IN THE CIRCUIT COURT OF PULASKI COUNTY
2nd DIVISION

SHEILA COLE, et. al. PLAINTIFFS

v. NO. CV 2008-14284

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

and

FAMILY COUNCIL ACTION COMMITTEE, et. al. INTERVENOR-DEFENDANTS

BRIEF IN SUPPORT OF STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION.

The Plaintiffs challenge the constitutionality of an initiated act approved by approximately 57% of Arkansas voters on November 4, 2008, titled "An Act Providing That an Individual Who is Cohabitating Outside of a Valid Marriage May Not Adopt or Be a Foster Parent of a Child Less Than Eighteen Years Old" ("Initiated Act 1" or "Act 1"). Consistent with its title, the Act provides, "A minor may not be adopted or placed in a foster home if the individual seeking to adopt or to serve as a foster parent is cohabiting with a sexual partner outside of a marriage that is valid under the Arkansas Constitution and the laws of this state." Ark. Code Ann. § 9-8-304(a). The Act's prohibition "applies equally to cohabiting opposite-sex and same-sex individuals." Ark. Code Ann. § 9-8-304(b).

Throughout their most recently filed amended complaint, the Plaintiffs repeatedly refer to *Ark. Dep't of Human Services v. Howard*, 367 Ark. 55, 238 S.W.3d 1 (2006). In that case, the Arkansas Supreme Court held that a regulation promulgated by the Child Welfare Agency Review Board violated the separation-of-powers doctrine set forth in Arkansas' Constitution. *Id.*, 367 Ark. at 66, 238 S.W.3d at 8. That regulation had prohibited anyone from serving as a foster parent "if any adult member of that person's household [was] a homosexual." *Id.*, 367 Ark. at 58, 238 S.W.3d at 3. Unlike the plaintiffs in *Howard*, the Plaintiffs in this lawsuit have not alleged any violation of the separation-of-powers doctrine. Thus, the holding in *Howard* is inapposite to the issues presented in this lawsuit.

Justice Brown wrote a concurring opinion in *Howard* in which he agreed that the regulation violated the separation-of-powers doctrine. Justice Brown, however, added that the regulation also was unconstitutional because it violated the plaintiffs' rights to equal protection

and privacy. *Id.*, 367 Ark. at 66-70, 238 S.W.3d at 9-11 (Brown, J., concurring). He determined that the regulation violated the plaintiffs' equal-protection rights because it "saddled [gay and lesbian couples] with an infirmity due to sexual orientation." *Id.*, 367 Ark. at 68, 238 S.W.3d at 10. Unlike the regulation at issue in *Howard*, Act 1 "applies equally to cohabiting opposite-sex and same-sex individuals." Ark. Code Ann. § 9-8-304(b). Thus, Justice Brown's concurring opinion with respect to the equal-protection issue in *Howard* has no application in this case.

Justice Brown also determined that the *Howard* regulation "overtly and significantly burden[ed] the privacy rights of couples engaged in sexual conduct in the bedroom[.]" *Id.*, 367 Ark. at 68, 238 S.W.3d at 10. Like the sodomy statute held unconstitutional in *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), the *Howard* regulation penalized homosexuals for having sex. *Howard*, 367 Ark. at 68, 238 S.W.3d at 10. In stark contrast to the sodomy statute and the *Howard* regulation, Act 1 clearly does not penalize anyone for having sex. Not a single word in Act 1 even remotely suggests that individuals who have sex, whether with persons of the same or opposite gender, may not adopt or foster children in Arkansas. Act 1 merely prohibits individuals who cohabit with a sexual partner out of wedlock from adopting or fostering children. In that way, Act 1 is very much like a long line of Arkansas cases holding that a parent who has been awarded custody of his or her biological child after divorcing the child's other parent may lose custody of that child for cohabiting with a sexual partner outside of marriage. *E.g.*, *Alphin v. Alphin*, 364 Ark. 332, 341, 219 S.W.3d 160, 165 (2005)("[T]his court and the court of appeals have held that extramarital cohabitation in the presence of children 'has never been condoned in Arkansas, is contrary to the public policy of promoting a stable environment for children, and may of itself constitute a material change of circumstances warranting a change of custody.'")(citing *Word v. Remick*, 75 Ark. App. 390, 396, 58 S.W.3d 422, 427 (2001);

Hamilton v. Barrett, 337 Ark. 460, 989 S.W.2d 520 (1999); *Taylor v. Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003); *Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001)). Act 1 no more invades bedroom privacy than do these well-settled cases. Accordingly, absolutely nothing in the *Howard* decision comes close to suggesting that Act 1 is somehow unconstitutional or that the Defendants are not entitled to summary judgment.

The Court has previously granted, in part, motions to dismiss filed by the State Defendants and the Intervenor-Defendants by dismissing the State of Arkansas and Attorney General Dustin McDaniel from this action and further dismissing Count 11 of the First Amended Complaint against the Intervenor-Defendants and the remaining State Defendants.[1] The Court has deferred judgment on the motions to dismiss with regard to Counts 1 through 10.[2] The Plaintiffs have subsequently amended their Complaint twice, and after the close of discovery, they added two claims to their Complaint.[3]

If a plaintiff fails to allege a cause of action upon which relief could be granted, then the defendant's motion to dismiss should be granted without regard to whether there might be any disputed issues of material fact relevant to a summary judgment motion. *Brandt v. St. Vincent Infirmary*, 287 Ark. 431, 433, 701 S.W.2d 103, 104 (1985). None of the facts produced by any

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[1]The Intervenor-Defendants are Jerry Cox and Family Council Action Committee. The remaining State Defendants are the Arkansas Department of Human Services, its Director, John M. Selig, in his official capacity, the Child Welfare Agency Review Board, and its Chairman, Ed Appler, in his official capacity. In his official capacity as the current Chairman of the Child Welfare Agency Review Board, Mr. Appler was automatically substituted as a Defendant in place of the Board's previous chairman pursuant to Ark.R.Civ.P. 25(d).

[2] *See* Order on Defendants' and Intervenor-Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, April 16, 2009, at ¶ 4 ("The Court defers judgment on the motions to dismiss Counts 1-10 upon a full hearing of the evidence and facts.").

