634, 80 S.W.3d at 351, and has never recognized cohabiters as a suspect class.

Yet the circuit court intimated that Act 1 violates equal protection principles by specifically targeting homosexuals "for exclusion." (State Add. 1008) The court made no findings of fact to support that statement, no evidence exists in the record to do so, and it is unquestioned that Act 1, on its face, does nothing to target homosexuals.

Equal protection "prohibits only purposeful discrimination," so the Appellees bear the burden to prove that Act 1 was primarily created to burden them. *Harris*, 448 U.S. at 323 n. 26; accord *Coffelt v. Bryant*, 238 Ark. 363, 371, 381 S.W.3d 731, 736 (1964). Not only did the Appellees fail to do this, it is unclear how they could have done so. The legislative body that enacted Act 1 was the people of Arkansas, and their motivation—protecting children—was clearly stated in Act 1. Ark. Code Ann. § 9-8-301. Thus, the circuit court's insinuation that Act 1 was no more than a "bare desire to harm a politically unpopular group," (State Add. 1008) is an entirely unsubstantiated insult to over half a million Arkansas voters.

III. The circuit court correctly held that Act 1 is rationally related to a compelling governmental interest.

Because Act 1 does not infringe on a fundamental right or discriminate against a suspect class, it is valid if it is rationally related to a legitimate

government purpose. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547 (1983). The circuit court correctly held that Act 1's channeling of children in State care toward married couples and away from cohabiting environments was rationally related to the State's compelling interest in protecting children. (State Add. 1007, 1008) The court was particularly persuaded by the State's point that "cohabiting environments, on average, facilitate poorer child performance outcomes and expose children to higher risks of abuse than do home environments where the parents are married or single." (State Add. 1007)

A. For Act 1 to be upheld, it need only be conceivable that Act 1 is rationally related to a legitimate government purpose.

The constitutionality of an initiated act is judged with the same deference as an enactment of the Arkansas General Assembly. *Jeffery v. Trevathan*, 215 Ark. 311, 319, 220 S.W.2d 412, 416 (1949). State statutes are presumed constitutional and, when reviewed on the rational basis standard, must be proved by the challenging party to be unconstitutional under any reasonably conceivable fact situation. *Rose*, 363 Ark. at 293, 213 S.W.3d at 618. Here, the Court need "merely to consider whether any rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives, so that the legislation is not the product of utterly arbitrary and capricious government purpose and void of any hint of deliberate and lawful purpose." *Hamilton v. Hamilton*, 317 Ark. 572, 576, 879 S.W.2d 416, 418 (1994). This means that Appellees bear the burden of

convincing this Court that they could feasibly prove utterly irrational every conceivable basis for Act 1.

Also, it is irrelevant whether the Appellees can provide evidence indicating that Act 1 was not the best choice.

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

Hancock Indus. v. Schaeffer, 811 F.2d 225, 228 (3d Cir. 1987) (emphasis added); accord *City of Lowell v. M&N Mobile Home Park, Inc.*, 323 Ark. 332, 342, 916 S.W.2d 95, 100 (1996). The Appellees cannot prove that Act 1 is so irrational that it is beyond reasonable debate.

The Appellees cannot undermine rationality by showing that a classification may be unreasonable in isolated circumstances, since a classification may be based on averages or generalities. *Phillips v. Town of Oak Grove*, 333 Ark. 183, 197, 968 S.W.2d 600, 607 (1998). Act 1 is rational even if some married couples would do poorly raising children while some cohabitants do well. "[B]road legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Jobst*, 434 U.S. at 55; accord *Phillips, supra* ("A classification does not fail ... because it is not made

with mathematical [precision] or because, in practice, it results in some inequality.”) (citing *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993)).

B. Even without reference to empirical evidence, there are many conceivable rational bases supporting Act 1 justifying it under rational-basis review.

Act 1 passes rational basis review without resort to empirical data because Arkansas voters could consult their own experiences, knowledge, and even long-standing state policy to reasonably conclude that cohabiting households are less stable and less safe for children, and that the stable unions of man-woman marriage are preferable for children. *Carter v. Arkansas*, 392 F.3d 965, 968 (8th Cir. 2004) (“a legislative choice ... may be based on rational speculation unsupported by evidence or empirical data.”).

