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' REPLY TO THE STATE DEFENDANTS' AND INTERVENOR-DEFENDANTS' RESPONSES TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The State's and the Intervenors' opposition papers fail to raise a triable issue of fact about the central infirmity of Act 1—the statute serves *no* child welfare purpose.[1] None of Defendants arguments provide a 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. The undisputed evidence shows that Act 1 serves only to categorically exclude good families who would provide loving homes to children in need.

Likewise, Defendants have not refuted the multiple constitutional violations and deprivations of Plaintiffs' fundamental rights addressed in Plaintiffs' motion that arise from Act 1: (1) Act 1 violates the fundamental due process rights of children in State care to be free from arbitrary harm and is directly contrary to child welfare professional judgment; (2) Act 1 impermissibly burdens the fundamental due process rights of the parent-Plaintiffs to make decisions about the care, custody and control of their children in the event of parental death or incapacity; (3) Act 1 violates the right of children to be treated the same as similarly situated children regardless of the marital status of the caregivers chosen for them by their parents; and (4) Act 1 unconstitutionally burdens the fundamental rights of the couple-Plaintiffs to maintain their intimate relationships without penalty.

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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."); (iii) Memorandum of Law in Support of Intervenors' Motion for Summary Judgment and Motion to Dismiss, dated February 9, 2010 ("Int.-Defs.' SJ Memo."); (iv) Plaintiffs' Opposition to the State Defendants' and Intervenor-Defendants' Motions for Summary Judgment and Renewed Motions to Dismiss, dated March 1, 2010 ("Pls' Opp."); (v) State Defendants' Response to Plaintiffs' Motion for Summary Judgment, dated March 1, 2010 ("State Defs.' Opp."); and (vi) Intervenors' Response to Plaintiffs' Motion for Summary Judgment, dated March 1, 2010 ("Int.-Defs.' Opp."). Attached hereto as Exhibit 143 is an index of exhibits to Plaintiffs' reply brief.

Rather than address these fundamental constitutional rights, Defendants improperly frame each constitutional right at issue so narrowly that, if their views were adopted, the Constitution would afford precious little protection and the harm caused by Act 1 could be disregarded. For example, Defendants admit that parents have a fundamental right to make decisions about "the care, custody, and control of their children," but then argue that this constitutional right disappears when the decision is a testamentary wish that his or her child be adopted. Likewise, Defendants recognize that there is a fundamental right to intimate association, but then assert that the right is erased if the intimate association is between cohabiting individuals. There is no legal support for Defendants' argument that the well-established fundamental rights at issue in this case are constrained and virtually obliterated in the ways they suggest.

Moreover, because Act 1 burdens fundamental rights, it can stand only if it meets the demanding requirements of strict scrutiny. It must be narrowly tailored to further a compelling government interest. Act 1 is not tailored in any sense whatsoever, let alone narrowly tailored. Act 1 is an absolute, blanket exclusion of cohabitors from applying to foster or adopt and be subject to the State's individualized review process. The State Defendants do not even contend that the statute can withstand this test. The Intervenors claim that Act 1 can survive strict scrutiny, but offer nothing more than statistical data on group averages for outcomes among heterosexual cohabiting and married couples. *See* Pls.' Opp. at 52-66. Throwing out qualified individuals based on group averages is impermissible under strict scrutiny. This is particularly true because the undisputed evidence in this case and the findings of the *Howard* court establish that same-sex couples do not pose any "heightened risk." And there is no basis to argue that all (or even most) cohabitors are unsuitable parents and, thus, must

be excluded in order to protect children, which is what Defendants would have to prove to prevail under strict scrutiny.

Indeed, Act 1 cannot stand under any level of scrutiny including rational basis review. The purpose of Act 1 cannot be to exclude a group that poses a purported "heightened risk" from adopting or fostering while simultaneously allowing the same group to care for children as guardians. In any event, Defendants' flawed statistical argument about the purported heightened risk posed by cohabitors has already been fully discredited. It is undisputed that children raised by same-sex couples have outcomes that are no different than children of married heterosexual couples. Defendants' statistical arguments about heterosexual couples are flawed for numerous reasons, including that they are mainly based upon outcomes for biological "children in intact married households," completely disregarding that Act 1 is about children removed from their biological parents, many of whom are faced with the choice of a suitable cohabiting family or a longer stint in a State facility or, possibly, never being placed with a permanent family at all. Nonetheless, Plaintiffs' experts have shown that cohabitors, which are a heterogeneous population, 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. Finally, as a matter of law, Act 1 cannot withstand rational basis review because the undisputed evidence shows that other groups that are not excluded from adopting and fostering—including singles, persons with low income and educational levels, and young adults—have similar or worse average outcomes than cohabiting heterosexual couples as a group.

Consequently, Plaintiffs' motion for summary judgment should be granted on the following claims:

- the fundamental due process rights of children in State care to be free from the harm caused by Act 1—a law that is contrary to professional judgment standards of child welfare (Counts 1 and 2);

- the fundamental due process rights of parents to make decisions about their children's futures without burden from a law that is in no way narrowly tailored to meet a compelling government interest (Counts 5 and 6);

- the equal protection rights of children to be treated the same as other similarly situated children regardless of the marital status of their designated caregivers (Counts 7 and 8); and

- the equal protection and due process rights of the couple-Plaintiffs to exercise their fundamental right to intimate association without burden from a law that is in no way narrowly tailored to advance a compelling government interest, or even rationally related to a legitimate government interest (Counts 9 and 10).[2]

I. ACT 1 VIOLATES THE DUE PROCESS RIGHTS OF CHILDREN IN STATE CARE TO BE FREE FROM THE HARM CAUSED BY ACT 1 (COUNTS 1 AND 2).

A. The State Defendants have a constitutional duty of care towards children in their custody that is properly measured under the professional judgment standard.

As Plaintiffs established in their opening memorandum, the State violates a child's substantive due process rights when it takes that child into its protective custody and then subjects the child to harm by failing to act according to "accepted professional judgment,

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[2] Defendants assert that, because "Plaintiffs make no mention or argument in their Motion for Summary Judgment regarding counts 3 and 4," summary judgment should be granted on these counts in the Defendants' favor. State Defs.' Opp. at 37. The fact that Plaintiffs Sheila Cole and W.H. did not move for summary judgment on their due process claims does not mean that summary judgment should be granted in Defendants' favor. Sheila Cole and W.H.'s claims epitomize the constitutional harm caused by Act 1. Their claims highlight how Act 1 harms children in State care because it denies them loving, appropriate adoptive homes. Defendants' arguments in support of their motions address phantom claims based on grandparents' rights to adopt their grandchildren or children's rights to be adopted by a particular individual and fail to address the actual claims presented: the violation of Plaintiffs Cole and W.H.'s rights to maintain the integrity of their existing family without undue interference from the government. Pls.' Opp. at 32-38. Defendants' request for summary judgment on these claims should be denied for the reasons set forth in Plaintiffs' opposition brief. *Id.*

practice, or standards." *Youngberg* v. *Romeo*, 457 U.S. 307, 323 (1982); *see also Yvonne L. ex rel. Lewis* v. *N.M. Dep't of Human Servs.*, 959 F.2d 883, 893-94 (10th Cir. 1992); *K.H. ex rel. Murphy* v. *Morgan*, 914 F.2d 846, 854 (7th Cir. 1990); *see* Pls.' SJ Memo. at 42-47. Defendants do not dispute that the professional judgment standard applies when the challenged harm arises out of the misconduct of State officials. *See* State Defs.' Opp. at 2-5; Int.-Defs.' Opp. at 1-6. Nor do Defendants directly address the reasons why summary judgment should not be granted to Plaintiffs under the professional judgment standard, aside from the flawed arguments addressed below. *See* Pls.' SJ Memo. at 42-52; Pls.' Opp. at 22-32.

Instead, Defendants argue that the constraints of the United States and Arkansas Constitutions are diminished when a lawsuit "involves a constitutional challenge to a statute passed by a legislature or by a majority vote of the people."[3] State Defs.' Opp. at 2; *see also* Int.-Defs.' Opp. at 10-11. Defendants therefore argue that this Court is required to abdicate its judgment and defer to those who voted for Act 1. State Defs.' Opp. at 29; Int.-Defs.' Opp. at 10-11. This is wrong. This Court is empowered to redress the harm caused by Act 1, regardless of whether it is a statute, regulation or policy. Amendment 7 to the Arkansas Constitution allows ballot initiatives as a means for voters to enact legislation—it does not elevate these statutes to a level that is immune from judicial review or constitutional constraint. Rather, Count 1 is a claim on behalf of the child-Plaintiffs, W.H., S.H., R.P. and E.P., based upon the State "Defendants' deprivation of Plaintiffs' constitutional rights [which] violates the Civil Rights Act, 42 U.S.C. § 1983." Fourth Amended Complaint ("Fourth Amend. Compl.") ¶ 99. Section 1983 applies with equal force when a "person who, under color of *any statute*, ordinance, regulation . . . subjects, or

[3] Under Defendants' theory, State action under color of a regulation or policy could be unconstitutional while the same actions taken under color of statute would necessarily be constitutional if the law was passed by the voters. This is not the law.

causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (West 2009) (emphasis added). Count 2 is a claim under the Arkansas Civil Rights Act on behalf of the same children who are directly harmed by state actors enforcing Act 1. Fourth Amend. Compl. ¶ 103. That Act provides in part: "[e]very person who, under color of *any statute*, ordinance, regulation . . . subjects, or causes to be subjected, any person . . . the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable." ARK. CODE ANN. § 16-123-105 (West 2009) (emphasis added). The civil rights acts applicable here do not apply with less force simply because the state actors are acting under color of a statute approved by certain voters. Plaintiffs here challenge both the statute and the acts of DHS and its agents in enforcing Act 1. Indeed, it is only through the acts of the state agency charged with protecting children that Act 1 has the harmful effects on Plaintiffs and others that are the core of the constitutional claims before this Court.

Intervenors argue that, even if this Court can review Act 1, a substantive due process violation should only be found if Act 1 "shocks the conscience" of the Court. Int.-Defs.' Opp. at 4 (citing *James* v. *Friend*, 458 F.3d 726, 730 (8th Cir. 2006)). But, as the Washington Supreme Court explained in *Braam ex rel. Braam* v. *Washington*, 81 P.3d 851 (Wash. 2003),

> [n]o contemporary court has attempted to determine whether state conduct toward those in the State's custody is constitutionally 'conscience shocking' without recourse to either the deliberative indifference standard or the exercise of professional judgment standard. We conclude that the proper inquiry is whether the State's conduct falls substantially short of the exercise of professional judgment, standards, or practices.

Indeed, the very case upon which Intervenors rely determined that "conduct will not be found . . . conscience-shocking unless the officials acted" with the applicable standard. *James*, 458 F.3d at 730. And, as Plaintiffs have demonstrated, *see* Pls.' SJ Memo. at 45-46, the "professional

judgment" standard is the appropriate standard for non-punitive foster care, because "the State owes [foster] children more than benign indifference," *Braam*, 81 P.3d at 859, and because the child-Plaintiffs here seek only injunctive relief.[4]

Here, Act 1 shocks the conscience. Act 1 departs from professional judgment and results in grievous harm to children in State custody. Pls.' SJ Memo. at 42-52. Act 1 harms one of the most vulnerable populations in the State of Arkansas—the children remanded to its custody and care. The effect of Act 1 is to categorically exclude good families who would provide loving homes to these children, leaving them in State care longer than necessary or permanently. There is no basis for Act 1's arbitrary barriers to 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. It is conscience shocking to inflict such harm on these children, as required under Act 1. The undisputed evidence establishes that the professional consensus in the field of child welfare is that children should not be deprived of adoption and foster opportunities based on the marital status or sexual orientation of the prospective parents and that disqualifying cohabitors from consideration serves no child welfare purpose. *See generally* Separate Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment ("Sep. Statement") (Ex. 7) ¶ 96 (compiling undisputed evidence that Act 1 does not serve a child welfare purpose). Indeed, Act 1 compels DHS officials to act against their own professional

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[4] The court in *James* did *not* decide whether the deliberate indifference or the professional judgment standard applied to the foster care context. Rather, it merely relied upon Eighth Circuit precedent, which reiterated the U.S. Supreme Court's holding in *County of Sacramento* v. *Lewis*, 523 U.S. 833, 848 (1998). *See Moore ex rel. Moore* v. *Brigg*, 381 F.3d 771, 773 (8th Cir. 2004) (citing *Lewis*, 523 U.S. at 848). *Lewis* concerned the applicable standard arising from a police high-speed pursuit of a motorcyclist. As Plaintiffs have explained, courts that have considered the specific circumstances of foster care have found the professional judgment standard to apply. *See* Pls.' SJ Memo. at 43-47.

judgment. DHS witnesses have testified that, under Act 1 and the Executive Directive that preceded it, they have been compelled to refuse foster placements they felt, as child care professionals, were in the best interests of children. *See, e.g.*, Deposition of Cassandra Scott ("Scott Depo.") (Ex. 33) at 38:19-40:13 (recommended against placement of child with her grandmother who was in a long-term cohabiting relationship on basis of DHS policy despite believing that placement was in the best interests of the child).[5] Act 1 results in a palpable harm to the children now in State care, and it is that harm for which Plaintiffs seek relief.[6]

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[5] Intervenors claim that Act 1 does not reduce the pool of prospective foster or adoptive parents because, even before Act 1, DHS had a policy that excluded cohabitors *See* Int.-Defs.' Opp. at 19-20. This is the policy that DHS announced in a press release would not be promulgated because a cohabitation ban (even a waivable one) was not in the best interests of children. Pls.' SJ Memo. at 34-35. Regardless of the extent to which the State deprived children of placements with qualified cohabiting couples in the past, it is undisputed that Arkansas doesn't have enough foster and adoptive parents and that Act 1 throws out families who could be good parents to some of those children. Act 1 unnecessarily exacerbates the shortage of families for children in state care. Pls.' SJ Memo. at 22-26, 29-35. Indeed, while DHS's cohabitation policy was in place, it is undisputed that children were placed with cohabiting families that were deemed to be the best placements for the children in question. *See* Pls.' SJ Memo. at 16, 49; Sep. Statement (Ex. 7) ¶ 125.

[6] Intervenors cite *Dias* v. *City & County of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009), to argue that the professional judgment standard "is not applicable to cases in which plaintiffs advance a substantive due process challenge to a *legislative* enactment." Int.-Defs.' Opp. at 3 (emphasis in original). But *Dias* had nothing to do with the State's obligation to children in the child welfare system. *Dias* involved a challenge to a municipal ordinance banning pit bulls, where dog owners claimed that the ordinance was not rationally related to the legitimate government interest in animal control. *Id.* at 1183-84. No historic liberty interest was found in *Dias*; the court rejected plaintiffs' assertion that animal companionship represented a fundamental liberty interest. *Id.* at 1181. By contrast, in *Youngberg*, the Court found that once the state has deprived individuals of their liberty by taking them into non-punitive custody, the plaintiffs' substantive due process right to personal security and safe conditions while in custody constitutes a "historic liberty interest" under the Constitution. 457 U.S. at 315. Children in non-punitive state confinement, or foster care, have a substantive due process right to be free from government action that causes them harm and departs from the professional judgment standard. Pls.' SJ Memo. at 42-47.