[3]The Plaintiffs filed their original Complaint on December 30, 2008, their First Amended Complaint on February 20, 2009, and their Second Amended Complaint on September 8, 2009. The parties agreed to a discovery deadline of December 18, 2009. *See* Amended Stipulated Scheduling Order entered by the Court on October 26, 2009. The Plaintiffs' Third Amended Complaint was filed on January 8, 2010.

party during over a year of incredibly voluminous discovery[4] come close to undermining the Defendants' arguments in support of dismissal of Counts 1 through 10. Despite the epic scale of the discovery conducted by the Plaintiffs, who have examined hundreds of thousands if not millions of pages of State files and taken scores of depositions, the posture of this case has not changed since the Plaintiffs filed their initial Complaint. A trial in this matter will not produce any new or critical evidence that has not already been produced in discovery. There is no need for a trial in this matter because the Plaintiffs' Third Amended Complaint completely fails to allege facts upon which relief can be granted with regard to any of the Plaintiffs' claims. *See* Ark.R.Civ.P. 8(a)(1) & 12(b)(6). Accordingly, the State Defendants renew their Motion to Dismiss the First Amended Complaint and, pursuant to Ark.R.Civ.P. 10(c), incorporate herein by reference their Motion to Dismiss and Brief in support of that motion filed on January 16, 2009, their Motion to Dismiss Amended Complaint filed on February 25, 2009, and their Reply in support of that motion filed on March 13, 2009.

Separate and apart from the pending motion to dismiss, the fact that the Plaintiffs have failed to state facts upon which relief can be granted is a sufficient ground for the Court to grant the State Defendants' Motion for Summary Judgment. *See, e.g.*, *Walker v. Hyde*, 303 Ark. 615, 619, 798 S.W.2d 435, 437-38 (1990); *see also Haase v. Starnes*, 323 Ark. 263, 275-76, 915

[4]The State Defendants have provided tens of thousands of pages of documents in discovery, and the Intervenor-Defendants have provided thousands of pages of documents. The correspondence file contains literally hundreds of pages worth of letters among counsel discussing a plethora of issues related to discovery. The parties have agreed to two protective orders governing discovery (filed January 12, 2009 and September 9, 2009). Both the State Defendants and the Intervenor-Defendants filed detailed Motions for Protective Order on June 23, 2009. Since that time, the Plaintiffs have engaged independent "authorized reviewers" to review roughly 250 gigabytes worth of electronic data taken from DHS' server. At the turn of the year, the reviewers had produced over 120,000 pages worth of redacted files on fifteen compact discs, and production apparently continues as of the date of this filing. The Plaintiffs have disclosed seven experts and 11 reports prepared by those seven experts. At the close of discovery, the Defendants had taken the depositions of the Plaintiffs' seven experts, 12 Plaintiffs, and a single lay witness. The Plaintiffs have taken the depositions of the three defense experts and nearly 40 lay witnesses.

S.W.2d 675, 681 (1996); David Newbern & John Watkins, *Civil Practice & Procedure* § 26:1 (4th ed. 2006)("If the Court concludes, in the course of deciding a summary judgment motion, that facts stating a claim for relief have not been alleged, the motion may be granted on that basis.").

The State Defendants are also entitled to summary judgment because undisputed material facts make clear that the State Defendants are entitled to judgment as a matter of law. "The purpose of our summary judgment rule is to expeditiously determine cases without necessity for formal trial where there is no substantial issue of fact and is in the nature of an inquiry to determine whether genuine issues of fact exist." *Joey Brown Interest, Inc. v. Merchants Nat'l Bank of Fort Smith*, 284 Ark. 418, 423, 683 S.W.2d 601, 604 (1985)(citation omitted). Summary judgment is not an extreme or drastic remedy, but rather is "one of the tools in a trial court's efficiency arsenal[.]" *Thomas v. Stewart*, 347 Ark. 33, 37, 60 S.W.3d 415, 417 (2001). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion." Ark.R.Civ.P. 56(c)(2). If this standard is met, then the case "should be disposed of by summary judgment rather than exposing the litigants to unnecessary delay, work and expense in going to trial when the trial judge would be bound to direct a verdict in movant's favor after all evidence is adduced." *Joey Brown Interest, Inc. v. Merchants Nat. Bank of Fort Smith*, 284 Ark. at 423, 683 S.W.2d at 604.

Because the Plaintiffs currently have twelve counts pending before the Court, this lawsuit may appear to be complex. Each individual count, however, turns on well-established law and is in reality very simple. Section II of this brief explains why each of the Plaintiffs' remaining

counts should be dismissed because the Plaintiffs have completely failed to state a claim. Section III then explains that the State Defendants also are entitled to summary judgment because the undisputed material facts leave no doubt that Initiated Act 1 is rationally related to legitimate government interests.

II. THE DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

As a threshold matter, the constitutionality of Initiated Act 1 should be determined just as an act passed by the legislature is determined. The Arkansas Supreme Court has made clear "that an Initiated Act, as regards constitutionality, is to be determined just as though it were an Act of the Legislature, because in adopting an Initiated Act the People become the Legislature, and must legislate within constitutional limits." *Jeffery v. Trevathan*, 215 Ark. 311, 319, 220 S.W.2d 412, 416 (1949).

That the Plaintiffs have challenged Act 1 on both federal and state constitutional grounds makes no difference with regard to the standards of review. The Arkansas Supreme Court analyzes the state constitution consistently with the federal constitution, so the applicable standards will be the same regardless of which constitution is at issue in a particular allegation. *See McDonald v. State*, 354 Ark. 216, 221 n. 2, 119 S.W.3d 41, 44 n.2 (2003)("We note that this court typically interprets Article 2, section 15, of the Arkansas Constitution in the same manner that the United States Supreme Court interprets the Fourth Amendment."); *see also* Ark. Code Ann. § 16-123-105(c)(when construing the Arkansas Civil Rights Act, the courts may look for guidance in state and federal decisions interpreting 42 U.S.C. § 1983). When the constitutionality of a statute is challenged, all doubts must be resolved in favor of finding the statute to be constitutional. *See Streight v. Ragland*, 280 Ark. 206, 213-15, 655 S.W.2d 459, 463-64 (1983). Statutes are presumed to be constitutional, and a party that challenges a statute

has the burden of proving it to be unconstitutional. *See Quinn v. Webb Wheel Products*, 59 Ark.App. 272, 277, 957 S.W.2d 187, 189 (1997).

In Counts 1 through 10, the Plaintiffs allege that Act 1 somehow violates the substantive due process and equal protection provisions of the federal and state constitutions. The analysis to be applied when a statute is challenged on substantive-due-process grounds turns on whether a fundamental liberty interest (or "right") is at issue. If a fundamental liberty interest is at issue, then the "strict-scrutiny test" applies and the government may infringe upon the liberty interest if the infringement is narrowly tailored to serve a compelling state interest. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Ark. Dep't of Corr. v. Bailey*, 368 Ark. 518, 533, 247 S.W.3d 851, 861-62 (2007). If a liberty interest, but not a fundamental one, is at issue, then the "rational-basis test" applies and the government may infringe upon the liberty interest if there is a "reasonable fit" between governmental purpose and the means chosen to advance that purpose. *Reno v. Flores*, 507 U.S. 292, 305 (1993); *see also Ark. Dep't of Corr. v. Bailey*, 368 Ark. at 533, 247 S.W.3d at 861-62 ("Under the rational-basis test, the party challenging the constitutionality of the statute must prove that the statute is not rationally related to achieving any legitimate governmental objective under any reasonably conceivable fact situation."). If no liberty interest is at issue, then the Due Process Clause does not limit the challenged governmental action. *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983).