Act 1 is part of a larger State policy, rooted in the Arkansas Constitution, that recognizes the “foundation[al]” nature of marriage to society and encourages families to grow within the context of the marital “home life.” *Fania v. Fania*, 199 Ark. 368, 133 S.W.2d 654, 656 (1939). Act 1 simply re-establishes this State policy for foster and adoptive homes so that, as often as possible, those children can receive the same benefit of being raised by a married father and mother that children in an intact family ideally will.

There are a number of bases supporting Act 1’s policy finding that children will do better in homes led by married couples instead of those by cohabitating

adults. For one, it is reasonable to expect that adults who have not publicly and legally committed themselves to one another via marriage will have less stable relationships. *Alphin*, 364 Ark. at 341, 219 S.W.3d at 165. Similarly, it is rational to think that the legal obligations that tie married couples together and to their children will increase the stability and health of the family relationship. *Standhardt v. Superior Court*, 206 Ariz. 276, 287-88, 77 P.3d 451, 462-63 (Ct. App. 2003); (FCAC Abs 199). It is also rational to consider stable relationships better for children, especially for the often fragile children in need of a home. *Lofton*, 358 F.3d at 822. It is also sound to want children to be brought up in a home that models marriage and teaches children that procreation should take place within such a relationship. And it is logical to prevent children's exposure to the illicit sexual conduct and revolving-door of adult sexual partners that often accompany cohabitation. *Alphin*, 364 Ark. at 341, 219 S.W.3d at 165.

All of these rationales are as true for same-sex cohabiters as they are for opposite-sex cohabiters. There are several additional reasons, though, to prefer that a child be raised in a home with a married mother and a father, instead of the intentionally motherless or fatherless homes of same-sex couples. They flow from two basic observations. First, both men and women are important to a child. Second, children learn immensely from the example set by their parents.

Especially early in life, a child's primary relationship is with his or her parents, and "[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." *Hernandez v. Robles*, 7 N.Y.3d 338, 339, 855 N.E.2d 1, 7, 821 N.Y.S.2d 770, 776 (2006). Further, it is reasonable to think the sexually-diverse nature of man-woman marriage provides a more complete picture for a child's understanding of his or her own sexuality. *In re Op. of the Justices*, 129 N.H. at 296, 530 A.2d at 25. Also, it is rational to think children are benefitted by the influence that a man and a woman "collectively contribute to the relationship." *In re Marriage of J.B. and H.B.*, No. 05-09-01170-CV, 2010 WL 3399074, at *19 (Tex. Ct. App. Aug. 31, 2010). And since the vast majority of children will grow up and enter opposite-sex relationships, it is reasonable to expect that the example provided by man-woman marriage for how to have such a relationship will be more helpful. *Lofton*, 358 F.3d at 822.

Even if some people might disagree with these rationales, "the very fact that they are arguable is sufficient, on rational-basis review, to immunize the legislative choice from constitutional challenge." *Heller v. Doe by Doe*, 509 U.S. 312, 333 (1993) (quotations and citations omitted). In fact, all of them find support in the record, as shown in the next section. Based on these arguable rationales alone, though, Act 1 is constitutional.

C. The empirical evidence shows that Act 1 is rationally related to protecting child welfare.

Among the ever-changing constellation of social science opinions, one star remains fixed: when it comes to raising children, married couples outperform cohabitating adults in every relevant category. Indeed, the experts on both sides of this case affirm that marriage is superior to cohabitation in at least these ways:

- **Relationship Stability**
- **Relationship Quality**
- **Income Level, Fidelity, and Social Support**
- **Domestic Violence, Abuse, and Child Safety**
- **Child Depression, Substance Abuse, and Delinquency**
- **Promotion of Overall Child Well-Being and Development**

In every category that is relevant to a child's best interests, married couples do better—usually much better—than cohabiters. As the experts testified in detail, the size of those differences is staggering. This testimony, summarized in the following pages, shows that Act 1 is at least rationally related to protecting and promoting child welfare. Any one of the categories *alone* is sufficient to provide a rational basis for Act 1.