Rather than address this, Defendants contend that Act 1 is justified because the screening process is not infallible and there are tragic cases in which children died or were abused at the hands of foster parents. *See* State Defs.' Opp. at 30-32. The undisputed evidence shows, however, that abuse and neglect occur among all kinds of families, including married couples, singles and cohabitors. Pls.' Opp. at 60-62. The tragic fact that some individuals who make it past the screening process turn out to be harmful to children does not explain why cohabitors as a group—and no one else—warrant a blanket exclusion. This is especially true when (a) it is undisputed that the individualized screening process in Arkansas works as effectively for cohabitors as other groups, *see* Pls.' SJ Memo. at 17-22; Pls.' Opp. at 57, and (b) other groups have similar or worse average outcomes for children are allowed to foster and adopt, *see* Pls.' Opp. at 60-62. Indeed, although anecdotal references to facts of particular cases would never be sufficient to overcome the evidence in this case that Act 1 is unconstitutional, the cases relied upon by the State Defendants to show that tragedies can occur in the foster care system do not even appear to involve cohabiting couples. *Norfleet* v. *DHS*, 989 F.2d 289, 290 (8th Cir. 1993), appears to have involved a single foster parent. In *White* v. *Chambliss*, 112 F.3d 731, 734 (4th Cir. 1997), the foster parents were married. In *Taylor* v. *Ledbetter*, 818 F.2d 791, 793 (11th Cir. 1987), the opinion does not indicate the type of family structure. Defendants' reliance on these cases illustrates that singling out cohabitors for a categorical ban is not a way to protect children.[7] *See also* Pls.' SJ Memo. at 29-34; Pls.' Opp. at 5-7.

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[7] Intervenors mischaracterize the testimony of Scott Tanner regarding delays for children being released from juvenile detention. Int.-Defs.' Opp. at 20. Scott Tanner testified that children most often remain in detention for two to four weeks past their release date because DHS cannot find proper placements for them. *See* Deposition of Scott Tanner ("S. Tanner Depo.") (Ex. 35) at 25:8-13. This affects approximately 45 foster children every year. *Id.* at 78:6-79:1; *see also* Pls.' SJ Memo. at 25-26.

Likewise, Intervenors' semantic arguments about the statements made by professional associations are specious. Defendants do not dispute that the professional associations dedicated to children's health and welfare oppose exclusions on the basis of marital status, sexual orientation and gender. Int.-Defs.' Opp. at 7. Rather, the Intervenors suggest that such statements "do not contradict Act 1's legitimate child welfare purposes in protecting children from the risks of cohabiting environments." *Id.* This is nonsense. A cohabiting couple is an unmarried couple. Plain and simple, Act 1 is a blanket exclusion based on *marital status* because Act 1 bars cohabiting (*i.e.*, unmarried) couples from even being considered as foster or adoptive parents. Likewise, Act 1 is a complete bar to same-sex couples fostering and adopting children because they cannot marry in Arkansas. All of the professional association statements are clear in their opposition to the exclusion of same-sex couples and, therefore, clear in their opposition to Act 1. *See* Plaintiffs' Response to State Defendants' Interrogatories Regarding Dr. Michael Lamb, dated January 12, 2010 (Ex. 147), at 15 (citing the Child Welfare League of America, Position Statement on Parenting of Children by Lesbian, Gay and Bisexual Adults, and the American Academy of Pediatrics, Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents).

Because categorically excluding same-sex and cohabiting heterosexual couples from adopting is contrary to the professional judgment of the child welfare field and causes grievous harm to children who are left parentless, it is unconstitutional.

II. ACT 1 VIOLATES THE DUE PROCESS RIGHTS OF PARENTS TO MAKE FUNDAMENTAL DECISIONS ABOUT THEIR CHILDREN'S CUSTODY, CARE AND CONTROL (COUNTS 5 AND 6).

The parent-Plaintiffs are not seeking recognition of a "new" fundamental right. State Defs.' Opp. at 36. The parent-Plaintiffs are seeking to protect their right to make determinations as to "the care, custody, and control of their children[, which is] . . . perhaps the

oldest of the fundamental liberty interests recognized by" the Supreme Court. *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000); *see also Linder* v. *Linder*, 348 Ark. 322, 342, 72 S.W.3d 841, 851-52 (2002) (applying *Troxel*). Act 1 clearly violates this fundamental right because it completely extinguishes the parent-Plaintiffs' voice in decisions about the care, custody, and control of their children in the event of their death or incapacity. Pls.' SJ Memo. at 60-62; Pls.' Opp. at 38-40. Act 1 should be stricken because there is no governmental purpose that could justify Act 1's requirement that a court refuse to give any consideration to the testamentary wishes of the parent-Plaintiffs, even when those directives are in a child's best interests. Pls.' SJ Memo. at 64; Pls.' Opp. at 40-42. Indeed, Defendants' expert Bradford Wilcox agrees that even when parents designate a cohabiting individual to adopt their child, "parents are more likely to have the best sense of [the best] interest of the child" and so the court would be expected in such cases to "defer in that case to the parent's expressed desire." Deposition of Dr. William Bradford Wilcox ("Wilcox Depo.") (Ex. 146) at 194:17-195:6.

Rather than address this claim and the arguments presented by Plaintiffs, Defendants again seek to frame the constitutional rights at issue too narrowly and to mischaracterize the relief that Plaintiffs seek. Defendants argue that the scope of the parent-Plaintiffs' fundamental right to make decisions about their children "simply does not include the ability to control who may adopt one's children posthumously through a testamentary instrument." State Defs.' Opp. at 20. Defendants further contend that the liberty interest of a parent in making decisions about the "care, custody, and control of her children" has "never been extended to allow deceased (or even living) parents to determine who will adopt their children." Int-Defs.' Opp. at 27.

Defendants' efforts to recast Plaintiffs' claims to Defendants' liking, and impermissibly narrow parents' rights and exempt this particular caretaking function—one of the most important decisions a parent can ever make for a child—from the protection afforded parental decision-making, has no basis in the law. It is indisputable that the parent-Plaintiffs have a fundamental right to make decisions about the care, custody and control of their children. The specific circumstances in which this parental right is exercised are as diverse and important as the breadth of decisions parents make each day in an effort to provide for the nurturing, protection, education and livelihood of their children.

Defendants offer no legal support for the proposition that a parent's right to make decisions about the care, custody or control of their children can be eviscerated depending on what the specific decision is and whether it has already been the subject of a court decision. For example, the Supreme Court has recognized that within a parent's fundamental right to decide about the "care, custody and control" of their children is the right to "establish a home and bring up children" and "to control the education of their own." *Meyer* v. *Nebraska*, 262 U.S. 390, 399-401 (1923). More recently, when confronted with visitation rights statutes, the Supreme Court recognized that the fundamental right of a parent to decide about the "care, custody and control" of their child included the right to control visitations with his or her child. *Troxel*, 530 U.S. at 64, 66-69. The Supreme Court recognized each of these circumstances as encompassed under the well-established liberty right of parents. Defendants offer no support for the proposition that the decisions at issue here—parents' testamentary decisions about the custody, care and control of their children—are somehow excluded from this fundamental right.

Indeed, in *Landis* v. *DeLaRosa*, 49 P.3d 410 (Id. 2002), the court recognized that parents' liberty interest in the care, custody and control of their children applies to parents'

testamentary selection of caregivers for their children. The court held that the "right of a parent while living to select the guardian for his child is a right of value, and, when it is properly exercised must be respected and no . . . court has the right to disregard this testamentary appointment," *id.* at 413-14, unless there is proof that the designated custodian "is an unfit person to act as guardian," *id.* at 414. Here, the parent-Plaintiffs are seeking the same consideration of their parental judgment. However, Act 1 violates the parent-Plaintiffs' constitutional rights by requiring that their testamentary wishes be ignored, even if the designated adoptive parent is entirely fit and the adoptive placement would clearly be in the best interest of the child.

Moreover, there is no support in the law for Defendants' idea that this fundamental, constitutional right is diluted when a parent's testamentary directives are not about placement with a guardian, but rather about adoption by a loved one.[8] Defendants' argument requires the Court to ignore that both the United States Supreme Court and the Arkansas Supreme Court have *explicitly* recognized that this fundamental right includes the right to make "*custody*" decisions about one's child. *Troxel*, 530 U.S. at 65; *Linder*, 348 Ark. at 342, 72 S.W. at 851 (emphasis added). There is nothing in these or other cases to support Defendants' argument that this fundamental right changes if the "custody, care and control" decision is, in the event of death or incapacity, adoption.[9] The proposition that a parent's fundamental rights differ

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[8] Defendants' parenthetical description of *Adoption of Irene*, 767 N.E.2d 91, 96 (Mass. App. Ct. 2002), is misleading. That case did not involve the judgment of a fit parent, but rather parents whose parental rights were terminated due to unfitness.

[9] Defendants' argument that because guardianship is permitted, no constitutional rights are burdened, fails to appreciate that the fundamental right to parental care, custody and control decisions entitles parents to choose adoption over guardianship. If anything, Defendants' guardianship argument shows that there is no conceivable child welfare justification for the

(Footnote Continued)

depending on what type of custody decision (guardianship or adoption) the parent makes, patently and improperly ignores that many parents, for good reason, will conclude that having their children raised by a loved one as guardian is substantially inferior to having those same designated parents adopt their children.[10]

Finding no traction for their arguments in the law on parents' rights, Defendants revert to arguing that there is no fundamental right at issue in this case. Defendants observe that the right to "appoint" a guardian by testamentary designation is a statutory right that is "'subservient to the principle that the child's interest is of paramount consideration.'" State Defs.' Opp. at 23-24, 36. Defendants therefore conclude that "[i]f a statute cannot absolutely control who may be appointed as guardian," then parents certainly cannot do so by testamentary designation. *Id.* at 36. Plaintiffs' claims are not based on any statutory rights, but rather their constitutional rights. As explained in Plaintiffs' earlier briefs, the fact that parents do not have the "absolute" authority to direct and control who will be the adoptive parents of their biological children does not give the State the right to trample on the parent-Plaintiffs' fundamental rights to at least have their designation considered and categorically rejected. There is no governmental purpose that could justify Act 1's requirement that a court absolutely ignore the testamentary wishes of the parent-Plaintiffs regarding who should adopt their children, even if

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(*Footnote Continued*)
statute's intrusion on fundamental parental rights because Act 1 allows cohabitors—the same people it seeks to exclude as adoptive parents on the purported basis that they are unfit parents—to serve as guardians.

[10] Even the State Defendants acknowledge that guardianship fails to provide permanency for a child. *See* Pls.' SJ Memo. at 64 n.33. A guardianship can be disrupted by court order if a court deems it no longer necessary, which is a much lower bar than required to sever an adoptive parent-child relationship. *Id.* Moreover, adoption ensures eligibility for health insurance benefits, social security benefits and the ability to inherit from an intestate parent. *Id.*

those directives are in the children's best interests. Pls.' SJ Memo. at 62-64; Pls.' Opp. at 40-42. Plaintiffs seek only what the constitution requires: That the parental wishes be considered.[11] *See Troxel*, 530 U.S. at 69 (parents' judgment about care of their children must be given "special weight").

III. ACT 1 VIOLATES 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).

Summary judgment should be granted in Plaintiffs' favor on Counts 7 and 8 because Act 1 discriminates against a class of children based on factors beyond their control. Pls.' Memo. at 65-67; Pls.' Opp. at 42-44. Act 1 treats children whose parents want them to be adopted by individuals in cohabiting relationships differently than children whose designated caregivers are not in cohabiting relationships. The former are deprived of consideration of their parents' best judgment about their care, custody and control, while the latter are not. Act 1 therefore should be stricken. *See* Pls.' SJ Memo. at 65-67; Pls.' Opp. at 42-44.

In response to this undisputed evidence, the State Defendants argue that Act 1 does not treat any classes of children differently because "Act 1 does not even identify any different classes of children, and Act 1 explicitly treats all children exactly the same." State Defs.' Opp. at 26. Similarly, Intervenors contend that "Act 1 does not discriminate against any class of surviving children because all surviving children are treated the same under Act 1,

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[11] The State Defendants also argue that parental caretaker designations simply do not matter because the best interest of the child is paramount and Act 1 "explicitly finds children's best interests are not served by adoption by unmarried cohabitants." State Defs.' Opp. at 22-23. Put simply, the State Defendants contend that this Court has no authority to consider the constitutionality of Act 1. This is not the law. There are constitutional limits on statutes passed by voters. *See Burnell* v. *City of Morgantown*, 558 S.E.2d 306, 313-14 (W. Va. 2001) (voter initiatives are "subject to the same judicial scrutiny as are laws passed by the legislature").

regardless of who[m] their parents have suggested as future caregivers." Int.-Defs.' Opp. at 31. Defendants' claim, at base, is that no equal protection violation is possible unless a challenged law expressly spells out the improper classifications on the face of the statute. The guarantee of equal protection is not so threadbare.

In *Bosworth* v. *Pledger*, 305 Ark. 598, 600-01, 810 S.W.2d 918, 919 (1991), the Arkansas Supreme Court rejected this identical argument, that no equal protection claim can be brought if the challenged classification is not explicitly on the face of the statute. There, telephone subscribers brought an equal protection challenge against an Arkansas sales tax statute that, in effect, taxed certain long distance telephone services, but not others. *Id.* at 600-03, 810 S.W.2d at 918-20. The defendants argued that no equal protection claim could be brought because "the threshold element of classification of individuals is not met" because the statute did not on its face require differing treatment of individuals. *Id.* at 604, 810 S.W.2d at 920. The only "distinction made by the statute is between services, not people," a fact that defendants asserted could not be the basis of an equal protection claim. *Id.*

The Arkansas Supreme Court flatly rejected this argument, which is the same as the argument raised by the Defendants here. The crucial determination was not whether the classification *per se* was named in the statute, but whether "there is a state action which differentiates among individuals." *Id.* Although the court ultimately determined that a rational basis existed for the state tax, it first concluded that the tax did constitute "disparate treatment . . . of classes of individuals . . . sufficient to raise the equal protection challenge."[12] *Id.* at 604, 810 S.W.2d at 921.