The analysis to be applied to an equal-protection allegation similarly turns on whether the challenged law discriminates against a suspect class. If it discriminates on the basis of race or national origin, for example, then the strict-scrutiny test applies and the law will be upheld if it is necessary to achieve a compelling government purpose. *E.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). If the law does not discriminate against a suspect class, then the rational-basis test

applies and the law will be upheld if it is rationally related to a legitimate government purpose. *E.g.*, *Pennell v. San Jose*, 485 U.S. 1, 14 (1988). Of course, if the challenged law does not discriminate, then there is not an equal protection violation.

A. The Defendants are entitled to summary judgment on Counts 1 and 2.

1. Counts 1 and 2 fail to state a substantive due process claim because the State does not have a duty to find the *best* placement for children in its custody.

It is well-established that "substantive due process analysis must begin with a careful description of the asserted right, for the doctrine of judicial restraint requires [the courts] to give the utmost care whenever [they] are asked to break new ground in this field." *Reno v. Flores*, 507 U.S. at 302 (citations and internal quotation marks omitted); *see also Ark. Dep't of Corr. v. Bailey*, 368 Ark. at 532, 247 S.W.3d at 861 (same). Otherwise, "the liberty protected by the Due Process Clause [could] be subtly transformed into the policy preferences of the [judiciary]." *Washington v. Glucksberg*, 521 U.S. at 721. Accordingly, a plaintiff's formulation of the asserted right must be "precise." *Id.* at 722-23.

In Counts 1 and 2, the Plaintiffs allege, "The State has a duty to act in the best interest of—and certainly not to harm—children in its custody."[5] Similarly, they allege that the State Defendants have "constitutional obligations to act in the best interests of children[.]"[6] The Plaintiffs further allege, "Defendants' enforcement of Act 1 will harm children in State care by categorically prohibiting cohabiting adults in an intimate relationship from serving as foster or adoptive parents."[7] Thus, the Plaintiffs assert, this categorical prohibition will prevent otherwise qualified persons from becoming foster and adoptive parents and thereby reduce the pool of

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[5]Third Amended Complaint, ¶ 90.
[6]Third Amended Complaint, ¶ 94.
[7]Third Amended Complaint, ¶ 89.

potential foster and adoptive parents.[8] According to the Plaintiffs, "Even if Arkansas had a surplus of available adoptive and foster parents," the exclusion would harm some children by preventing them "from being placed with the family that is *best* suited to meet their needs."[9] Thus, with regard to Count 1, the Plaintiffs conclude that "Act 1 is void and unenforceable because it violates the Due Process Clause of the United States Constitution by depriving children of access to available suitable and appropriate adoptive and foster families[.]"[10] In Count 2, the Plaintiffs similarly conclude, "For the same reasons alleged in paragraphs 92 to 101, Act 1 fails to serve the best interests of and in fact harms children in State custody and thus violates Plaintiff W.H.'s right to due process guaranteed by Article 2, Sections 8 and 21, of the Arkansas Constitution and Ark. Code Ann. § 16-123-101, *et. seq.*"[11]

Counts 1 and 2 fail to state any claim for which relief can be granted. Counts 1 and 2 are plainly based on the Plaintiffs' mistaken belief that children have a constitutionally recognized right or liberty interest in being adopted or placed in foster care, and that the State Defendants have a corresponding duty to allow children in State care to be adopted or placed in foster care. Indeed, the Plaintiffs conclude these counts by alleging that Act 1 violates the Due Process Clauses of the federal and state constitutions "by depriving children of access to available suitable and appropriate adoptive and foster families."[12] Children do not have a right or liberty interest in being adopted or placed in foster care. The State does not have a duty to allow children to be adopted or fostered by anyone, and certainly not by cohabitating adults. *See Lofton v. Sec'y of Dep't of Children & Family Services*, 358 F.3d 804, 811 (11th Cir.

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[8]Third Amended Complaint, ¶¶ 91-92.
[9]Third Amended Complaint, ¶ 93 (emphasis added).
[10]Third Amended Complaint, ¶ 94.
[11]Third Amended Complaint, ¶ 99.
[12]Third Amended Complaint, ¶ 94, *see also* ¶ 99.

2004)("there is no fundamental right to adopt or to be adopted"); *In re Adoption of T.K.J.*, 931 P.2d 488, 494-95 (Co. Ct. App. 1997)(holding children did not have liberty interest in care from potential adoptive parent, therefore the lack of a hearing on cohabitating partners' petitions to adopt each other's children did not violate children's right to due process); *Georgina G. v. Terry M.*, 516 N.W.2d 678, 685 (Wis. 1994)(holding that minor's right to due process was not violated by statute prohibiting woman who cohabitated with minor's mother from adopting the minor, even though trial court found that such adoption would have been in the minor's best interest). These Plaintiffs appear to concede this point; on page 14 of their Opposition to Defendants' Motion to Dismiss they disavow the allegations in their amended complaint by making clear that they "do not assert a right to be fostered or adopted in either these two counts or any other count in the Complaint." The Plaintiffs' concession is tantamount to an admission that neither Count 1 nor Count 2 states a claim.

Counts 1 and 2 also fail to state a claim for a separate and equally important reason. Although the State Defendants have an *interest* in advancing the best interests of children in their custody, the Plaintiffs' assertion that the State Defendants have a *duty* to do so is completely mistaken. The Plaintiffs' allegation that children in state custody are constitutionally entitled to be "placed with the family that is *best* suited to meet their needs,"[13] and that any failure by the State Defendants to place them with that best family somehow harms them, is wrong as a matter of law. The United States Supreme Court has held that "a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible," does not have a right "to be placed in the custody of a willing-and-able private custodian rather than a government-operated or government-selected child-care institution." *Reno v. Flores*, 507 U.S. at

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[13]Third Amended Complaint, ¶ 93 (emphasis added).