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

a. Cohabiters are less stable than married couples.

One of the most important factors for child welfare is the stability of his or her parents' relationship. (FCAC Add 331; FCAC Abs 246-247) But cohabiting

relationships are infamous for their instability, as State-Intervenors' experts (Intervenors' expert), University of Virginia Professor Dr. W. Bradford Wilcox, testified. (FCAC Add 329) Indeed, children born into cohabiting environments are 119% more likely to see their parents break up, compared to children born to married parents. (FCAC Add 329, 798)

The numbers get even worse when kids are thrown into the mix. Intervenors' expert Dr. Paul Deyoub's review of the literature and 31 years of experience as a clinical psychologist treating Arkansas families show that "[c]ohabitants with children are even more likely to break up than childless cohabitants. Introducing foster and adopted children to cohabiting couples increases the likelihood that they will break up." (FCAC Add 349) He points out that about 40 percent of cohabiting unions in the United States break up without the couple ever marrying, and that unions begun by cohabitation are almost twice as likely to dissolve within 10 years, compared to all first marriages. (FCAC Add 348)

The Appellees' experts generally concede these points. They admit that:

- **Dissolution rates for cohabiters are higher than married couples.**

(**Dr. Osborne:** FCAC Abs 383-384, 392; **Dr. Peplau:** FCAC Add 234; FCAC Abs 432, 33, 437, 438, 447, 457, 485-486; **Dr. Faust:** FCAC Abs 196)

- **The married biological family is the most stable family structure.**

(Dr. Osborne: FCAC Abs 413)

- **Poorer outcomes apply to both heterosexual and homosexual cohabiters.** (Dr. Lamb: FCAC Abs 250, 256 (acknowledging FCAC Add 609))

In sum, there is little debate that cohabiting adults are far more likely than married couples to break up, especially if they have children. It is also undisputed that instability has a negative impact on children.

b. Cohabitors have poorer quality relationships than married couples.

One likely reason that cohabiting relationships are less stable is that they are also poorer in quality than married relationships. Dr. Deyoub's testimony provides a good summary of the undisputed evidence: "[t]hose who live together prior to marriage score lower on tests rating satisfaction in marriage than couples who did not cohabit." (FCAC Add 348)

Appellees' experts agreed that cohabiters generally have lower quality relationships than married couples and less relationship satisfaction. (Dr. Osborne: FCAC Abs 421; Dr. Peplau: FCAC Abs 480; Dr. Lamb: FCAC Abs 244, 247) Appellees' expert Dr. Lamb affirmed that cohabiting relationships are less stable because of their lower quality. (FCAC Abs 256) One factor for cohabiters' lower relationship quality may be that they generally have significantly less income and social support. (FCAC Abs 373; *see also* 383, and 392; FCAC Add 325-326)

Experts on both sides also agreed that higher quality and more stable relationships are key markers for successful child outcomes. (FCAC Add 331; FCAC Abs 246-247) And, on average, a child's relationship with his parents is better if his parents are married than if they are cohabiting. (FCAC Abs 248) This is true even where the father is unrelated to the child—data suggests that married stepfathers are more involved in the care of their children than are cohabiting stepfathers. (FCAC Abs 263-264)

c. Cohabitation is associated with higher levels of behavior that is harmful to child development.

Dr. Deyoub asserts that “[t]he benefit of marriage for children is indisputable. Adults who marry live longer, healthier, happier lives, with lower rates of suicide, substance abuse, alcoholism, mental illness, depression, anxiety, and poverty.” (FCAC Add 346) The studies and this case's experts agree. Cohabitors generally have much higher levels of substance abuse and infidelity. (FCAC Abs 143, 385, 454, 487; FCAC Add 247, 346, 348)

Further, comparative domestic violence rates for cohabiters are shocking. (FCAC Add 347, 451 (citing CDC report that found marital status was single strongest predictor of abuse); FCAC Add 235; FCAC Abs 449, 486; FCAC Add 348 (violence is “more severe in cohabiting than married couples, not just more frequent”); FCAC Add 348, 452 (“Overall rates of violence for cohabiting couples

were twice that of marital couples, and rates of severe violence for cohabiting couples were nearly five times the rates for marital couples.”))