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[12] Similarly, in *Alaska Civil Liberties Union* v. *State*, 122 P.3d 781, 783 (Alaska 2005), the Alaska Supreme Court held that a state law offering benefits to spouses violated the

(Footnote Continued)

Simply put, the Equal Protection Clause is implicated by the unequal treatment of similarly situated individuals. *See City of Cleburne, Tex.* v. *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike."); *Engquist* v. *Or. Dep't. of Agric.*, 128 S. Ct. 2146, 2153 (2008) ("When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and conditions.") (internal quotation marks omitted); *McDole* v. *State*, 339 Ark. 391, 401, 6 S.W.3d 74, 81 (1999) ("The issue of equal protection involves whether people in the same situation are being treated differently") (internal citations omitted). A statute is not immune from equal protection scrutiny simply because the challenged classification does not appear on the face of the statute. Act 1 is unconstitutional because it treats similarly situated children differently, based on factors beyond their control.

(*Footnote Continued*)
equal protection rights of same-sex couples who were prohibited from marrying. The state defendants argued that the benefits programs "differentiate[d] on the basis of marital status, not sexual orientation or gender," and therefore the law "treats same-sex couples no differently than any other unmarried couples." *Id.* at 787. The court rejected the defendants' argument. The issue is "whether there is a classification that results in different treatment for similarly situated people." *Id.* Opposite-sex couples could marry under the law and obtain benefits, but same-sex couples were prohibited from marrying and therefore could never receive the benefits. *Id.* at 788. The court therefore held that the law violated equal protection because, even though same-sex couples and opposite-sex couples were not explicitly mentioned by the statute, these two similarly-situated groups received unequal treatment under the law, which was not substantially related to asserted governmental interests. *Id.* at 793-94; *see also Williams* v. *Zobel*, 619 P.2d 422, 424-25 (Alaska 1980) (tax statute violated equal protection because it treated categories of residents differently despite no reference to categories in statute).

IV. ACT 1 VIOLATES THE EQUAL PROTECTION AND DUE PROCESS RIGHTS OF THE COUPLE-PLAINTIFFS BY PENALIZING THEIR EXERCISE OF THE FUNDAMENTAL RIGHT TO MAINTAIN THEIR INTIMATE RELATIONSHIPS (COUNTS 9 AND 10).

In their opening and opposition briefs, Plaintiffs showed that Act 1 conditions the privilege to apply to adopt or foster on individuals forgoing their right to maintain an intimate relationship with a same-sex or unmarried heterosexual partner. Pls.' SJ Memo. at 52-56; Pls.' Opp. at 45-48. Because Act 1 penalizes the exercise of the fundamental right to maintain an intimate relationship, and is not narrowly tailored to meet a compelling state interest, it must be stricken. Pls.' SJ Memo. at 56-60; Pls.' Opp. at 45-51. Defendants attempt to avoid this conclusion by again mischaracterizing the issue before the Court as whether there is a fundamental right to cohabit. State Defs.' Opp. at 9-11. And, relying on this improperly narrow construction of Plaintiffs' rights and constructing a claim Defendants would prefer to address rather than the one Plaintiffs' assert, they argue that rational basis review applies when the intimate relationship is a cohabiting, unmarried relationship. *Id.* at 14. Defendants' arguments find no support in law.[13]

The Supreme Court's decision in *Moore* v. *City of East Cleveland, Ohio*, 431 U.S. 494 (1977), illustrates the error of framing the question as whether there is a fundamental right to cohabit. In *Moore*, the plaintiffs challenged an East Cleveland housing ordinance that defined "family," for occupancy purposes, in a manner that excluded a woman and her grandchild from the definition. *Id.* at 495-96. The ordinance did not prohibit Mrs. Moore from maintaining her

[13] The Defendants say that "Plaintiffs appear to concede that if Act 1 serves a child welfare purpose, then Counts 9 and 10 fail to state a claim." State Defs.' Opp. at 4. While it is certainly true that Act 1 serves no child welfare purpose, Act 1 can only stand if the Defendants prove that Act 1 serves a compelling state interest and is narrowly tailored to achieve that goal. *See* Pls.' SJ Memo. at 55. Act 1 must fall because it does not serve a compelling state interest and is in no way narrowly tailored to meet any such goal.

relationship with her grandson. Nevertheless, the Court recognized that the ordinance, by preventing them from living together, burdened their associational rights guaranteed by the due process clause. *Id.* at 499-506. Likewise, here, Act 1 burdens the well-established right to intimate association.

And Defendants cite no case holding that the right to intimate association arises only if the couple is married or holding that this fundamental right is expunged if the intimate couple is not married. To the contrary, Defendants' suggestion that the right to intimate association is afforded only to married couples cannot be squared with *Lawrence* and *Jegley*, which recognized that unmarried, same-sex, couples have a fundamental right to maintain intimate relationships. *Lawrence* v. *Texas*, 539 U.S. 558, 566-67 (2003); *Jegley* v. *Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002).

Indeed, Defendants' overly narrow framing of the right claimed by plaintiffs is precisely the error for which the United States Supreme Court criticized *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). *Lawrence*, 539 U.S. at 566-67. In *Lawrence*, the Court noted that the *Bowers* court "fail[ed] to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said *marriage is simply about the right to have sexual intercourse.*" *Id.* (emphasis added). The Court went on to say that the Texas sodomy law "seek[s] to control a personal relationship" that "is within the liberty of persons to choose." *Id.* at 567. Put another way, the right to intimate association encompasses the right to maintain close personal relationships. *See also Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). Thus, Defendants' suggestion that the right to intimate association is limited to sexual activity and protects only against the criminalization of intimate

relationships is not only unsupported by the law, it was specifically rejected by the Supreme Court in *Lawrence*. Indeed, *Witt* v. *Department of Air Force*, 527 F.3d 806 (9th Cir. 2008), and *Cook* v. *Gates*, 528 F.3d 42 (1st Cir. 2008), both of which addressed challenges to the military's Don't Ask Don't Tell policy—not criminalization of sexual relationships—recognize this.[14]

While Defendants go on at length regarding the disagreement among the federal courts about the level of scrutiny that the Supreme Court applied in *Lawrence*,[15] they overlook that there is no disagreement in Arkansas. The Arkansas Supreme Court held in *Jegley* that under the Arkansas Constitution there is a "fundamental right" to maintain intimate relationships and laws that burden such relationships are subject to strict scrutiny. *See Jegley*, 349 Ark. at

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[14] The United States Supreme Court has repeatedly recognized the fundamental right to form intimate relationships, including in *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), and *Roberts*, 468 U.S. 609. Rather than directly address these cases, Defendants suggest they can be ignored because they "are not analogous to Plaintiffs' claim that Arkansas must place children in cohabiting environments to avoid violating the right of adults to engage in private consensual sex." Int.-Defs.' Opp. at 23-24. Once again, Defendants' misstate the claims before the Court. There is no claim that "Arkansas must place children in cohabiting environments." The claim is that Act 1 must be stricken because there is a protected fundamental right to form intimate relationships and Act 1 burdens that right without a sufficient justification or narrow tailoring.

[15] While some courts have interpreted *Lawrence* as a rational basis case, others recognized that the decision rested on a long line of heightened scrutiny cases and that the court's holding—"[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," *Lawrence*, 539 U.S. at 578—was not rational basis language but rather a heightened form of scrutiny. *See, e.g., Witt*, 527 F.3d at 816-18; *Cook*, 528 F.3d at 52-56. As the *Witt* court explained, in accordance with *Lawrence*, for a government act that implicates this right to stand, "the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Witt*, 527 F.3d at 819. Plaintiffs prevail under this standard for the same reason that they prevail under traditional strict scrutiny. Contrary to the State Defendants' assertion, *Cook* does not indicate that Plaintiffs' equal protection claims should be evaluated under rational basis review. In *Cook* the plaintiffs' equal protection claim was based on the argument that sexual orientation is a suspect classification, which the court rejected. Here, plaintiffs' are not arguing suspect classification but rather, seek heightened scrutiny based solely on the law's burden on their due process right to intimate association, which *Cook* recognized warrants heightened scrutiny.

632, 80 S.W.3d at 350; Pls.' SJ Memo. at 55-56. The *Jegley* court specifically stated, "[a]s the right to privacy is a fundamental right, we must analyze the constitutionality of [the challenged statute] under strict scrutiny review." *Id.* Indeed, *Sylvester* v. *Fogley*, 465 F.3d 851 (8th Cir. 2006), cited by defendants, acknowledges *Jegley*'s holding. *Id.* at 857-58. Moreover, Plaintiffs' intimate association claim is not based solely on *Lawrence*[16] and *Jegley*. These cases simply recognized that the intimate relationships of same-sex couples merit the same protection as other close personal relationships that have long been afforded constitutional protection. *See, e.g.*, *Roberts*, 468 U.S. at 617-18; Pls.' SJ Memo. at 53.[17]

In apparent recognition that strict scrutiny applies to Plaintiffs' claims, the Defendants alternatively assert that Act 1 does not trigger any constitutional scrutiny because it does not directly and substantially burden Plaintiffs' right to intimate association. State Defs.' Opp. at 8-14; Int.-Defs.' Opp. at 22-24.

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[16] The *Lawrence* passage noting that the case did "not involve minors" or whether "the government must give formal recognition to any relationship that homosexual persons seek to enter" does not, as Defendants suggest, make *Lawrence* inapplicable to this case. *Lawrence*, 539, U.S. at 578; Int.-Defs.' Opp. at 22. When read in context, it is clear that the reference to minors had to do with sexual activity of minors and the reference to formal recognition had to do with legal recognition of the relationships between same-sex partners, not relationships between homosexuals and others, such as children.

[17] Defendants' reliance on *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), and *U.S. Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), is misplaced. The relationships at issue in *Belle Terre* involved groups of roommates, not the close, "highly personal relationships" of the type recognized by the Court in *Roberts* and at issue here. *See Roberts*, 468 U.S. at 618-19. State Defendants assert that, in *Moreno*, "[t]wo of the plaintiffs lived together as a couple" but the Court made no mention of a fundamental right of the couple to live together. State Defs.' Opp. at 12. However, the opinion does not identify any of the plaintiffs as unmarried couples. *See Moreno*, 413 U.S. at 531-32 (describing plaintiffs). But even if there were unmarried couples in that case, the plaintiffs did not make any claims based on a right to intimate association and, thus, it is unsurprising that the Court did not mention such a right.

First, Defendants say Act 1 does not burden any fundamental right because it does not say that individuals cannot live together, but rather that if unmarried couples do live together they cannot be considered as adoptive or foster parents. State Defs.' Opp. at 9. As discussed at length in Plaintiffs' opening brief, the courts have long recognized that it is not only laws that *prohibit* the exercise of the right that are subjected to strict scrutiny, but also laws that *penalize* the exercise of a fundamental right. *See* Pls.' SJ Memo. at 53-56. For example, excluding Baptists from adopting would not prevent them from practicing their faith, but no one would dispute that such a policy penalizes the exercise of the fundamental right to religious freedom and, thus, must be evaluated under strict scrutiny.

Second, Defendants say Act 1 does not burden a fundamental right because it does not exclude individuals from applying to be foster or adoptive parents on the basis of their intimate relationship, but only on their cohabiting status. State Defs.' Opp. at 9. As discussed above, however, Act 1's exclusion of individuals who cohabit penalizes the exercise of their right to intimate association, just as East Cleveland's prohibition against grandparents living with grandsons penalized Mrs. Moore's exercise of that right. *See* Section IV, *supra*.

Third, Defendants argue that Act 1 does not burden the fundamental right to intimate association because it is designed to promote children's welfare, calling the burden on Plaintiffs' fundamental rights an incidental "side effect." State Defs.' Opp. at 13-14. Act 1 specifically targets people based on the exercise of this fundamental right,[18] and thus, directly and substantially burdens the exercise of that right.[19]

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[18] For this reason, *Califano* v. *Jobst*, 434 U.S. 47 (1977), is inapposite. *Califano*, like *Lyng* v. *Castillo*, 477 U.S. 635 (1986) (previously cited by Defendants), involved a challenge to the allocation of government benefits. The challenged allocation schemes in these cases recognized that economic units often form based on family relationships. *See Califano*,

(Footnote Continued)

In sum, Act 1 violates the couple-Plaintiffs' right to intimate association because it penalizes their exercise of that right and is not narrowly tailored to further any compelling government interest, or even rationally related to any legitimate government interest. Accordingly, Plaintiffs are entitled to summary judgment on Counts 9 and 10.

V. ACT 1 FAILS UNDER ANY LEVEL OF CONSTITUTIONAL SCRUTINY.

As shown above, Act 1 is properly evaluated under strict scrutiny and, therefore, can only stand if Defendants prove it is narrowly tailored to further a compelling State interest. The State Defendants do not even try to meet this standard. Intervenors make only a halfhearted attempt in one paragraph at the end of their brief that, as discussed below, falls far short of constitutional requirements. Int.-Defs.' Opp. at 33.

A. Act 1 is not narrowly tailored.

Intervenors cite the government's compelling interest in protecting children's welfare and assert that Act 1 meets the narrow tailoring requirement because it "could not be less restrictive given that no child's welfare should be subjected to a known heightened risk of

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(*Footnote Continued*)
434 U.S. at 53-54 (upholding termination of dependent child social security benefits upon marriage based on recognition that married couples generally are no longer dependent on their parents); *see also* Pls.' Opp. at 47-48 (discussing *Lyng*). These policies sought to gauge need. They did not target individuals because they married or lived with family members. Act 1, by contrast, penalizes people precisely for exercising their right to intimate association.

[19] Intervenors also re-assert the argument that there is no differential treatment of homosexuals because it is the Arkansas Constitution, not Act 1, that prohibits same-sex marriage and that Plaintiffs must challenge the constitutionality of the Arkansas marriage laws. Int.-Defs.' Opp. at 24; *see also* 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*, 122 P.3d at 788; *Tanner* v. *Or. Health Scis. Univ.*, 971 P.2d 435, 443 (Or. Ct. App. 1998); *see* Pls.' Opp. at 50-51.

cohabiting environments" and "[a]ll screening is fallible." Int.-Defs.' Opp. at 33. The "heightened risk" Intervenors suggest is based on group averages about a wide variety of heterosexual cohabitors. Pls.' Opp. at 55-56. The undisputed expert testimony, however, establishes that children raised by same-sex couples have outcomes that are no different than children of married heterosexual couples. Expert Report of Dr. Michael Lamb ("Lamb Expert Report") (Ex. 46) at 6; Wilcox Depo. (Ex. 42) at 200:18-201:13; Deposition of Dr. Paul Deyoub ("Deyoub Depo.") (Ex. 20) at 18:19-21:20).[20] This expert testimony is consistent with the findings of the *Howard* court. *Howard* v. *Child Agency Review Bd.*, 367 Ark. 55, 63-65, 238 S.W.3d 1, 6-8 (2005) (quoting *Howard* v. *Child Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3200916 (Ark. Cir. Ct. Dec. 29, 2004), Findings of Fact ¶¶ 29-33, 37). Although Intervenors protest that they are not bound by *Howard's* findings, Defendants present no evidence to refute those findings. Pls.' Opp. at 55-56. Instead, Intervenors claim that the exclusion of same-sex couples is justified based on average rates of couple break-up and domestic violence among gay and married heterosexual couples. Int.-Defs.' Opp. at 25. But all Intervenors have done is mischaracterize the research presented by Plaintiffs' experts.[21] The research on *same-sex parents* demonstrates *no* risk. Pls.' Opp. at 55-56.