302. In so holding, the Court left no doubt that the best-interest-of-the-child standard may govern divorce cases in which the issue is whether a child's interests would be better served by residing with one parent or the other, but it is not the standard that governs how the government must care for children in its custody. *Id.*, 507 U.S. at 304. "[C]hild-care institutions operated by the State in the exercise of its *parens patriae* authority are not constitutionally required to be funded at such a level as to provide the *best* schooling or the *best* health care available; nor does the Constitution require them to substitute, wherever possible, private nonadoptive custody for institutional care." *Id.* (internal citation omitted); *see also In the Interest of Jeremy P.*, 278 Wis. 2d 366, 382, 692 N.W.2d 311, 320 (2004)("[N]either the United States Supreme Court nor the Wisconsin Supreme Court has recognized that children have a fundamental liberty interest in having their best interest considered in any decision the government makes in their lives."); *In the Interest of C.S.*, 516 N.W.2d 851, 860-62 (Iowa 1994)(mentally ill foster child's right to substantive due process not violated by his placement in treatment facility that was at least minimally adequate, but not optimal). Accordingly, Counts 1 and 2 are fatally flawed because children in the custody of the State Defendants do not have a right or liberty interest in, and the State Defendants do not have a duty to provide them with, anything and everything that conceivably may be in their very *best* interests—including placement in any particular foster or adoptive home, and especially not placement in a home headed by cohabiting adults.

Even if this Court were to determine that the State Defendants had some constitutionally mandated duty to act in the best interests of children in their custody, the Arkansas Supreme Court has left no doubt that cohabitation alone is a sufficient ground for a parent to lose custody of his or her *biological* child, *e.g.*, *Alphin v. Alphin*, 364 Ark. at 341, 219 S.W.3d at 165, even though a parent's right to custody of his or her biological child is one of the most well-

established liberty interests recognized by the United States Constitution, *see, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000), and biological parentage "precedes and transcends formal recognition by the state[.]" *Lofton v. Sec'y of Dep't of Children & Family Services*, 358 F.3d at 809. Numerous decisions by Arkansas' appellate courts hold that cohabitation in the presence of children is contrary to the public policy of promoting a stable home environment for children. *E.g.*, *Alphin*, 364 Ark. at 341, 219 S.W.3d at 165 (citing cases). Arkansas' judiciary has "never condoned a parent's unmarried cohabitation" in the presence of a child. *Taylor v. Taylor*, 345 Ark. at 305, 47 S.W.3d at 225 (affirming trial court's finding that it was not in children's best interests for primary custodian to continue cohabitating with another adult with whom she admitted being sexually involved). Accordingly, and as a matter of law, Act 1 *does* protect the best interests of children in State custody, even though the State has no constitutionally mandated duty to do so.

W.H. and the taxpayer Plaintiffs' allegation that the "Defendants' enforcement of Act 1 will harm children in State care by categorically prohibiting cohabitating adults in an intimate relationship from serving as foster or adoptive parents"[14] is also incorrect as a matter of law. The United States Supreme Court has held that children in state custody do not have a right to individualized consideration of whether private placement would be in a child's '"best interests' – followed by private placement if the answer is in the affirmative." *Reno v. Flores*, 507 U.S. at 303. The Court explained "that if institutional custody (despite the availability of responsible private custodians) is not unconstitutional in itself, it does not become so simply because it is shown to be less desirable than some other arrangement for the particular child." *Id.* Act 1's categorical prohibition of cohabiting adults from serving as foster or adoptive parents is plainly

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[14]Third Amended Complaint, ¶ 89.

constitutional, even if Act 1 results in the placement of a child in an arrangement that is less desirable than an arrangement prohibited by Act 1 for that particular child.

Accordingly, none of the allegations in Counts 1 and 2 implicate any right, liberty interest, or duty associated with the Due Process Clauses of the federal and state constitutions and both counts should be dismissed as a matter of law. *See DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189, 197 (1989)(allegation that government had failed to protect child from abuse by his father (who coincidentally was cohabitating with a girlfriend) did not implicate any right or duty provided or required by the Fourteenth Amendment's Due Process Clause). Act 1 unmistakably does not violate the substantive-due-process provisions of either the Fourteenth Amendment or Ark. Const. art. 2, §§ 8 & 21. Accordingly, Counts 1 and 2 should be dismissed for failure to state a claim. *See* Ark.R.Civ.P. 8(a) & 12(b)(6). Even if these counts did state a claim, they should be dismissed because Act 1 is rationally related to legitimate government interests for the reasons discussed below in Section III.

2. The Defendants are entitled to summary judgment on Counts 1 and 2 with regard to the taxpayer Plaintiffs because they have failed to state a claim for illegal exaction.

The fact that W.H. and the taxpayer Plaintiffs have failed to state a federal or state substantive-due-process claim is alone sufficient to warrant dismissal Counts 1 and 2, including the illegal-exaction allegations, which are based on the substantive-due-process allegations. The illegal-exaction allegations should be dismissed for an independent reason as well. An illegal exaction under Article 16, Section 13 of the Arkansas Constitution is an exaction of public funds that is not authorized by law or is contrary to law. *See Brewer v. Carter*, 365 Ark. 531, 534, 231 S.W.3d 707, 709 (2006); *Martin v. Couey Chrysler Plymouth, Inc.*, 308 Ark. 325, 328-329, 824 S.W.2d 832, 834 (1992); *Starnes v. Sadler*, 237 Ark. 325, 327-329, 372 S.W.2d 585, 586-587

(1963). The Arkansas Supreme Court has held that two types of illegal-exaction cases can arise under this constitutional provision: "public funds" cases, where a citizen contends that public funds generated from tax dollars are being misapplied or illegally spent, and "illegal tax" cases, where the citizen asserts that the tax itself is illegal. *See Pledger v. Featherlite Precast Corp.*, 308 Ark. 124, 128, 823 S.W.2d 852, 855 (1992).

Obviously, this case does not involve any illegal tax. Similarly, there is no evidence or indication that the enforcement of Initiated Act 1 will involve the expenditure of any funds. The Plaintiffs assert in conclusory fashion that "public funds generated from Arkansas tax dollars [will be] misapplied and illegally used in support of Act 1."[15] However, the Act merely establishes a rule that must be followed in foster and adoption cases in the State of Arkansas. There is no requirement that State officials take any specific action that could be characterized as an expenditure of funds. The State officials responsible for the enforcement of the Act are salaried employees and will receive their same salary regardless of whether Initiated Act 1 is enforced or not. There is simply no reason to believe that Act 1 will result in the expenditure of any additional State funds, whether the expenditure is legal or not.

Further, the indisputable evidence presented in this case demonstrates that Act 1 does not and will not result in the expenditure of State funds that would not be expended in the absence of Act 1.[16] Thus, Act 1 cannot possibly be an illegal exaction because it does not result in tax funds being *spent*, much less illegally spent. In any event, whether Act 1 results in the expenditure of tax funds is not a material fact because any expenditure of funds that may arise from Act 1 is constitutional, *supra* and *infra*. Thus, the taxpayer Plaintiffs have failed to state a claim in

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[15]Third Amended Complaint, ¶¶ 96 & 100.