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

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

The immense qualitative difference between cohabiting relationships and married relationships (or even singles) translate directly to generally poorer outcomes for children with cohabiting parents or custodians. The consequences are sadly but easily measurable in virtually every category, from child depression to cognitive function. Experts in this case and scientific literature agree that children with cohabiting parents have poorer outcomes in at least these categories:

- **Delinquency**
- **Drug Use**
- **Behavioral Problems**
- **School Drop-Out Rates**
- **Grades**
- **School Suspension**
- **Cognitive Abilities**
- **Interaction with the Criminal Justice System**

Intervenors’ experts point out that studies show that children in cohabiting environments are significantly more likely to experience depression, difficulty sleeping, feelings of worthlessness, nervousness, and tension, compared to children

in intact, married households. (FCAC Add 325) Studies also find that children in cohabiting environments are significantly more likely to experience delinquency, drug use, lying, problems relating to peers, and trouble with the police, compared to children in intact, married families. (FCAC Add 324)

These problems also translate to poorer school performance. Children in cohabiting environments are more likely to experience difficulties with concentrating, dropping out of high school, low grades, low levels of school engagement, and school suspension, compared to children raised in intact, married households. (FCAC Add 324-325) Studies further find that children in cohabiting environments are more likely to suffer low grades, low levels of school engagement, and school suspension or expulsion than those in single-parent families. (FCAC Add 326, 361)

Appellees' expert Dr. Osborne's work with the Fragile Families study required her to concede that there is a significant association between marriage and improved child outcomes, and even more broadly, between family structure and child outcomes. (FCAC Abs 393) Dr. Deyoub adds that children living with cohabiting adults suffer significantly poorer mental health than children living with married parents. (FCAC Add 349)

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

It is also undisputed between the parties that, on average, children in cohabiting environments are significantly more likely to experience physical and sexual abuse than are children in married households. Indeed, a recent study by the U.S. Department of Health and Human Services found that compared to children living with married, biological parents, children of cohabiters were 8 times more likely to be maltreated, 10 times more likely to be abused, and 8 times more likely to be a victim of neglect. (Andrea J. Sedlak, et al., *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress*, Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families, Executive Summary at 12 (2010), available at http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl_incid/nis4_report_congress_full_pdf_jan2010.pdf; accord FCAC Add 325)

Appellees' experts agree. Dr. Michael Lamb believes that an unrelated male in the home is a source of risk for maltreatment to children living in the home. (FCAC Abs 263; FCAC Add 611) Dr. Worley also testified that sex abuse against children occurs more frequently in cohabiting households than in married households where both parents are biologically related to the child. (FCAC Abs 492, 493)

c. Children raised by single parents have better outcomes than children raised by cohabiters.

While a married father and mother provide the optimal environment for a child, single-mother households also are superior to cohabiting environments. (FCAC Add 327, 811, 818) One nationally-representative study found that 11.3% of teenagers from a single-mother family were suspended or expelled from school in a year, compared to 23% of teenagers from a cohabiting family. (FCAC Add 829)

The Schnitzer and Ewigman study of fatal child abuse in Missouri found that preschoolers who were living in a cohabiting household were nearly 50 times more likely to be killed than preschoolers who were living with a single mother. (FCAC Add 850; *see also* FCAC Add 350, 459) Appellees' experts acknowledged that, on average, children are more likely to be physically abused in a cohabiting environment than they are in a married or a single parent home. (FCAC Abs 211)

CONCLUSION

It is a rare law that aligns public opinion, public policy, case law, rationality, and scientific studies so neatly. Perhaps the only thing that could do so is the cause of protecting children. This Court should not allow the circuit court's decision to disrupt such impressive and rational agreement. The circuit court should be reversed.

Respectfully submitted this the 28th day of September, 2010.

Martha M. Adcock

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CERTIFICATE OF SERVICE

I hereby certify that I served FCAC's Abstract, Brief, and Addendum by hand delivering to the following:

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