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[20] Defendants say "[t]here is absolutely no dispute about the fact that households headed by unmarried cohabiting adults are generally less stable and generally present greater risks of poor outcomes for children than households headed by married adults." State Defs.' Opp. at 30. Plaintiffs' experts acknowledge that among *heterosexual parent* families, *if you do not control* for factors such as education and income, there are disparities in the average outcomes for these groups. This is not true for children raised by *same-sex couples.* Lamb Expert Report (Ex. 46) at 6.

[21] Intervenors' assertion that Plaintiffs' experts agree that same-sex couples have a greater risk of domestic violence than married heterosexual couples is wrong. *See* Expert Report of Dr. Letitia Peplau ("Peplau Expert Report") (Ex. 115) at 4-5 ("Rates of domestic violence appear to be roughly similar in same-sex cohabiting couples and married heterosexual couples."). And with respect to the Kurdek study on couple stability discussed by Intervenors, *see* Int.-Defs.'

(Footnote Continued)

In any event, on summary judgment Defendants' argument misses the point. Act 1 is not tailored in any sense whatsoever. Defendants do not contend that all (or even most) cohabitors—gay or heterosexual—must be excluded to protect children, which is what they would have to prove to prevail under strict scrutiny. It is undisputed that the majority of cohabiting parents raise children who have positive outcomes and that, in some cases, the best possible placement for a particular child is with a cohabiting couple. *See, e.g.*, Wilcox Depo. (Ex. 42) at 91:2-4 (regarding negative outcomes for children raised by cohabiting parents: "it is the case when you look at any given outcome that we are talking about, it's a minority of the kids."); *id.* (Ex. 42) at 134:20-23 (same); *id.* (Ex. 146) at 188:5-8 (same); *id.* (Ex. 146) at 188:13-189:1, 248:24-249:15 (admitting that a majority of cohabiting heterosexuals do *not* engage in sexual infidelity, do *not* engage in domestic violence, and do *not* abuse children); Deyoub Depo. (Ex. 144) at 97:2-102:18 (same); Wilcox Depo. (Ex. 42) at 185:24-186:4, 206:22-207:4 (admitting to the possibility that Act 1 prevents placement of children with families with whom it would be in their best interests); Deposition of Dr. Jennifer Roback Morse ("Morse Depo.") (Ex. 27) at 61:3-64:9, 200:3-11, 208:1-25 (same); Deyoub Depo. (Ex. 20) at 91:6-22 (same).

Reliance on group averages to exclude qualified individuals who are members of a particular group is not narrow tailoring. For example, in *United States* v. *Virginia*, the Supreme Court rejected average differences between men and women which were asserted to justify the exclusion of women from a military academy. 518 U.S. 515, 541 (1996); *see also id.* at 550 ("estimates of what is appropriate for *most women*, no longer justify denying opportunity

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(*Footnote Continued*)
Opp. at 13, Plaintiffs' expert testified that when controlling for the presence or absence of children in the family, the break up rates for same-sex and married heterosexual couples were similar. Deposition of Dr. Letitia Peplau ("Peplau Depo.") (Ex. 145) at 65:12-68:4.

to women whose talent and capacity place them outside the average description.") (emphasis in original).[22]

Intervenors' assertion that Act 1's blanket ban is the least restrictive means is unfathomable, given: (a) the less restrictive system already in place of individual screening of all applicants; (b) Defendants admit that this system is "thorough" and "effective" and (c) Defendants and their experts admit that individual screening is the only way to identify suitable parents. Pls.' Opp. at 57-58. Intervenors' response that "[a]ll screening is fallible," is no response at all. Int.-Defs.' Opp. at 33. Of course, no screening process is perfect. But Defendants' admit that the individualized screening process works just as effectively for cohabiting applicants as it does for married and single applicants. Pls.' Opp. at 57-58. And, although Arkansas's effective screening process regrettably lets through singles and married couples who do harm to children, Defendants' argument amounts to an assertion that any group that has ever harmed a child should be categorically banned as a group from fostering or adopting. Taken to its logical conclusion, Defendants' argument would require a categorical ban on all adult applicants, including those who are married and single. Act 1 cannot be saved by an argument that effectively calls for the end of adoption and foster placements.

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[22] Plaintiffs do not mean to suggest by citing this case that the average cohabitor poses a risk to children. Indeed, the undisputed expert testimony shows that the majority of children of cohabiting parents have positive outcomes and it is a minority of cohabitors who pose the other risks cited by defendants such as child abuse and drug abuse. *See, e.g.*, Wilcox Depo. (Ex. 146) at 188:13-189:1, 248:24-249:15 (admitting that a majority of cohabiting heterosexuals do not engage in sexual infidelity, do not engage in domestic violence, and do not abuse children). The strict scrutiny case law demands that *even where most people* in the excluded group are not qualified, *that does not justify excluding the entire group.*

Because Act 1 is overly restrictive, unnecessarily excluding many individuals who would make good parents, it does not meet the narrow tailoring requirement of strict scrutiny, and thus, must be invalidated.

B. Act 1 would fail rational basis review.

Assuming, *arguendo*, that strict scrutiny did not apply here, Act 1 would fail even under rational basis review. Pls.' Opp. at 59-66. The arguments Defendants make based on group averages of heterosexual married and unmarried couples do not rescue the blanket exclusion of cohabitors—heterosexual or same-sex—from constitutional infirmity. As the Supreme Court has explained, "even in . . . [a] case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996) (striking down a statute under rational basis review). Here, the object is improved child welfare. The undisputed evidence demonstrates the absence of a "link between the classification and the objective." *Id.* This evidence, which includes the evidence discussed above in the strict scrutiny analysis as well as additional evidence, was discussed at length in Plaintiffs' opposition to Defendants' motions for summary judgment, Pls.' Opp. at 52-66, but four arguments warrant brief discussion because each independently compels the conclusion that Act 1 cannot survive rational basis review and, collectively, they leave no doubt that Act 1 is unconstitutional.

First, Defendants' statistics do not change the fact that Act 1 expressly permits guardianship placements with unmarried cohabiting adults. The purpose of Act 1 cannot be to exclude a purportedly dangerous population from caring for children when the face of the statute expressly permits that same population to act as guardians, a state-facilitated placement with less oversight and monitoring. Pls.' Opp. at 53-55. Where, as here, the asserted child welfare justification for Act 1 is undermined by the government's own actions in permitting placement of

children with unmarried cohabiting adults as guardians, the law is devoid of a rational basis. *See Cornerstone Bible Church* v. *City of Hastings*, 948 F.2d 464, 471-72 (8th Cir. 1991) (rejecting the asserted justification of economic vitality for a law, which excluded a church from a zoned area, frustrated by the government's own actions in permitting other non-commercial entities to operate in the same zone).

Second, Defendants repeated arguments that the averages on which they rely to show that children would be subjected to "a known heightened risk of cohabiting environments," are misleading and fail under any level of scrutiny. Int.-Defs.' Opp. at 33. The undisputed expert testimony and the findings of *Howard* establish that children raised by same-sex couples have outcomes that are no different than children of married heterosexual couples. Pls.' Opp. at 55-56. Thus, there is no rational basis for Act 1's exclusion of same-sex couples. *Id.* With regard to heterosexual couples, Defendants' statistics look primarily at outcomes for children raised in intact married biological households compared with averages for cohabitors, without regard for the fact that children affected by Act 1 will not be raised by their biological parents, but rather many will be faced with the choice of a suitable cohabiting family or a longer stint in a State facility and, possibly, never being placed with a permanent family at all. Pls.' Opp. at 59-60. There is nothing rational to electing to leave children in State facilities (which all experts agree is harmful), when suitable cohabiting homes are available. *Id.* There is nothing rational to a blanket exclusion when the evidence shows that cohabitors who apply to foster and adopt children (and who have been approved) would be no less likely than married or single applicants to be suitable parents and no less likely than married couples to be in stable relationships. Pls.' Opp. at 62-63. And, as a matter of law, excluding one demographic group (cohabitors) from adopting or fostering based on group averages when the State does not exclude single applicants,

applicants who have low-income or low-education levels, or young adult applicants—all groups whose "statistical averages" show similar or poorer outcomes than those of cohabiting heterosexuals cannot be defended. Pls.' Opp. at 60-62. Act 1's blanket ban on cohabiting adoptive and foster applicants while allowing applicants from groups with similar or worse average outcomes lacks a rational basis. *See Cleburne*, 473 U.S. at 448-50 (under rational basis review, government may not single out a group for disfavored treatment unless the group presents a "special threat to the [state's] legitimate interests"); *Cornerstone Bible Church*, 948 F.2d at 471-72.

Third, Defendants cannot evade the conclusion that Act 1 serves no child welfare purpose by arguing that the "opinions" of DHS officials regarding Act 1 are irrelevant and insufficient to invalidate a law under rational basis review. State Defs.' Opp. at 27-29. The testimony cited by Plaintiffs is not comprised of the "opinions" of DHS officials, but rather are the party admissions of DHS through its 30(b)(6) representatives. Pls.' Opp. at 4, 57. These admissions are entirely consistent with the conclusion reached by DHS in October 2008, when it announced that a pre-Act 1 policy of categorically excluding cohabiting adults would not be promulgated because it served no child welfare purpose. *See* Pls.' SJ Memo. at 34-35; Arkansas DHS Media Release, October 9, 2008. These admissions establish that Act 1 is unconstitutional.

Fourth, Intervenors' arguments about certain criminals and adults under the age of 21 or over age 65 that are not permitted to foster or adopt again misstates the record and does not meet the rational basis standard. Int.-Defs.' Opp. at 17-18. To a large extent, these are policies that are waivable. DHS caseworkers evaluate and screen underage and overage applicants—and applicants with certain criminal convictions—and have approved placements with them, when determined to be in the best interests of the child, because the policies

disfavoring these placements are waivable when it is in a child's best interest to waive them. *See* Pls.' Opp. at 64-65; Deposition of Cindy Young ("Young Depo.") (Ex. 43) at 54:25-56:2 (all DHS policies subject to waiver); Deposition of Ed Appler ("Appler Depo.") (Ex. 9) at 70:2-72:14 (some criminal convictions can be waived); Arkansas DHS, List of Alternative Compliance Waivers, 2007 to 2009 (Ex. 124) (finding that the age requirements were waived over 100 times in a two-year span). Act 1, however, is not waivable. Act 1 is applied without any regard for children's interests. Moreover, even assuming *arguendo*, that cohabitors were as likely to be unsuitable parents as people in these groups (as Intervenors appear to suggest),[23] Act 1 fails rational basis review because the State of Arkansas nonetheless allows placements with individuals who have certain criminal convictions and from these age groups. As *Cleburne* and *Cornerstone Bible Church* make clear, as a matter of law Act 1 is not constitutional because the State excludes cohabitors when other permitted groups have similar or worse average outcomes.

In sum, even under the lowest level of constitutional scrutiny, Defendants fail to provide the missing link between classification and purpose because Act 1 is not rationally related to the achievement of its purported child welfare objective or any other legitimate goal.

CONCLUSION

Act 1 directly harms the children whose care has been entrusted to the State of Arkansas. The State's own child welfare professionals admit that Act 1 serves no child welfare purpose, a view that is supported by the national child welfare associations. Act 1 violates the Due Process rights of children in State care, denies the parent-Plaintiffs the right to exercise parental authority, and denies children their right to equal protection of the laws, and

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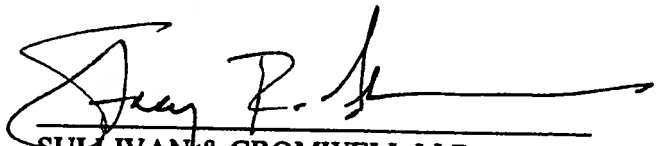
[23] Defendants' analogies misleadingly suggest that most cohabitors make unsuitable parents or engage in conduct such as child abuse and drug abuse. But it is undisputed that this is not the case. *See* Section V.A. at 25-26, *supra*.

impermissibly impinges on the fundamental rights to intimate association. Plaintiffs respectfully ask that their motion be granted and this Court declare Act 1 to be unconstitutional and immediately unenforceable.

Dated: March 15, 2010

RESPECTFULLY SUBMITTED,



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Attorneys for Plaintiffs

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was served by e-mail on the following, pursuant to agreement among the parties, on the 15th day of March, 2010:

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Christopher Diffee

Exhibit 143

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.

INDEX OF EXHIBITS TO PLAINTIFFS' REPLY TO THE STATE DEFENDANTS' AND INTERVENOR- DEFENDANTS' RESPONSES TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INDEX OF EXHIBITS

Exhibit No.	Description
143	Index of Exhibits to Plaintiffs' Reply to the State Defendants' and Intervenor-Defendants' Responses to Plaintiffs' Motion for Summary Judgment
144	Deposition of Dr. Paul Deyoub
145	Deposition of Dr. Letitia Anne Peplau
146	Deposition of Dr. William Bradford Wilcox
147	Plaintiffs' Response to State Defendants' Interrogatories Regarding Dr. Michael Lamb

Exhibit 144

124 West Capitol Ave, Suite 1560, Little Rock, AR 72201
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FLYNN LEGAL SERVICES

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

SHEILA COLE, et al — PLAINTIFFS

VS. — CASE NO. CV 2008-14284

THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, et al — DEFENDANTS

VS.

FAMILY COUNCIL ACTION COMMITTEE, et al — INTERVENORS

ORAL DEPOSITION

OF

PAUL DEYOUB, PH.D.

(Taken October 27th, 2009, at 9:15 a.m.)

ORIGINAL

APPEARANCES

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INDEX

EXHIBITS

CAPTION

ANSWERS AND ORAL DEPOSITION OF PAUL DEYOUB, a witness produced at the request of the Defendants, taken in the above-styled and numbered cause on the 27th day of October, 2009, before Donna Kay Verser, Arkansas Supreme Court Certified Court Reporter #699, at 9:15 a.m., at the Arkansas Attorney General's Office, 323 Center Street, 3rd Floor, Little Rock, Arkansas, pursuant to the agreement hereinafter set forth.

* * * * * * * * * *

STIPULATIONS

IT IS STIPULATED AND AGREED by and between the parties through their respective counsel that the oral deposition of PAUL DEYOUB may be taken for any and all purposes according to the Arkansas Rules of Civil Procedure.

* * * * * * * * * *

PROCEEDINGS

THE COURT REPORTER: What I would like to do is have everyone go around the room and identify themself on the record, please, if you don't mind. And Steve, can we start with you?