[16]If anything, as discussed in more detail below, Act 1 saves the State the time and expense of screening adoptive and foster applicants who pose a greater risk of negative outcomes for children.

Counts 1 and 2. *See* Ark.R.Civ.P. 8(a) & 12(b)(6). Even if they had, both of these counts should be dismissed because Act 1 is rationally related to legitimate government interests for the reasons discussed in Section III.

3. The Defendants are entitled to summary judgment with respect to Plaintiff W.H.'s allegations in Counts 1 and 2 because indisputable material facts prove that she is not in the custody of the State and thus she does not have standing to raise those allegations.

Plaintiff W.H. is the minor granddaughter of Plaintiff Shelia Cole.[17] As just discussed, W.H.'s allegations in Counts 1 and 2, like the taxpayer Plaintiffs' allegations in those two counts, are premised on their mistaken belief that the State Defendants have a duty "to act in the best interest of—and certainly not to harm—*children in its custody*."[18] Indisputable material facts, however, make clear that W.H. is not in the State Defendants' custody. In fact, Plaintiff W.H. lives with Plaintiff Sheila Cole and Plaintiff Cole's partner in the State of Oklahoma.[19] Plaintiff Cole has never lived in the State of Arkansas.[20] Plaintiff Cole obtained custody of Plaintiff W.H. on January 13, 2009, pursuant to an order of the Circuit Court of Benton County, Arkansas.[21] The Arkansas case regarding Plaintiff W.H. has since been closed, and Plaintiff Cole plans to adopt W.H. in the State of Oklahoma, pursuant to the laws of the State of Oklahoma.[22] The State of Oklahoma has conducted the requisite six months of supervision of the placement of Plaintiff W.H. with Plaintiff Cole in Oklahoma, and has recommended that the

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[17]Third Amended Complaint, ¶ 15

[18]Third Amended Complaint, ¶ 90 (Count 1)(emphasis added), *see also* ¶ 99 (reasserting this allegation with regard to Count 2)

[19]*See* Transcript of Deposition of Sheila Cole, relevant portions attached to the State Defendants' Motion for Summary Judgment as Exhibit 1, 9:4-9:9, 10:1-10:7, 11:5-11:15, 17:10-17:11.

[20]Exhibit 1, 17:1-17:2.

[21]Exhibit 1, 18:10-19:2.

[22]Exhibit 1, 17:12-18:4.

Oklahoma ICPC case be closed and that Plaintiff Cole be given guardianship of Plaintiff W.H. in Oklahoma.[23]

Because Plaintiff W.H. is not in the custody of the State Defendants, the State Defendants cannot, and do not, have any constitutionally mandated duty to Plaintiff W.H. Accordingly, whether Act 1 somehow violates the substantive-due-process rights of children in state custody (and it does not), is not a justiciable controversy with regard to Plaintiff W.H. "In order to establish standing, a party must show that he has a right which a statute infringes upon and that he is within the class of persons affected by the statute." *Ark. Dep't of Human Services v. Howard*, 367 Ark. at 59, 238 S.W.3d at 4. "To be a proper plaintiff in an action, one must have an interest which has been adversely affected or rights which have been invaded." *City of Dover v. City of Russellville*, 352 Ark. 299, 304, 100 S.W.3d 689, 693 (2003)(citing Newbern, Arkansas Civil Practice and Procedure, § 5-15, at 61-62 (2d ed. 1993)). "[O]nly a claimant who has a personal stake in the outcome of a controversy has standing to invoke the jurisdiction of the circuit court in order to seek relief and [] his injury must be concrete, specific, real, and immediate, rather than conjectural or hypothetical." *Ark. Beverage Retailers Ass'n, Inc. v. Moore*, 369 Ark. 498, 505, 256 S.W.3d 488, 493 (2007). "It is well settled that in order to have standing to challenge the constitutionality of a statute, a person must show that the challenged statute had a prejudicial impact on him." *Bader v. State*, 344 Ark. 241, 247, 40 S.W.3d 738, 743 (2001).

Amendment 80 to the Arkansas Constitution took effect in July 2001. Ark. Const. Amend. 80, § 21. Prior to that time, the issue of whether standing is a jurisdictional requirement was unsettled. *Compare Pulaski County v. Carriage Creek Prop. Owners Improvement Dist.*,

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[23]*See* Oklahoma DHS ICPC Progress Report dated June 30, 2009 (Plaintiffs' bates-stamp PL-406 and PL-407), attached to the State Defendants' Motion for Summary Judgment as Exhibit 2.

319 Ark. 12, 14, 888 S.W.2d 652, 653 (1994)("[W]e are unaware of any authority in this Court holding that lack of standing deprives a court of jurisdiction.") *with Ramirez v. White County Circuit Court*, 343 Ark. 372, 374, 38 S.W.3d 298, 299 (2001)("[Plaintiff] lacks standing under the wrongful death statute. This deprives the circuit court of jurisdiction."). Amendment 80 settled the issue by conferring "original jurisdiction" to the circuit courts over "all justiciable matters not otherwise assigned pursuant to this Constitution." Ark. Const. Amend. 80, § 6(A). After Amendment 80 took effect, the Arkansas Supreme Court made clear that justiciability turns on the related factors of ripeness, mootness, and standing, *Jegley v. Picado*, 349 Ark. 600, 614, 80 S.W.3d 332, 348 (2002), and explicitly stated that "only a claimant who has a personal stake in the outcome of a controversy has standing to invoke the jurisdiction of the circuit court[.]" *Ark. Beverage Retailers Ass'n, Inc. v. Moore*, 369 Ark. at 505, 256 S.W.3d at 493. Thus, Arkansas law is now clear that standing is a jurisdictional issue.

Regardless of whether standing is a jurisdictional issue, under the terms of W.H.'s own allegation—that the State has some duty to children in its custody—she has no interest that can be adversely affected by Act 1 and she no stake in whether Act 1 is upheld or not because she is not in the State's custody. W.H. plainly lacks standing to prosecute these purported claims. Accordingly, Counts 1 and 2 should be dismissed.

4. The Defendants are entitled to summary judgment with respect to Plaintiff W.H.'s allegations in Counts 1 and 2 because indisputable material facts prove that she is not in the custody of the State and thus her allegations are moot.

W.H.'s allegations in Counts 1 and 2 also are also not justiciable because they are moot. A case becomes moot "when any judgment rendered would have no practical legal effect upon a then-existing legal controversy." *Davis v. Brushy Island Pub. Water Auth. of State*, 375 Ark. 249, 251, 290 S.W.3d 16, 18 (2008). Mootness is a jurisdictional issue. *Gee v. Harris*, 94 Ark.

App. 32, 33, 223 S.W.3d 88, 88 (2006). The Arkansas Supreme Court has held that a case must be dismissed as moot "[w]hen a party demonstrates only that it would like a legal opinion, but does not show that there is an ongoing controversy[.]" *City of Pine Bluff v. Jones*, 370 Ark. 173, 178, 258 S.W. 3d 361, 365 (2007).

W.H.'s allegations in Counts 1 and 2 are based on the alleged existence of some duty to children in the State's custody, but she is no longer in the State's custody. A judgment on those two counts would not have any impact on her whatsoever, and Counts 1 and 2 are thus moot. W.H.'s allegations in Counts 1 and 2 should be dismissed accordingly.

B. The Defendants are entitled to summary judgment on Counts 3 and 4.

1. The Defendants are entitled to summary judgment on Counts 3 and 4 because indisputable material facts prove that Act 1 does not apply to any adoption petition that Plaintiff Cole could file regarding Plaintiff W.H.

In Counts 3 and 4, Plaintiffs Cole and W.H. allege that their right to family integrity under the Due Process Clauses of the federal and state constitutions, and federal and state statutes, are violated by Act 1 because Plaintiff Cole cannot foster or adopt Plaintiff W.H. in Arkansas under the terms of Act 1 so long as she is cohabiting in an intimate relationship.[24] Putting aside the question whether Plaintiffs Cole and W.H. have such a constitutional right to family integrity, which they do not, *infra*, this allegation fails to state a claim under the undisputed facts of this case. Plaintiff Cole resides in the State of Oklahoma and has never resided in the State of Arkansas, *supra*. Although Plaintiff W.H. resided in Arkansas at one time, she currently resides with Plaintiff Cole in the State of Oklahoma and she has resided in Oklahoma since January 13, 2009, *supra*. The Arkansas case regarding Plaintiff W.H. is closed,

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[24] *See* Third Amended Complaint, ¶¶ 102-112.

and Plaintiff Cole's plan is to adopt W.H. in the State of Oklahoma, under the laws of the State of Oklahoma, *supra*. Obviously, Act 1 is not a law of the State of Oklahoma and Act 1 thus does not govern any placement of Plaintiff W.H. pursuant to the laws of the State of Oklahoma.

Further, even if Plaintiff Cole were to allege that she wished to adopt Plaintiff W.H. under Arkansas law, the State of Arkansas would not have jurisdiction over such an adoption. Pursuant to the Revised Uniform Adoption Act of Arkansas, "[t]he state shall possess jurisdiction over the adoption of a minor if the person seeking to adopt the child, or the child, is a resident of this state." Ark. Code Ann. § 9-9-205(a)(1). Because neither Plaintiff Cole nor Plaintiff W.H. is a resident of the State of Arkansas, Plaintiff Cole cannot adopt Plaintiff W.H. in Arkansas pursuant to Arkansas law. Thus, any alleged right of Plaintiff Cole's and Plaintiff W.H.'s to family integrity cannot possibly be violated by Act 1. Counts 3 and 4 should be dismissed accordingly.

2. Counts 3 and 4 fail to state a substantive due process claim because Act 1 does not burden a liberty interest in family integrity.

In Count 3, Plaintiff Cole and Plaintiff W.H. attempt to state a substantive due process claim under the Fourteenth Amendment by alleging that Act 1 violates a right to "family integrity" by barring Cole from adopting or fostering W.H., who is her granddaughter.[25] In Count 4, Plaintiff Cole and Plaintiff W.H. attempt to state an identical substantive due process claim under Ark. Const. art. 2, §§ 8 & 21.[26] However, as discussed above, Plaintiff W.H. does not have a liberty interest in being adopted by Plaintiff Cole or in being placed in her foster care. *See In re Adoption of T.K.J.*, 931 P.2d at 494-95; *Georgina G. v. Terry M.*, 516 N.W.2d at 685. As a result, Plaintiff W.H. has failed to state facts in Counts 3 and 4 upon which relief can be

[25]Third Amended Complaint, ¶¶ 102-109.
[26]Third Amended Complaint, ¶¶ 110-112.

granted and her allegations in those Counts should be dismissed as a matter of law. *See* Ark.R.Civ.P. 8(a) & 12(b)(6).

Likewise, Plaintiff Cole does not have a liberty interest in adopting or fostering Plaintiff W.H. Indeed, the Arkansas Supreme Court has made clear that grandparents have no constitutionally protected liberty interest in adopting or taking custody of their grandchildren in any form. In *Cox v. Stayton*, 273 Ark. 298, 619 S.W.2d 617 (1981), the grandparents of three infant children brought suit challenging the adoption of the children by their respective foster parents. *Id.*, 273 Ark. at 299. The plaintiff grandparents previously had custody of the children, but their custody was terminated and the children were determined to be wards of the state, and foster placement was ordered. *Id.* at 299-300. In the underlying and subsequent adoption proceedings, the plaintiff grandparents intervened to argue that it would not be in the best interests of the children to grant the adoptions to the unrelated foster parents. *Id.* at 300. The adoption was granted to the foster parents despite the objection of the grandparents. *Id.* On appeal, the Arkansas Supreme Court affirmed, holding that that the grandparents' due process rights under the Fourteenth Amendment had not been violated because they did not have any constitutionally protected interest in the adoption or custody of their grandchildren. *Id.* at 304-305.

Cox is in accord with the United States Court of Appeals for the Ninth Circuit's decision in *Mullins v. State of Or.*, 57 F.3d 789 (9th Cir. 1995). In *Mullins*, a recently married couple filed an adoption petition seeking to adopt two children who were the biological grandchildren of one member of the couple. *Id.*, 57 F.3d at 791. The children were in the custody of the State of Oregon's Children's Services Division ("CSD"), after having been removed from their parents' home due to abuse. *Id.* CSD treated the Mullinses' adoption petition like any other, declining to

give the petition any preferential treatment despite the fact that Ms. Mullins was the biological grandmother of the children. *Id.* Ultimately, CSD rejected the Mullinses' petition, without a hearing and without stating any reason for the rejection. *Id.* The Mullinses filed suit in federal court pursuant to 42 U.S.C. § 1983, claiming violations of their substantive and procedural due process rights. *Id.* at 792. The district court dismissed the Mullinses' action for failure to state a claim, and the Mullinses appealed to the Ninth Circuit Court of Appeals. *Id.*