MR. EHRENBERG: Steven Ehrenberg. Sullivan and Cromwell for the Plaintiff's.

MS. COOPER: Leslie Cooper. ACLU for the Plaintiff's.

MS. TAPPEN: Sarah Tappen for the Intervenors.

MS. ADCOCK: Martha Adcock for the Intervenors.

MR. JORGENSON: Colin Jorgenson for the State Defendants.

MR. BABIONE: Byron Babione for the Intervenors.

MR. CORDI: Joe Cordi, Arkansas Attorney General's Office for the Defendant's.

THE WITNESS: Paul Deyoub, witness.

THE COURT REPORTER: Okay. Thank you. I'll put the witness under --

MR. EHRENBERG: Please.

THEREUPON,

PAUL DEYOUB,

THE WITNESS HEREINBEFORE NAMED,

having been first duly cautioned and sworn by me to testify to the truth, the whole truth, and nothing but the truth, testified on his oath as follows, to-wit:

EXAMINATION

BY MR. EHRENBERG:

Q Good morning, Doctor.

A Good morning.

Q I'm Stephen Ehrenberg. I represent the plaintiff's along with my colleague, Leslie Cooper, from the ACLU. You've been deposed many times before, is that right?

A Yes.

Q You're familiar with the procedures, not talking over each other, answering aloud audibly, that sort of thing?

A Yes.

Q Okay. If I ask you a question and you don't understand it, just please let me know, and I'll try to re-phrase it. And if you need to take a break, let me know, and we can do that. I just ask that you

BY MR. EHRENBERG:
Q Is it your opinion that a majority of heterosexual co-habitors experience domestic violence in their relationships?
A It's -- what I'm saying is that -- no. Not, I mean, not a majority of them maybe experience one thing. As a group, co-habitators are involved in more domestic abuse. This is what the research says.
Q I'm just asking if it's a majority of heterosexual co-habitors experience domestic violence in their relationship?
MR. BABIONE: Objection. Asked and answered.
A No.
BY MR. EHRENBERG:
Q Is that a no?
A But, no. Not a -- not necessarily a majority. It's a comparison of the co-habitors to the married people that's significant.
Q The difference between them is significant?
A Yes.
Q Okay. But it's not a majority of co-habitors that experience domestic violence in their relationships?
MR. BABIONE: Asked and answered.

A Well, I could -- like we answered before, some of the percentages are very high in terms of the single female, heterosexual and homosexual. You know, up to 37 to 50 percent of these females, heterosexual or homosexual, say that they have been abused.

BY MR. EHRENBERG:

Q My question was co-habitors, not singles.

A Well, I think -- I'm not going to say a majority. I'm going to say it's a large percentage of co-habitating women. Again, co-habitation is probably the most dangerous for children and women.

Q A majority of heterosexual co-habitors do not experience domestic violence in their relationships; is that correct?

MR. BABIONE: Objection asked and answered.

A I think the majority --

MR. BABIONE: I think I might -- hang on a second. I think I need a standing objection to that same question since it's continuously --

MR. EHRENBERG: You can have it. I would like an answer.

MR. BABIONE: You are getting an answer

to the question.
BY MR. EHRENBERG:
Q Is it your testimony --
A The majority of --
Q Go, go ahead.
A -- the majority meaning 51 percent --
Q Yes.
A -- I don't know. Probably not, probably not that high.
Q But you don't know?
A The study --
MR. BABIONE: Objection. Asked and answered.
BY MR. EHRENBERG:
Q You said "probably". I'm asking if you know whether --
A There's some -- I'm sorry.
Q Do you know whether a majority of co-habitors experience domestic violence in their relationships?
A The answer is, there have been some studies that have talked about up to 50 percent of co-habitating women report domestic violence, so some of the studies might say that -- do say that.
Q Co-habiting women or co-habiting generally?
A Co-habitating women.

Q Which study?
A I don't know which study.
Q Okay.
THE COURT REPORTER: I need to take a break.
(WHEREUPON, a short break was taken and the proceedings resumed as follows, to-wit:)
THE COURT REPORTER: We're back on the record at 12:11.
BY MR. EHRENBERG:
Q Doctor, what percentage of heterosexual co-habitors have poor physical health?
A I don't know what percentage have poor physical health or report --
Q All right. Go ahead.
A -- or they report for physical health.
Q I'm sorry.
A I don't know the percentage.
Q What percentage of heterosexual co-habitors have poor mental health?
A I don't know.
Q What percentage of heterosexual co-habitors have abused drugs?
A I don't know. The point is that all of these questions are at higher rate than marital -- than

marrieds.
Q Do you know if more than 25 percent of heterosexual co-habitors abuse drugs?
MR. BABIONE: Objection. Asked and answered.
A I don't know.
BY MR. EHRENBERG:
Q Do you know what percentage of heterosexual co-habitors are unfaithful to their partner?
A I don't know the percentage. I know it's -- I know infidelity is significantly higher than marriage.
Q Is it more than 25 percent?
A I don't know.
Q Do you know if more than 25 percent of heterosexual co-habitors report having poor physical health?
A I don't know the percentage.
Q Do you know if more than 25 percent of heterosexual co-habitors report having poor mental health?
A I don't know.
Q Do you know if more than 25 percent of heterosexual co-habitors report domestic violence in their relationship?

A Yes, I think it's higher than that.
Q Is it more then 50 percent?
A Well, one here -- according to the national crime victimization study, violence against women between '79 and '87 was committed by a boyfriend or ex-husband 65 percent of the time. Only nine percent was committed by husbands, so pretty high for boyfriends.
Q Do you know if that study looked at co-habitors or does boyfriends in that context include men who live with the woman?
A Well, boyfriends and ex-husbands, some of them would be co-habitors -- co-habitators.
Q Do you know what percentage of heterosexual co-habitors abuse their children?
A No, I don't.
Q Do you know if it's greater than 25 percent?
A No, but it's higher than married couples.
Q Do you know if more than 25 percent of gay co-habitors report having poor physical health, poor mental health, abuse drugs, are unfaithful to their partner, or report domestic violence in their relationship, or abuse their children?
A I don't know if it's --
MR. BABIONE: Hold on. I'm going to have

CERTIFICATE

STATE OF ARKANSAS)
)ss
COUNTY OF PULASKI)

I, Donna Kay Verser, Certified Court Reporter #699, do hereby certify that the facts stated by me in the caption on the foregoing proceedings are true; and that the foregoing proceedings were reported verbatim through the use of the voice-writing method and thereafter transcribed by me or under my direct supervision to the best of my ability, taken at the time and place set out on the caption hereto.

I FURTHER CERTIFY, that I am not a relative or employee of any attorney or employed by the parties hereto, nor financially interested or otherwise, in the outcome of this action, and that I have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect impartiality, that requires me to relinquish control of an original deposition transcript or copies of the transcript before it is certified and delivered to the custodial attorney, or that requires me to provide any service not made available to all parties to the action.

WITNESS MY HAND AND SEAL this 9th day of November, 2009.

Donna Kay Verser

DONNA KAY VERSER

Arkansas State Supreme Court

Certified Court Reporter #699

Exhibit 145

CERTIFIED COPY

THE CIRCUIT COURT OF PULANSKI COUNTY

ARKANSAS SECOND DIVISION

SHEILA COLE, ET AL., PLAINTIFFS, VS. THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, ET AL., DEFENDANTS. FAMILY COUNCIL ACTION COMMITTEE, ET AL., INTERVENERS.	)	CASE NO. CV2008-14284

DEPOSITION OF LETITIA ANN PEPLAU, PH.D.

OCTOBER 2, 2009

KRISTI CARUTHERS
CSR 10560
21655

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Court Reporters
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08:58:51

THE CIRCUIT COURT OF PULANSKI COUNTY
ARKANSAS SECOND DIVISION

SHEILA COLE, ET AL., PLAINTIFFS, VS. THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, ET AL., DEFENDANTS. FAMILY COUNCIL ACTION COMMITTEE, ET AL., INTERVENERS.	)	CASE NO. CV2008-14284

DEPOSITION OF LETITIA ANN PEPLAU, PH.D., TAKEN ON BEHALF OF THE DEFENDANTS, AT 1888 CENTURY PARK EAST, SUITE 2100, LOS ANGELES, CALIFORNIA, COMMENCING AT 9:07 A.M., OCTOBER 2, 2009, BEFORE KRISTI CARUTHERS, CLR, CSR NUMBER 10560.

APPEARANCES OF COUNSEL:

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I N D E X

EXHIBITS FOR IDENTIFICATION:

DEFENDANTS':

(BOUND UNDER SEPARATE COVER)

I N D E X (CONTINUED)

EXHIBITS MARKED FOR IDENTIFICATION:

INTERVENERS':

(BOUND UNDER SEPARATE COVER)

INFORMATION REQUESTED:

(NONE)

DEPONENT INSTRUCTED NOT TO ANSWER:

(NONE)

LOS ANGELES, CALIFORNIA, FRIDAY

OCTOBER 2, 2009

9:07 A.M.

LETITIA ANNE PEPLAU, PH.D.,
CALLED AS A DEPONENT AND SWORN IN BY
THE DEPOSITION OFFICER, WAS EXAMINED
AND TESTIFIED AS FOLLOWS:

DEPOSITION OFFICER: DO YOU SOLEMNLY SWEAR THAT THE TESTIMONY YOU ARE ABOUT TO GIVE IN THE FOLLOWING DEPOSITION WILL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE DEPONENT: I DO.

09:06:59 EXAMINATION

09:06:59 BY MR. JORGENSEN:

09:07:02 Q. GOOD MORNING, DR. PEPLAU. AM I PRONOUNCING THAT CORRECTLY?

09:07:06 A. UH-HUH.

09:07:06 Q. MY NAME IS COLIN JORGENSEN. I'M A LAWYER FROM THE ARKANSAS ATTORNEY GENERAL'S OFFICE, AND WE REPRESENT THE ARKANSAS DEPARTMENT OF HUMAN SERVICES AND THE ARKANSAS CHILD AGENCY

10:42:14 Q. DOES BEING UNMARRIED CORRELATE IN
10:42:19 ANY WAY WITH ELEVATED BREAKUP RATES?
10:42:32 A. IT IS CERTAINLY THE CASE THAT
10:42:36 COUPLES WHO ARE DATING ARE MORE LIKELY TO BREAK UP
10:42:41 THAN MARRIED COUPLES, SO IT'S ALWAYS A QUESTION OF
10:42:49 SORT OF WHAT COMPARISON WE'RE TRYING, YOU KNOW, TO
10:42:55 GRAPPLE WITH.
10:43:03 SO DO LONG-TERM COHABITING
10:43:07 HETEROSEXUAL COUPLES WHO HAVE DECIDED TO ADOPT A
10:43:11 CHILD BREAK UP AT GREATER RATES OR AT LESSER RATES
10:43:15 THAN MARRIED COUPLES? WE DON'T KNOW.
10:43:40 Q. LET'S TURN TO PAGE 4, AND I'M
10:43:43 LOOKING AT SECTION 2, TITLED "COHABITING SAME-SEX
10:43:47 COUPLES."
10:43:47 A. OKAY.
10:43:56 Q. THE THIRD PARAGRAPH STARTS WITH THE
10:43:56 SENTENCE:
10:43:58 "THE RELATIONSHIP
10:43:58 DISSOLUTION RATES FOR COHABITING
10:44:01 SAME-SEX COUPLES IS SOMEWHAT
10:44:03 HIGHER THAN THE RELATIONSHIP
10:44:04 DISSOLUTION RATES FOR MARRIED
10:44:05 HETEROSEXUAL COUPLES."
10:44:07 DID I READ THAT CORRECTLY?
10:44:08 A. YES, YOU DID.

10:44:09 Q. WHAT DO YOU MEAN BY "SOMEWHAT HIGHER"?

10:44:15 A. I'VE USED THE WORD "SOMEWHAT" FOR A COUPLE OF REASONS.

10:44:22 ONE IS THAT THE STUDIES THAT COMPARE BREAKUP RATES FOR MARRIED COUPLES AND FOR SAME-SEX COHABITING COUPLES ARE -- COME UP WITH DIFFERENT -- SOMEWHAT DIFFERENT RESULTS. THE PATTERNS SEEM TO BE DIFFERENT.

10:45:01 THAT'S PARTLY BECAUSE WE DON'T HAVE NATIONALLY REPRESENTATIVE DATA ON SAME-SEX COUPLES SO WE'RE NOT COMPARING GOVERNMENT STATISTICS OF MARRIAGE, SO IT'S NOT THE MOST DIRECT COMPARISON.

10:45:21 SO IN ONE OF THE STUDIES THAT HAS TRIED TO GET AROUND THIS LACK OF EXACTLY COMPARABLE DATA, TO GIVE YOU AN EXAMPLE, LARRY KURDEK RECRUITED SAMPLES OF MARRIED HETEROSEXUAL COUPLES AND OF COHABITING SAME-SEX COUPLES, AND HE FOLLOWED THOSE COUPLES OVER TIME FOR 11 OR 12 YEARS, AND THE QUESTION THAT HE ASKED WAS WHAT PERCENT OF THOSE COUPLES STAYED TOGETHER AND WHAT PERCENT BROKE UP.

10:46:01 AND WHAT HE FOUND WAS, FIRST OF ALL, THAT THE MAJORITY OF THE COUPLES, OF ALL TYPES, STAYED TOGETHER OVER THE LENGTH OF HIS

10:46:12 STUDY.

10:46:14 HE FOUND THAT THE RATES OF BREAKUP
10:46:21 WERE SOMEWHAT HIGHER -- AND I'LL TELL YOU WHAT I
10:46:25 MEAN BY "SOMEWHAT HIGHER" IN A MINUTE -- SOMEWHAT
10:46:27 HIGHER FOR SAME-SEX COUPLES THAN FOR MARRIED
10:46:29 COUPLES, BUT THE QUALIFICATION WAS THAT IT MADE A
10:46:34 DIFFERENCE WHETHER THE MARRIED COUPLES HAD
10:46:36 CHILDREN OR NOT.

10:46:37 SO HE FOUND THAT THE BREAKUP RATES
10:46:38 FOR GAY AND LESBIAN COUPLES AND FOR HETEROSEXUAL
10:46:43 COUPLES WITH NO CHILDREN WERE REALLY PRETTY
10:46:44 SIMILAR, SOMETHING LIKE 20 PERCENT -- I'D HAVE TO
10:46:47 HAVE THE STUDY IN FRONT OF ME TO GIVE YOU THE
10:46:49 SPECIFICS, I THINK A LITTLE BIT HIGHER, 24 PERCENT
10:46:51 FOR LESBIANS OR, YOU KNOW, WHATEVER, BUT VERY
10:46:54 SIMILAR -- BUT THE BREAKUP RATE FOR MARRIED
10:46:56 COUPLES WITH CHILDREN WAS 3 PERCENT.

10:47:00 SO WHAT DOES "SOMEWHAT" MEAN?
10:47:02 "SOMEWHAT" MEANS THAT IF YOU MAKE WHAT IS PROBABLY
10:47:07 THE BETTER COMPARISON OF COUPLES WHO DON'T HAVE
10:47:11 CHILDREN, YOU'RE FINDING DIFFERENCES OF 3,
10:47:14 4 PERCENT BETWEEN THE GROUPS, AND MOST OF THEM ARE
10:47:18 STAYING TOGETHER, SO IN MY MIND THAT WOULD BE AN
10:47:21 EXAMPLE OF WHAT I MEAN BY "SOMEWHAT."

10:47:27 IT'S DIFFERENT THAN SAYING A

10:47:30 MAJORITY OF ONE GROUP STAYED TOGETHER AND THE
10:47:32 MAJORITY OF THE OTHER GROUP BROKE UP. MOST
10:47:35 EVERYBODY STAYED TOGETHER, BUT THERE WERE
10:47:38 DIFFERENCES IN THE RATES THAT WERE SMALL.
10:47:56 Q. CAN YOU QUANTIFY THE RELATIONSHIP
10:47:59 DISSOLUTION RATE FOR COHABITING SAME-SEX COUPLES?
10:48:05 A. AS A CATEGORY?
10:48:06 Q. YES.
10:48:09 A. NO. I CAN TELL YOU ABOUT SPECIFIC
10:48:13 STUDIES, BUT I CANNOT GIVE YOU A NATIONALLY
10:48:18 REPRESENTATIVE STATISTIC.
10:48:18 Q. CAN YOU QUANTIFY THE RELATIONSHIP
10:48:22 DISSOLUTION RATES FOR MARRIED HETEROSEXUAL
10:48:25 COUPLES?
10:48:25 A. FOR MARRIED HETEROSEXUAL COUPLES,
10:48:28 WE HAVE GOVERNMENT STATISTICS ON RATES OF
10:48:30 DISSOLUTION.
10:48:31 Q. LET'S SKIP DOWN TO SECTION 3 ON
10:48:43 COHABITING HETEROSEXUAL COUPLES.
10:48:59 THE THIRD SENTENCE SAYS -- OF THE
10:49:01 FIRST PARAGRAPH THERE --
10:49:02 A. UH-HUH.
10:49:03 Q. -- SAYS:
10:49:04 "SOME ARE EDUCATED YOUNG
10:49:05 PEOPLE IN DATING RELATIONSHIPS

STATE OF CALIFORNIA)
)SS
COUNTY OF LOS ANGELES)

DEPONENT'S DECLARATION

I CERTIFY UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED AT _____ ON _____.

_____
(SIGNATURE OF DEPONENT)

STATE OF CALIFORNIA)
)SS
COUNTY OF LOS ANGELES)

I, KRISTI CARUTHERS, CERTIFIED SHORTHAND REPORTER, CERTIFICATE NUMBER 10560, FOR THE STATE OF CALIFORNIA, HEREBY CERTIFY:

THE FOREGOING PROCEEDINGS WERE TAKEN BEFORE ME AT THE TIME AND PLACE THEREIN SET FORTH, AT WHICH TIME THE DEPONENT WAS PLACED UNDER OATH BY ME;

THE TESTIMONY OF THE DEPONENT AND ALL OBJECTIONS MADE AT THE TIME OF THE EXAMINATION WERE RECORDED STENOGRAPHICALLY BY ME AND WERE THEREAFTER TRANSCRIBED;

THE FOREGOING TRANSCRIPT IS A TRUE AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES SO TAKEN;

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR NOR RELATED TO ANY PARTY TO SAID ACTION, NOR IN ANY WAY INTERESTED IN THE OUTCOME THEREOF.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME THIS 14TH DAY OF OCTOBER, 2009.

17:14:31

Kristi Caruthers

Exhibit 146

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION
****
SHEILA COLE, et al.,
Plaintiffs,
-vs-
Case No.
CV2008-14284
THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, et al.,
Defendants.
FAMILY COUNCIL ACTION COMMITTEE, et al.,
Intervenors.
****

DEPOSITION OF WILLIAM BRADFORD WILCOX, Ph.D.
8:30 a.m. to 4:25 p.m.
October 23, 2009
Charlottesville, Virginia

ORIGINAL

REPORTED BY: Kimberly A. Adderley, RMR

Deposition of WILLIAM BRADFORD WILCOX, Ph.D., taken and transcribed on behalf of the Plaintiffs, by and before Kimberly A. Adderley, RMR, Notary Public in and for the Commonwealth of Virginia at large, pursuant to the Arkansas Rules of Civil Procedure, and by Notice to Take Deposition; commencing at 8:38 a.m., October 23, 2009, at McGuire Woods, 310 Fourth Street, N.E., Suite 300, Charlottesville, Virginia.

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I N D E X

WITNESS:

WILLIAM BRADFORD WILCOX, Ph.D.

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(Exhibits retained by Ms. Friedman)

* * * * *

(8:38 a.m., October 23, 2009)

WILLIAM BRADFORD WILCOX, Ph.D.,
was sworn and testified as follows:

E X A M I N A T I O N

BY MS. FRIEDMAN:

Q. Can you state your name for the record.

A. Sure. It's Brad Wilcox.

And also, just to let you know, I'm probably going to be standing and sitting. I have a bad back, so that's why I do that.

Q. Oh, yeah. I totally understand.

Why are you here today?

A. I'm here to testify in regards to Act 1 in Arkansas.

Q. And I'm sure that your lawyers have gone over some ground rules, but I just want to set a few for you and me.

A. Okay.

Q. When I ask a question, I would like for you to wait until I finish asking the question and then answer back.

A. Okay.

Q. Are you aware of any research or evidence right now that shows the majority of cohabiting couples, the kids of cohabiting couples are maladjusted?

A. I'm not aware of any current evidence that would suggest that on one outcome the majority of kids in cohabiting households are maladjusted.

Q. Okay.

A. Like I said, we would have to look. No one has looked at a composite measure that would capture a lot of outcomes.

Q. Right. Do you know if a majority of cohabiting heterosexuals engage in sexual infidelity?

A. No. It depends on the study. One study found, for instance, it was 4 percent of heterosexual marriages versus 20 percent of cohabiting heterosexual relationships.

Q. Do a majority of cohabiters engage in domestic violence?

A. No. Once again, it depends on the study. It's between 2 and 3 times, usually in the studies. But, it would be a large minority of cohabiting couples who are engaging, but not the

majority.
Q. What study says a large minority of cohabiting couples engage in domestic violence?
A. Well, I'm thinking it's around -- my guess, if my memory serves correctly, is one by Catherine Kenney and Sara McLanahan, like in the neighborhood of 30 percent, give or take.
Q. You think Sara McLanahan would agree with your views on Act 1?
MR. BABIONE: Object to the form.
THE WITNESS: I have no idea.
MR. BABIONE: Calls for speculation.
MS. FRIEDMAN: He's an expert, he can speculate.
MR. BABIONE: He's not speculating what's in the mind of somebody else.
MR. CORDI: I will join that objection.
BY MS. FRIEDMAN:
Q. You have worked with Sara; right?
A. I have, yes.
Q. You know her views on research pretty well?
A. I think so, yeah.
Q. Do you have any idea of what her -- whether she would agree with you on Act 1?

response.

Q. And is it the same for testamentary witnesses, if the State of California came to you for advice today and said we would like to do something like Act 1, would you have an override that allowed parents to direct in their testamentary witness where their child should be placed?

Do you have a view on whether that sort of exception would be in the best interest of children?

MR. CORDI: Object to the form.

THE WITNESS: So, are you saying if someone was creating a will?

BY MS. FRIEDMAN:

Q. Uh-huh.

A. And they could specify in the will who they would like their kids to go to?

Q. And the person they specify is sexually cohabiting.

MR. CORDI: Object to the form.

THE WITNESS: I would defer in that case to the parent's expressed desire in the will.

* * * * *

BY MS. FRIEDMAN:

Q. Why would you do that?

A. Because I also believe that, on average, that parents are more likely to have the best sense of interest of the child than other people are.

Q. How does -- if one of the effects -- I will use a hypothetical, of Act 1 is that certain kids see their stay in state care, or stay in state care longer, how does that stranding of kids in state care get worked into your analysis?

A. No. I think it's a very important concern that we want to try to do all that we can to move kids from institutional care into a home environment that's going to be providing them with the love and the affection and support that they need.

So, I think that's an important consideration. But, I think it's also important to remember that if you -- kind of in a sense of moving them from -- I always get these little sayings wrong, if you move them from the hot bin to whatever, the griddle on the stove --

Q. Got it.

A. -- that's probably not in their best

MR. BABIONE: Because I think it's possible -- and we probably should have talked about this off record first, but I think it's possible for somebody to ask a witness, perhaps one of the expert witnesses, about an article that they wrote, or if they were quoted in a paper, and I wouldn't necessarily want to stipulate to the authenticity of something like that.

MS. FRIEDMAN: That's fair. This is, for now, the ones that were referenced in the reports that have been filed. And the parties can work cooperatively on others if they come up.

MR. BABIONE: Okay.

MR. CORDI: Thank you.

MS. FRIEDMAN: All right.

BY MS. FRIEDMAN:

Q. Dr. Wilcox, I think we are close to the end. I'm going to hop around a little bit because I think some of these are bits that I may have left off and may not. But I'm trying not no cover old ground.

I had asked you a flavor of this question a couple times. I'm going to ask it in a

slightly different way. Is it your view that a majority of cohabiters abuse children?

A. No, it's not my view.

Q. Is there a research or consensus in your field that a majority of cohabiters abuse children?

A. Well, I think there is a -- that there are a set of findings that indicate that cohabiters are more likely to abuse kids. But, there's not a consensus yet on that score.

Q. And for this set of findings where they show it's more likely, is it a majority of the cohabiters that are, in those studies, found to abuse children?

A. No.

Q. Okay. Skipping to a new topic. We talked about single moms, and I think you had referenced something, stably single I think is what you said?

A. Uh-huh.

Q. What do you mean by stably single?

A. Well, I mentioned to you before that Andrew Cherlin's new book out called The Marriage-Go-Round, which I just recently read and reviewed, and in that book he makes the argument,

COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

I, Kimberly A. Adderley, RMR, Notary Public in and for the Commonwealth of Virginia at Large, and whose commission expires October 31, 2011, do certify that the aforementioned appeared before me, was sworn by me, and was thereupon examined by counsel; and that the foregoing is a true, correct, and full transcript of the testimony adduced.

I further certify that I am neither related to nor associated with any counsel or party to this proceeding, nor otherwise interested in the event thereof.

Given under my hand and notarial seal at Charlottesville, Virginia, this 5th day of November, 2009.

Kimberly A. Adderley

Kimberly A. Adderley, RMR
Notary Registration No. 273323
Commonwealth of Virginia at Large

ORIGINAL

Exhibit 147

IN THE CIRCUIT COURT OF PULASKI COUNTY
2nd DIVISION

SHEILA COLE, et al.,	:	
Plaintiffs,	:	
v.	:	
THE ARKANSAS DEPARTMENT OF HUMAN SERVICES, et al.,	:	NO. CV 2008-14284
Defendants	:	
and	:	
FAMILY COUNCIL ACTION COMMITTEE, et al.,	:	
Intervener-Defendants.	:	

PLAINTIFFS' RESPONSE TO STATE DEFENDANTS' INTERROGATORIES REGARDING DR. MICHAEL E. LAMB

Pursuant to Rules 26 and 33 of the Arkansas Rules of Civil Procedure, Plaintiffs hereby respond as follows to Defendants' Interrogatories Regarding Dr. Michael E. Lamb (the "Interrogatories").

Interrogatory No. 1: State the basis for, and identify any document, that supports the following opinion included in the Expert Report:

> There is nothing about the marital status, sex, or sexual orientation of a parent determining that parent's capacity to be a good foster or adoptive parent or affecting a child's healthy development.

Response to Interrogatory No. 1:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the

interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the following publications as representative of the documents responsive to this request:

> Arranz Freijo, E., Bellido, A., Manzano, A., Martin, J. L., & Artetsxe, F. (2008). Assessment of new family structures as childrearing contexts which foster children's psychological adjustment. Final Report. San Sebastian: University of the Basque Country.
>
> Averett, P., Nalavany, B., & Ryan, S. (2009). An evaluation of gay/lesbian and heterosexual adoption. *Adoption Quarterly, 12*, 129-151.
>
> Baetens, P., & Brewaeys, A. (2001). Lesbian couples requesting DI, an update of the knowledge with regard to lesbian mother families. *Human Reproduction Update, 7(5),* 512-519.
>
> Bigner, J. J., & Jacobsen, R. B. (1989). Parenting behaviors of homosexual and heterosexual fathers. In F. W. Bozett (Ed.), *Homosexuality and the family* (pp. 173-186). New York: Harrington Park Press.
>
> Bigner, J. J., & Jacobsen, R. B. (1992). Adult responses to child behavior and attitudes toward fathering: Gay and nongay fathers. *Journal of Homosexuality, 23*, 99-112.
>
> Bos, H. (2004). *Parenting in planned lesbian families.* Amsterdam: Vossiuspers UvA.
>
> Bos, H. (2007). Child adjustment and parenting in planned lesbian-parent families. *American Journal of Orthopsychiatry*, 77, 38-48.
>
> Bos, H. M. W., van Balen, F., & van den Boom, D. C. (2007). Child adjustment

and parenting in planned lesbian-parent families. *American Journal of Orthopsychiatry*, 77, 38-48.

Brewaeys, A., & Van Hall, E. V. (1997). Lesbian motherhood: The impact on child development and family functioning. *Journal of Psychosomatic Obstetrics and Gynecology*, 18, 1-16.

Brewaeys, A., Ponjaert, 1., Van Hall, E.V., & Golombok, S. (1997). Donor insemination: Child development and family functioning in lesbian mother families. *Human Reproduction*, 12, 1349-1359.

Brodzinsky, D., & Palacios, J. (Eds.) (2005). *Psychological issues in adoption: research and practice.* New York: Praeger.

Brown, S. L. (2004). Family structure and child well-being: the significance of parental cohabitation. *Journal of Marriage and Family*, 66, 351-367.

Buehler, C., Rhodes, K. W., Orme, J. G., & Cuddeback, G. (2006). The potential for successful family foster care: Conceptualizing competency domains. *Child Welfare*, 85, 523-558.

Chan, R. W., Brooks, R. C., Raboy, B., & Patterson, C. J. (1998). Division of labor among lesbian and heterosexual parents: Associations with children's adjustment. *Journal of Family Psychology*, 12,402-419.

Chan, R. W., Raboy, B., & Patterson, C. J. (1998). Psychosocial adjustment among children conceived via donor insemination by lesbian and heterosexual mothers. *Child Development*, 69,443-457.