On appeal, the Ninth Circuit noted that the United States Supreme Court has held that the genetic link between a parent and child does not give a parent a fundamental right to custody of a child. *Id.*, 57 F.3d at 794 (citing *Lehr v. Robertson*, 463 U.S. 248, 256-65 (1983)). The Ninth Circuit could find "no reason why an even more attenuated biological connection, such as the one between grandmother and grandchild, should merit greater constitutional protection." *Id.* The Court of Appeals went on to explain that "grandparents sometimes may be unsuitable adoptive parents precisely because of their blood relationship, especially in cases of abuse such as this in which there may be a well founded fear that the grandparents will be unable to protect the children from future parental contact and abuse." *Id.* at 797. Accordingly, the Court of Appeals held that grandparents do not have any liberty interest whatsoever in adopting their grandchildren. *Id.*

In the instant case, Counts 3 and 4 allege, "Because [Plaintiff Cole] cohabits in an intimate relationship with her partner, the terms of Act 1—were they to be applied to [Plaintiff Cole]—*would bar [Plaintiff Cole] from adopting or fostering her own granddaughter*, regardless of [Plaintiff Cole's] suitability as a parent and the needs of [Plaintiff] W.H., *instead requiring [Plaintiff] W.H. to remain outside of the family* in foster care."[27] However, as explained above,

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[27]Third Amended Complaint, ¶ 107 (emphasis added).

Plaintiff W.H. does not have a right to be adopted by Plaintiff Cole, and Plaintiff Cole does not have a right to adopt Plaintiff W.H. The Plaintiffs apparently agree with the State Defendants' statement of the law on this point position because they have explicitly denied asserting a constitutional right to adopt or be adopted.[28]

Because they must concede that there is no constitutionally protected right to adopt or be adopted, even among individuals with genetic relationships, Plaintiffs Cole and W.H. argue that Act 1 interferes with their right to family integrity.[29] However, Act 1 does not impinge on any supposed right to family integrity vis-à-vis Plaintiffs W.H. and Cole. If Plaintiff Cole were a resident of Arkansas (which she is not and never has been) and desired to adopt her granddaughter (or any other child), then Plaintiff Cole could simply refrain from cohabitating with her partner and thus avoid Act 1's prohibition against a child being adopted by an individual who is cohabitating with a sexual partner outside of marriage. As discussed with regard to Counts 9 and 10, *infra*, Act 1 does not come anywhere near a constitutionally significant infringement on *any* liberty interest that Cole may have in residing with her intimate partner.

Counts 3 and 4, like Counts 1 and 2, fail to burden any right associated with the Due Process Clauses of the federal and state constitutions and should be dismissed as a matter of law. *See DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. at 197 (victim of child abuse failed to state an actionable claim because his allegations did not implicate any right or duty provided or required by the Due Process Clause); *see also* Ark.R.Civ.P. 8(a) & 12(b)(6).

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[28]Plaintiffs' Opposition to Defendants' Motion to Dismiss, filed February 27, 2009, p. 21 ("neither Count 3 nor 4 (nor any other of plaintiffs' claims) asserts a constitutional right to adopt or be adopted[.]").

[29] Plaintiffs' Opposition to Defendants' Motion to Dismiss, p. 20 ("Counts 3 and 4 concern the well-established constitutional right of plaintiffs Sheila Cole and W.H., Cole's granddaughter, to maintain the integrity of their family without undue interference by the government.").

Even if they did, Act 1 should be upheld because, as explained in Section III, Act 1 is rationally related to legitimate government interests.

C. The Defendants are entitled to summary judgment on Counts 5 and 6.

Several of the Plaintiffs are the biological parents of children currently in their custody. These Plaintiffs assert that Act 1 violates their right to parental autonomy under the Due Process Clauses of the federal and state constitutions by prohibiting courts from honoring testamentary instruments in which they allege that they have designated, in the event of their deaths, adoptive parents for their children.[30] These Plaintiffs' argument is based on their incorrect assumption that their constitutional right to parental autonomy grants them a constitutionally protected liberty interest in controlling exactly who, if anyone, might someday adopt their children. There is no such constitutionally protected right.

Under Arkansas law, the courts, not biological parents, have jurisdiction over the adoption of any minor. *See* Ark. Code Ann. § 9-9-205(a)(1). While it is true that in some cases, the written consent of the biological parents is required in order for a state court to grant a petition to adopt a minor, *see* Ark. Code Ann. §§ 9-9-206(a) & 9-9-207(a), this does not mean that the biological parents have the *right to control* who will adopt their child. When a petition to adopt is filed in an Arkansas circuit court, if all prerequisites are satisfied in the petition, a study of the home of the petitioner is *required* to be conducted by a licensed child welfare agency. *See* Ark. Code Ann. § 9-9-212(b). The home study is prepared and submitted to the court, and "shall address whether the adoptive home is a suitable home and shall include a recommendation as to the approval of the petitioner as an adoptive parent." Ark. Code Ann. § 9-9-212(b)(4). Following the completion of numerous other requirements, including a check of the

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[30]Third Amended Complaint, ¶¶ 113-116 and 117-119.

child maltreatment central registry for all household members age 10 and older (Ark. Code Ann. § 9-9-212(b)(6)), and criminal background checks (Ark. Code Ann. § 9-9-212(b)(8)-(9)), a hearing is held on the adoption petition.

> If at the conclusion of the hearing the court determines that the required consents have been obtained or excused and the required period for the withdrawal of consent and withdrawal of relinquishment have passed and that the adoption is in the best interest of the individual to be adopted, it **may** (1) issue a final decree of adoption; or (2) issue an interlocutory decree of adoption which by its own terms automatically becomes a final decree of adoption on a day therein specified . . .

Ark. Code Ann. § 9-9-214(c) (emphasis added). Thus, Arkansas's statutes make clear that adoptions are granted at the discretion of the courts, based upon numerous factors specific to each individual adoption petition filed by a person seeking to adopt a child. As the Plaintiffs have recognized in their pleadings[31], a biological parent has no right to enforce an adoptive placement of their choice, through a testamentary instrument or otherwise. The logic of this is obvious; if such an unfettered right were allowed, then biological parents in Arkansas could force the courts to place their children into homes that would be contrary to the interests of the children, or less desirable than other available options, and therefore contrary to the very interests that the courts seek to protect. Under Arkansas law, biological parents have no protected liberty interest in directing and controlling the adoptive home into which their children are placed by the courts.