Coakley, T. M., Cuddeback, G., Buehler, C., & Cox, M. E. (2007). Kinship foster parents' perceptions of familial and parental factors that promote or inhibit successful fostering. *Children and Youth Services Review*, 29, 92-109.

Cuddeback, G. S., Buehler, C., Orme, J. G., & Le Prohn, N. S. (2007). Measuring foster parent potential: Casey Foster Applicant Inventory: Worker Version. *Research on Social Work Practice*, 17, 93-109.

Damon, W., & Lerner, R. (Eds.) (2006). *Handbook of Child Psychology.* Hoboken, NJ: Wiley.

Erich, S., Kanenberg, H., Case, K., Allen, T., & Bogdanos, T. (2009). An empirical analysis of factors affecting adolescent attachment in adoptive families with homosexual and straight parents. *Children and Youth Services Review*, 31, 398-404.

Erich, S., Leung, P., & Kindle, P. (2005). A comparative analysis of adoptive family functioning with lesbian/gay and heterosexual parents and their children.

Journal of GLBT Family Studies, 1, 43-60

Farr, R. and Patterson, C. Adoptive Families led by Gay Fathers: Family Processes and Outcomes, presented to the Society for Research in Child Development, April 4, 2009.

Golombok, S. & Badger, S. (In press). Children raised in fatherless families from infancy: A follow-up of children of lesbian and single heterosexual mothers in early adulthood. *Human Reproduction.*

Golombok, S. & Tasker, F. (1996). Do parents influence the sexual orientation of their children? Findings from a longitudinal study of lesbian families. *Developmental Psychology*, 32, 3-11.

Golombok, S. (2000). *Parenting: What really counts*. Psychology Press.

Golombok, S., Perry, B., Burston, A., Murray, C., Mooney-Somers, J., Stevens, M. & Golding, J. (2003). Children with lesbian parents: A community study. *Developmental Psychology*, 39, 20-33.

Golombok, S., Spencer, A. & Rutter, M. (1983). Children in lesbian and single parent households: Psychosexual and psychiatric appraisal. *Journal of Child Psychology & Psychiatry*, 24, 551-572.

Golombok, S., Tasker, F. & Murray, C. (1997). Children raised in fatherless families from infancy: Family relationships and the socioemotional development of children of lesbian and single heterosexual mothers. *Journal of Child Psychology & Psychiatry,* 38, 783792.

Kiernan, K. E., & Mensah, F. K. (In press). Unmarried parenthood, family trajectories, parent and child well being. In K. Hansen, H. Joshi, & S. Dex (Eds.), *Children of the 21st Century: From birth to age 5*. London: Policy Press.

Kurdek, L.A. (2004). Are gay and lesbian cohabiting families really different from heterosexual married couples? *Journal of Marriage and Family*, 66, 880-900.

Kurdek, L.A. (2005). Differences between partners from heterosexual, gay and lesbian cohabiting couples. *Journal of Marriage and Family*, 68, 1-20.

Kurdek, L.A. (2006). What do we know about gay and lesbian couples? *Current Directions in Psychological Science*, 14, 251-254.

Lamb, M. E. (Ed) (2004). *The role of the father in child development* (4th ed). Hoboken, N.J.: Wiley.

Lamb, M. E. (Ed.) (1999). *Parenting and child development in non-traditional*

families. Mahwah, NJ: Erlbaum.

MacCallum, F. & Golombok, S. (2004). Children raised in fatherless families from infancy: A follow-up of children of lesbian and single heterosexual mothers at early adolescence. *Journal of Child Psychology and Psychiatry*, 45, 1407-1419.

Manning, W. (2003). Cohabitation and child well-being. In D. J. Besharov (Ed.), *Family and child well-being after welfare reform* (pp. 113-128). New Brunswick, N.J.: Transaction Publishers.

Orme, J. G., Buehler, C., McSurdy, M., Rhodes, K. W., Cox, M. E., & Patterson, D. A. (2004). Parental and familial characteristics of family foster care applicants. *Children and Youth Services Review*, 26, 307-329.

Orme, J. G., Buehler, C., McSurdy, M., Rhodes, K. W., Cox, M. W. (2003). The Foster Parent Potential Scale. *Research on Social Work Practice*, 13, 181-207.

Orme, J. G., Buehler, C., Rhodes, K. W., Cox, M. E., McSurdy, M., & Cuddeback, G. (2006) Parental and familial characteristics used in the selection of foster families. *Children and Youth Services Review*, 28, 396-421.

Orme, J. G., Cuddeback, G. S., Buehler, C., Cox, M. E., & Le Prohn, N. S. (2007) Measuring foster parent potential: Casey Foster Applicant Inventory: Applicant Version. *Research on Social Work Practice*, 17, 77-92.

Orme, J., Cherry, D., & Rhodes, K. W. (2006). The Help with Fostering Inventory. *Children and Youth Services Review*, 28, 1293-1311.

Patterson, C. (2004). Gay fathers. In M. E. Lamb (Ed.), *The role of the father in child development* (4th ed.). Hoboken, NJ: Wiley.

Patterson, C. J. (1995). Families of the lesbian baby boom: Parents' division of labor and children's adjustment. *Developmental Psychology*, 31, 115-123.

Patterson, C. J. (1995). Sexual orientation and human development: An overview. *Developmental Psychology*, 31, 3-11.

Patterson, C. J. (1996). Lesbian mothers and their children: Findings from the Bay Area Families Study. In J. Laird & R. J. Green (Eds.), *Lesbians and Gays in Couples and Families: A Handbook for Therapists* (pp. 420-437). San Francisco: Jossey-Bass.

Patterson, C. J. (1997). Children of lesbian and gay parents. In T. Ollendick & R. Prinz (Eds.), *Advances in Clinical Child Psychology*, Volume 19 (pp. 235-282). New York: Plenum Press.

Patterson, C. J. (2000). Sexual orientation and family life: A decade review.

Journal of Marriage and the Family, 62, 1052-1069.

Patterson, C. J. (2001). Families of the lesbian baby boom: Maternal mental health and child adjustment. *Journal of Gay and Lesbian Psychotherapy*, 4, 91-107.

Patterson, C. J. (2006). Children of lesbian and gay parents. *Current Directions in Psychological Science*, 15, 241-244.

Patterson, C. J., & Redding, R. (1996). Lesbian and gay families with children: Public policy implications of social science research. *Journal of Social Issues*, 52, 29-50.

Patterson, C. J., and Chan, R. W. (1998). Families headed by lesbian and gay parents. In M. E. Lamb (Ed.), *Nontraditional families: Parenting and child development* (2d ed.). Hillsdale, N. J.: Erlbaum.

Patterson, C. J., Fulcher, M., & Wainright, J. (2002). Children of lesbian and gay parents: Research, law, and policy. In B. L. Bottoms, M. B. Kovera, and B. D. McAuliff (Eds.), *Children, social science and the law* (pp. 176-199). New York: Cambridge University Press.

Patterson, C. J., Hurt, S., & Mason, C. D. (1998). Families of the lesbian baby boom: Children's contacts with grandparents and other adults. *American Journal of Orthopsychiatry, 68,* 390-399.

Rhodes, K. W., Orme, J. G., Cox, M. E., & Buehler, C. (2003). Foster family resources, psychosocial functioning, and retention. *Social Work Research*, 27, 135-150.

Risman, B. J. & Park, K. (1988). Just the two of us: Parent-child relationships in single-parent homes. *Journal of Marriage and the Family, 50*, 1049-1062.

Risman, B. J. (1987). Intimate relationships from a microstructural perspective: Men who mother. *Gender and Society*, 1, 6-32.

Rivers, I., Poteat, V. P. , & Noret, N. (2008). Victimization, social support, and psychosocial functioning among children of same-sex and opposite-sex couples in the United Kingdom. *Developmental Psychology. 44,* 127-134.

Smith, P., & Hart, C. (Eds.) (2002). *Blackwell handbook of childhood social development.* Blackwell.

Tan, T. X., & Baggerly, J. (2009). Behavioral adjustment of adopted Chinese girls in single-mother, lesbian-couple, and heterosexual-couple households. *Adoption Quarterly, 12*, 171-186.

Tasker, F. & Golombok, S. (1997) *Growing up in a lesbian family.* Guilford

Press, New York.

Tasker, F. (2005). Lesbian mothers, gay fathers, and their children: A review. *Developmental & Behavioral Pediatrics*, 26, 224-40.

Vanfraussen, K., Kristoffersen, I., & Brewaeys, A. (2003). Family functioning in lesbian families created by donor insemination. *American Journal of Orthopsychiatry*, 73, 7890.

Vanfraussen, K., Ponjaert-Kristoffersen, I., & Brewaeys, A. (2002). What does it mean for youngsters to grow up in a lesbian family created by means of donor insemination? *Journal of Reproductive & Infant Psychology*, 20, 237-252.

Wainright, J. (2008). Peer relations among adolescents with female same-sex parents. *Developmental Psychology,* 44, 117-126.

Wainright, J. L., & Patterson, C. J. (2008). Peer relations among adolescents with female same sex parents. *Developmental Psychology*, 44, 117-126.

Wainright, J. L., Russell, S. T., & Patterson, C. J. (2004). Psychosocial adjustment, school outcomes, and romantic relationships of adolescents with same-sex parents. *Child Development*, 75, 1886-1898.

Wainright, J.L. & Patterson, C.J. (2006). Delinquency, victimization, and substance use among adolescents with female same-sex parents. *Journal of Family Psychology*, 20, 526-530.

Weiner. (Ed.) (2003). *Handbook of Psychology.* Hoboken, NJ: Wiley.

Interrogatory No. 2: State the basis for, and identify any document, that supports the following opinion included in the Expert Report:

> Children raised by same-sex couples – including adopted and foster children – are as likely to be well-adjusted as children raised by married, heterosexual couples and are at no greater risk of abuse.

Response to Interrogatory No. 2:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition.

These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the publications provided in response to Interrogatory No. 1 as representative of the documents responsive to this request.

Interrogatory No. 3: State the basis for, and identify any document, that supports the following opinion included in the Expert Report:

> As a result of this significant body of research, psychologists have reached a consensus on the factors that predict healthy child adjustment:
>
> (a) the quality of the child's relationship with the parent who is primarily responsible for his or her care;
>
> (b) the quality of the child's relationship with a second parent figure, if the child has two important parental figures;
>
> (c) the quality of the adults' intimate relationships, with conflict predicting maladjustment, and harmonious relationships between adults predicting healthy adjustment; and
>
> (d) the availability of adequate economic and social resources, with poverty and isolation predicting maladjustment and adequate resources predicting better adjustment.

Response to Interrogatory No. 3:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these

interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the following publications as representative of the documents responsive to this request:

> Damon, W., & Lerner, R. (Eds.) (2006). *Handbook of Child Psychology.* Hoboken, NJ: Wiley.
>
> Golombok, S. (2000). *Parenting: What really counts.* Psychology Press.
>
> Lamb, M.E. (Ed.)(2004). *The role of the father in child development* (4th ed.). Hoboken, NJ: Wiley.
>
> Lamb, M.E. (Ed.) (1999). *Parenting and child development in non-traditional families.* Hillsdale, N. J.: Erlbaum.
>
> Smith, P., & Hart, C. (Eds.) (2002). *Blackwell handbook of childhood social development.* Blackwell.
>
> Weiner. (Ed.) (2003). *Handbook of Psychology.* Hoboken, NJ: Wiley.
>
> *See also* response to Interrogatory No. 1.

Interrogatory No. 4: State the basis for, and identify any document, that supports the following opinion included in the Expert Report:

> Research has demonstrated that the correlates or predictors of children's adjustment (listed above) hold true regardless of whether children are raised in traditional family settings or in nontraditional families.

Response to Interrogatory No. 4:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the following publications as representative of the documents responsive to this request:

> Golombok, S., Cook, R., Bish, A., & Murray, C. (1995). Families created by the new reproductive technologies: Quality of parenting and social and emotional development of the children. *Child Development, 64*, 285-298.
>
> Golombok, S., MacCallum, F., Goodman, E., & Rutter, M. (2002). Families with children conceived by donor insemination: A follow-up at age 12. *Child Development, 73*, 952-968.
>
> Owen, L., & Golombok, S. (2009). Families created by assisted reproduction: Parent-child relationships in late adolescence. *Journal of Adolescence, 32*, 835-848.

Interrogatory No. 5: State the basis for, and identify any document, that supports the following opinion included in the Expert Report:

> When you compare outcomes of children raised by heterosexual parents in different family structures, children who live with both of their married

biological parents have better outcomes on average than children raised by single parents and cohabiting parents.

Response to Interrogatory No. 5:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the following publications as representative of the documents responsive to this request:

Amato, P. R., & Sobolewski, J. M. (2004). The effects of divorce on fathers and children: Nonresidential fathers and stepfathers. In M. E. (Ed.), *The role of the father in child development* (4th edition; pp. 341-367). New York: Wiley.

Brown, S. L. (2004). Family structure and child well-being: the significance of parental cohabitation. *Journal of Marriage and Family, 66,* 351-367.

McLanahan, S. & Carlson, M. S (2004). Fathers in fragile families. In M. E. (Ed.), *The role of the father in child development* (4th edition; pp. 368-396). New York: Wiley.

Interrogatory No. 6: State the basis for, and identify any document, that supports the following opinion included in the Expert Report:

> Outcomes for children raised by cohabiting heterosexual parents are similar to or better than those of children raised in single parent families.

Response to Interrogatory No. 6:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the following publications as representative of the documents responsive to this request:

> Brown, S. L. (2004). Family structure and child well-being: The significance of parental cohabitation. *Journal of Marriage and Family*, 66, 351-367.
>
> *Child Maltreatment: 2007*. Washington, D.C.: Administration for Children and Families (Children's Bureau), United States Department of Health and Human Services.
>
> Hao, L. & Xie, G. (2002). The complexity and endogeneity of family structure in explaining children's misbehavior. *Social Science Research, 31*, 1-28.
>
> Kiernan, K. E., & Mensah, F. K. (In press). Unmarried parenthood, family trajectories, parent and child well being. In K. Hansen, H. Joshi, & S. Dex (Eds.),

Children of the 21st Century: From birth to age 5. London: Policy Press.

Raley, R. K., Frisco, M. L., & Wildsmith, E. (2005). Maternal cohabitation and educational success. *Sociology of Education, 78*, 144-164.

Interrogatory No. 7: State the basis for, and identify any document, that supports the following opinion included in the Expert Report:

> Children's outcomes are likely to be better when cohabiting parents actively seek to become parents together, including by adoption or fostering.

Response to Interrogatory No. 7:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the following as responsive to this request:

The fact that a couple seeks to bring a child into the family through adoption suggests that they have a committed relationship. And couples seeking to adopt are couples who have strong motivation to parent. Both of these factors are correlated with good child outcomes. See

responses to interrogatories nos. 3 and 15. In addition, the literature on step-families consistently shows that children have better outcomes when living with two parents who formed the family together than when living in step-families where one adult who is not their parent subsequently joined the family.. See, e.g., Hetherington, E. M. & Kelly, J. (2002). For better or for worse. New York: Norton; Amato, P. R., & Sobolewski, J. M. (2004). The effects of divorce on fathers and children: Nonresidential fathers and stepfathers. In M. E. (Ed.), The role of the father in child development (4th edition; pp. 341- 367). New York: Wiley.

Interrogatory No. 8: State the basis for, and identify any document, that supports the following opinion included in the Expert Report:

> Because of this robust, consistent body of research, there is consensus within the scientific community that being raised by same-sex couples has no adverse effect on children's adjustment.

Response to Interrogatory No. 8:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his

career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the following publications as representative of the documents responsive to this request:

> American Academy of Pediatrics, Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents, PEDIATRICS Vol. 109 No. 2 February 2002, pp. 341-344. Available at http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/341.
>
> American Psychiatric Association, Adoption and Co-Parenting of Children by Same-Sex Couples, Position Statement. Approved by the Board of Trustees and the Assembly, November 2002. Available at http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200214.aspx
>
> American Psychological Association, APA Policy Statement: Sexual Orientation, Parents, & Children. Adopted by the APA Council of Representatives July 28 and 30, 2004. Available at http://www.apa.org/pi/lgbc/policy/parents.html.
>
> Child Welfare League of America, Position Statement on Parenting of Children by Lesbian, Gay and Bisexual Adults. Available at http://www.cwla.org/programs/culture/glbtqposition.htm
>
> Golombok, S. (2008) Lesbian and gay parenting: What really matters for the psychological wellbeing of the child? In Lord Justice Thorpe & S. Singer (Eds) *Integrating diversity*. Bristol: Jordans Publishing.
>
> North American Council on Adoptable Children, Position Statement on Gay and Lesbian Foster Care and Adoption. Available at http://www.nacac.org/policy/positions.html#eliminating
>
> Tasker, F. (2005) Lesbian mothers, gay fathers and their children: A review. *Journal of Developmental & Behavioral Pediatrics, 26*, 224-240

Interrogatory No. 9: State the basis for, and identify any document, that supports the following opinion included in the Expert Report:

> Research shows that children raised by cohabiting same-sex couples are no more likely to be abused (physically or sexually) than children raised by married heterosexual parents.

Response to Interrogatory No. 9:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these

interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the following publications as representative of the documents responsive to this request:

> American Psychological Association, APA Policy Statement: Sexual Orientation, Parents, & Children. Adopted by the APA Council of Representatives July 28 and 30, 2004. Available at http://www.apa.org/pi/lgbc/policy/parents.html.
>
> Child Welfare Information Gateway (2004). *Risk and protective factors for child abuse and neglect.* The Children's Bureau, Administration for Children and Families, U.S. Department of Health and Human Services, Washington, D.C.
>
> Coulton, C.J., Crampton, D.S., Irwin, M., Spilsbury, J.C. & Korbin, J.E. (2007). How neighborhoods influence child maltreatment: A review of the literature and alternative pathways. *Child Abuse & Neglect, 31*, 1117-1142.
>
> Coulton, C.J., Korbin, J.E., & Su, M. (1999). Neighborhoods and child maltreatment: A multi-level study. *Child Abuse & Neglect, 11*, 1019-1040.
>
> Finkelhor, D., Ormrod, R., Turner, H., & Hamby, S.L. (2005). The victimization of children and youth: A comprehensive, national survey. *Child Maltreatment, 10*, 5-25.
>
> Freisthler, B., Merritt, D.H., & LaScala, E.A. (2006). Understanding the ecology of child maltreatment: a review of the literature and directions for future research. *Child Maltreatment, 11*, 263-280.

Freund, K., Watson, R., & Dickey, R. (1989). Heterosexuality, homosexuality, and erotic age preference. *Journal of Sex Research 26*, 107-117.

Garbarino, J. & Crouter, A. (1978). Defining the community context for parent-child relations: The correlates of child maltreatment. *Child Development, 49*, 604-616.

Garbarino, J., & Sherman, D. (1980). High-risk neighborhoods and high-risk families: The human ecology of child maltreatment. *Child Development, 51*, 188-198.

Groth, A.N. & Birnbaum, H. J. (1978). Adult sexual orientation and attraction to underage persons. *Archives of Sexual Behavior* 7, 175-181.

Hussey, J.M., Chang, J.J., & Kotch, J.B. (2006). Child maltreatment in the United States: Prevalence, risk factors, and adolescent health consequences. *Pediatrics*, 118, 933-942.

Jenny, C., Roesler, T. A., & Poyer, K. A. (1994). Are children at risk for sexual abuse by homosexuals? *Pediatrics, 94*, 41- 44.

Molnar, B. E., Buka, S. L., Brennan, R. T., Holton, J. K., & Earls, F. (2003). A multilevel study of neighborhoods and parent-to-child physical aggression: Results from the project on human development in Chicago neighborhoods. *Child Maltreatment*, 8, 84-97.

Sedlak, A., J., & Broadhurst, D. (1996). *Third National Incidence Study of Child Abuse and Neglect.* Washington, DC: Dept of Health and Human Services.

Sidebotham, P.D., & ALSPAC Study Team (2001). Child maltreatment in the "Children of the nineties": A longitudinal study of parental risk factors. *Child Abuse & Neglect*, 25, 1177-1200.

Interrogatory No. 10: State the basis for, and identify any document, that supports the following opinion included in the Expert Report:

> Heterosexual couples in cohabiting relationships who have adequate individual, social, and financial resources are no more likely than married heterosexual parents to abuse their children (physically or sexually).

Response to Interrogatory No. 10:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these

interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the documents provided in response to Interrogatory No. 9 as responsive to this request.

Interrogatory No. 11: State the basis for, and identify any document, that supports the following opinion included in the Expert Report:

> Child maltreatment is no more common among cohabiting heterosexual families than single parent families.

Response to Interrogatory No. 11:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the following publication as representative of the documents responsive to this request:

> *Child Maltreatment: 2007.* Washington, D.C.: Administration for Children and Families (Children's Bureau), United States Department of Health and Human Services.

Interrogatory No. 12: State the basis for, and identify any document, that supports the following opinion included in the Expert Report:

> The blanket exclusion of cohabiting heterosexual and same-sex couples from consideration as foster or adoptive parents undermines rather than promotes children's well-being.

Response to Interrogatory No. 12:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would

be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs state that excerpted passage from his report is a conclusion that is based on the entirety of his report but is specifically supported by the sources cited hereinafter.

The exclusion undermines the well being of children by removing qualified parents from the pool of available adoptive and foster parents (see response to Interrogatory No. 1), which can result in some children being denied the placement that best meets their needs or in some cases any family placement at all. Research demonstrates the poor outcomes of children who remain in the foster care system as opposed to adoptive families and of children who are placed in inappropriate adoptive or foster placements. See, e.g.:

Children, families and foster care. *The Future of Children,* 2004, *14*(1).

Cook, R. J. (1991). *A national evaluation of Title IV-E foster care independent living programs for youth* (Phase 2, Final Report, Vols. 1–2). Rockville, MD: Westat, Inc.

Cook, R. J. (1994). Are we helping foster care youth prepare for their future? *Child and Youth Services Review*, 16, 213–229.

Courtney M. E., & Piliavin, I. (1998). *Foster youth transitions to adulthood: Outcomes 12 to 18 months after leaving out-of-home care.* Madison, WI: University of Wisconsin, School of Social Work and Institute for Research and Poverty.

Jones, M. A., & Moses, B. (1984). *West Virginia's former foster children: Their experiences in care and their lives as young adults*. New York: Child Welfare League of America, Inc.

Pecora, P. J., Kessler, R. C., Williams, J., Downs, A. C., English, D. J., White, J., & O'Brien, K. (2010). *What works in foster care? Key components of success from the northwest foster care alumni study.* New York: Oxford University Press.

Reilly, T. (2003) Transition for care: Status and outcomes of youth who age out of foster care. *Child Welfare*, 82, 727–748.

Scannapieco, M., Connell-Carrick, K., & Painter, K. (2007.) In their own words: Challenges facing youth aging out of foster care. *Child & Adolescent Social Work Journal*, 24, 423–435.

Vacca, J. S. (2008). Foster children need more help after they reach the age of eighteen. *Children and Youth Services Review, 30,* 485-492.

The exclusion may also result in some children being separated from adult caregivers to whom they have formed attachments. The research shows the significant harms to children that can result from severed attachments to parent figures. See, e.g.:

Brodzinsky, D., & Palacios, J. (Eds.) (2005*). Psychological issues in adoption: research and practice.* New York: Praeger.

Cassidy, J., & Shaver, P. (Eds). (2008). *Handbook of attachment (second edition).* New York: Guilford Press.

Prior, V., & Glaser, D. (2006). *Understanding attachment and attachment disorders: Theory, evidence and practice.* London: Jessica Kingsley Publishers.

Professional associations dedicated to children's health and welfare recognize that such blanket exclusions undermine children's interests. See, e.g.:

American Psychological Association, APA Policy Statement: Sexual Orientation, Parents, & Children. Adopted by the APA Council of Representatives July 28 and 30, 2004. Available at http://www.apa.org/pi/lgbc/policy/parents.html.

North American Council on Adoptable Children, Position Statement on Gay and Lesbian Foster Care and Adoption. Available at http://www.nacac.org/policy/positions.html#eliminating

Social Work Speaks, Sixth Edition, National Association of Social Workers, Policy Statements, Foster Care and Adoption. 2003 by NASW Press.

Interrogatory No. 13: State the basis for, and identify any document, that supports the following opinion included in the Rebuttal Expert Report:

Decades of research, amply substantiated by the sad experiences of agencies around the world, have shown that children tend to do very poorly in state care, and that prompt and long-lasting placement in the care

of loving committed parents offers them the best hope of overcoming the effects of traumatic prior experiences.

Response to Interrogatory No. 13:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the documents provided in response to Interrogatory No. 12 as responsive to this request.

Interrogatory No. 14: State the basis for, and identify any document, that supports the following opinion included in the Rebuttal Expert Report:

> Cohabitors who seek to adopt or foster together would not be expected to have the poorer outcomes sometimes associated with step-families.

Response to Interrogatory No. 14:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the

interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the documents provided in response to Interrogatory No. 7 as responsive to this request.

Interrogatory No. 15: State the basis for, and identify any document, that supports the following opinion included in the Rebuttal Expert Report:

> Moreover, as one might expect, adults who seek to adopt children are on average at least as child – oriented and committed as natural parents in similar socioeconomic circumstances.

Response to Interrogatory No. 15:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience

as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the following publications as representative of the documents responsive to this request:

> Golombok, S., Cook, R., Bish, A,. & Murray, C. (1995). Families created by the new reproductive technologies: Quality of parenting and social and emotional development of the children. *Child Development, 64*, 285-298.
>
> Golombok, S., MacCallum, F., Goodman, E., & Rutter, M. (2002). Families with children conceived by donor insemination: A follow-up at age 12. *Child Development, 73*, 952-968.
>
> Owen, L., & Golombok, S. (2009). Families created by assisted reproduction: Parent-child relationships in late adolescence. *Journal of Adolescence, 32*, 835-848.

Interrogatory No. 16: State the basis for, and identify any document, that supports the following opinion included in the Rebuttal Expert Report:

> Children are not randomly assigned by agency personnel to families, cohabiting, married or single, without appropriate assessment.

Response to Interrogatory No. 16:

Plaintiffs object on the ground that the State defendants took the deposition of Dr. Lamb on December 11, 2009 and had the opportunity to request the information sought in these interrogatories during that deposition. Plaintiffs further object to the extent that the interrogatories ask questions already asked of Dr. Lamb and answered by him at his deposition. These interrogatory answers incorporate by reference those answers. Subject to and without waiving the forgoing objections, Plaintiffs respond as follows:

The entirety of Dr. Lamb's reports, including this excerpt, is based on and supported by information Dr. Lamb has reviewed throughout his thirty-plus years of research and experience

as an expert in the area of child development, including but not limited to his review of the publications listed on the appendix to his reports. Without waiving their objection that it would be unduly burdensome to list every publication read or consulted by Dr. Lamb throughout his career that supports the excerpt identified in the above Interrogatory, Plaintiffs identify the following publications as representative of the documents responsive to this request:

Brodzinsky, D. M., & Palacios, J. (Eds.) (2005). *Psychological issues in adoption.* New York: Praeger.

Brodzinsky, D. M., Smith, D. W., & Brodzinsky, A. (1998). *Children's adjustment to adoption: Developmental and clinical issues.* Thousand Oaks, CA: Sage.

Buehler, C., Rhodes, K. W., Orme, J. G., & Cuddeback, G. (2006). The potential for successful family foster care: Conceptualizing competency domains. *Child Welfare*, 85, 523-558.

Coakley, T. M., Cuddeback, G., Buehler, C., & Cox, M. E. (2007). Kinship foster parents' perceptions of familial and parental factors that promote or inhibit successful fostering. *Children and Youth Services Review*, 29, 92-109.

Cuddeback, G. S., Buehler, C., Orme, J. G., & Le Prohn, N. S. (2007). Measuring foster parent potential: Casey Foster Applicant Inventory: Worker Version. *Research on Social Work Practice*, 17, 93-109.

Orme, J. G., Buehler, C., McSurdy, M., Rhodes, K. W., Cox, M. E., & Patterson, D. A. (2004). Parental and familial characteristics of family foster care applicants. *Children and Youth Services Review*, 26, 307-329.

Orme, J. G., Buehler, C., McSurdy, M., Rhodes, K. W., Cox, M. W. (2003). The Foster Parent Potential Scale. *Research on Social Work Practice*, 13, 181-207.

Orme, J. G., Buehler, C., Rhodes, K. W., Cox, M. E., McSurdy, M., & Cuddeback, G. (2006) Parental and familial characteristics used in the selection of foster families. *Children and Youth Services Review*, 28, 396-421.

Orme, J. G., Cuddeback, G. S., Buehler, C., Cox, M. E., & Le Prohn, N. S. (2007) Measuring foster parent potential: Casey Foster Applicant Inventory: Applicant Version. *Research on Social Work Practice*, 17, 77-92.

Orme, J., Cherry, D., & Rhodes, K. W. (2006). The Help with Fostering Inventory. *Children and Youth Services Review*, 28, 1293-1311.

Rhodes, K. W., Orme, J. G., Cox, M. E., & Buehler, C. (2003). Foster family resources, psychosocial functioning, and retention. *Social Work Research*, 27, 135-150.

RESPECTFULLY SUBMITTED,

Dated: January 12, 2010.

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing was served by first-class U.S. mail on the following on the 12th day of January, 2010:

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