The conclusion that biological parents have no right to direct the placement of their children into adoptive homes is consistent with adoption laws and regulations nationwide. "The adoption process is entirely a creature of state law, and parental rights and expectations involving

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[31]Plaintiffs' Opposition to Defendant's Motion to Dismiss, p. 26 ("The parent-plaintiffs recognize that they do not have the absolute right to dictate the adoptive placement of their children through their testamentary wishes").

adoption have historically been governed by legislative enactment." *Lindley v. Sullivan*, 889 F.2d 124, 130 (7th Cir. 1989). Adoption "always involves the weighing and balancing of many competing interests[,]" and "is entirely conditioned upon the combination of many variables." *Id.* at 131. A child may not be adopted merely based upon the volition of the biological parent, or any other party to the adoption individually, but only through conformity with the adoption laws and the approval of the relevant court. *See In re Flora's Adoption*, 52 P.2d 178, 180 (Or. 1935)("It is not in the power of an individual to adopt the minor child of another of his own volition, or merely by the consent of the parents; such adoption may only be made by strictly conforming to the statute and with approval of the court."). Indeed, in Arkansas, a court does not have jurisdiction to enter an adoption decree without the consent of the relevant social services agency that has custody of the child as a state ward. *See Falbo v. Howard*, 271 Ark. 100, 607 S.W.2d 369 (1980). Accordingly, while the consent of the biological parent is not required, the consent of the court and the consent of DHS are required in order for the State to place a child into an adoptive home. Thus, the Plaintiffs' assertion that the enforcement of Act 1 will violate their right to parental autonomy under the federal and state constitutions fails to state a claim as a matter of law. Counts 5 and 6 should be dismissed pursuant to Ark.R.Civ.P. 8(a) & 12(b)(6).

The parent Plaintiffs themselves and the attorneys who drafted their wills clearly understand that there is no parental right to control who might someday adopt one's child. On February 23, 2009, Plaintiff Meredith Scroggin executed her will designating Plaintiff Matthew Harrison, an unmarried cohabitant, as an alternate guardian of her children (which is not prohibited by Act 1), and also expressing her desire that the guardianship designee, who is married, or in the alternative Plaintiff Harrison if the guardianship designee is unable to serve as

guardian, "take all steps necessary to legally adopt my minor children."[32] Ms. Scroggin's prior will also designated Plaintiff Harrison as an alternate guardian of her children, but her prior will made no mention of adoption.[33] Also on February 23, 2009, Plaintiff Benny Scroggin executed his will designating Plaintiff Matthew Harrison as an alternate guardian of his children (which is not prohibited by Act 1), and also expressing his desire that the guardianship designee, who is married, or in the alternative Plaintiff Harrison if the guardianship designee is unable to serve as guardian, "take all steps necessary to legally adopt my minor children."[34] Mr. Scroggin's prior will also designated Plaintiff Harrison as an alternate guardian of his children, but his prior will made no mention of adoption.[35] The undisputed fact that the Scroggin Plaintiffs designate an unmarried cohabitant as an alternate guardian of their children and merely express their desire that the unmarried cohabitant take steps to legally adopt their children demonstrates their awareness that they have no right to designate adoptive parents through a testamentary instrument, nor any right to force any court or designee to comply with their desire.

Similarly, on March 11, 2009, Plaintiff Chris Mitchell executed his will designating an unmarried cohabiting couple as guardian of his children, and also stating that "[i]t would be [his] wish for [the unmarried cohabitant] to adopt any of [his] children who have not reached legal

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[32] *See* Relevant portions of the Transcript of the Deposition of Plaintiff Meredith Scroggin, attached to the State Defendants' Motion for Summary Judgment as Exhibit 3, p. 13-20; Last Will and Testament of Meredith Scroggin (Deposition Exhibit 73), attached to the State Defendants' Motion for Summary Judgment as Exhibit 4, § G (PL-363).

[33] *See* Exhibit 3, 18:25-19:17.

[34] *See* Relevant portions of the Transcript of the Deposition of Plaintiff Benny Scroggin, attached to the State Defendants' Motion to for Summary Judgment as Exhibit 5, p. 17-22; Last Will and Testament of Benny Scroggin (Deposition Exhibit 74), attached to the State Defendants' Motion for Summary Judgment as Exhibit 6, § G (PL-350).

[35] *See* Exhibit 5, 26:6-27:22.

age."[36] Mr. Mitchell had no will or other testamentary instrument prior to March 11, 2009.[37] On March 16, 2009, Plaintiff Susan Duell-Mitchell likewise executed her will designating an unmarried cohabitant as guardian of her children, and also stating that "[i]t would be [her] wish for [the unmarried cohabitant] to adopt any of [her] children who have not reached legal age."[38] Ms. Duell-Mitchell had no will or other testamentary instrument prior to March 16, 2009.[39] Like the Scroggins, the fact that the Mitchells merely expressed a "wish" that an unmarried cohabitant adopt their children demonstrates their and their attorneys' understandings that they have neither a right to designate adoptive parents through a testamentary instrument, nor a right to force any court or designee to comply with their wish. Accordingly, Counts 5 and 6 should be dismissed.

It is also worth mentioning that Act 1 does not prohibit courts from considering a deceased parent's testamentary wish that a particular individual be appointed as the child's *guardian*, even if that person would be prohibited from fostering or adopting by Act 1. The Plaintiffs who are biological parents nevertheless assert a supposed fundamental liberty interest in having their testamentary request for the *adoption* of their children by cohabitating individuals considered by the courts.[40] This allegation, like Counts 3 and 4, is speculative and thus not ripe for the Court's consideration. *See, e.g.*, *Tex. v. United States*, 523 U.S. 296, 300 (1998); *Ark.*

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[36] *See* Relevant Portions of the Transcript of the Deposition of Chris Mitchell, attached to the State Defendants' Motion for Summary Judgment as Exhibit 7, p.11-14 ; Last Will and Testament of Christopher D. Mitchell (Deposition Exhibit 82), attached to the State Defendants' Motion for Summary Judgment as Exhibit 8, Article IX (PL-336).

[37] *See* Exhibit 7, 13:24-14:1.

[38] *See* Relevant Portions of the Transcript of the Deposition of Susan Duell-Mitchell, attached to the State Defendants' Motion for Summary Judgment as Exhibit 9, p. 16-20; Last Will and Testament of Susan Duell-Mitchell (Deposition Exhibit 81), attached to the State Defendants' Motion for Summary Judgment as Exhibit 10, Article IX (PL-324).

[39] *See* Exhibit 9, 20:1-20:10.

[40] Plaintiffs' Opposition to Defendants' Motion to Dismiss, p. 26 ([The parent-plaintiffs] "do have a protected right to provide a recommendation that will be given weight by the State in considering the best interests of their children."). Notably, the Plaintiffs offer no legal citation in support of this alleged "protected right."

Dep't of Human Services v. Ross-Lawhon, 290 Ark. 578, 579, 721 S.W.2d 658, 658 (1986). The appropriate forum to resolve any issues regarding the parent Plaintiffs' testamentary recommendation that, in the event of their deaths, their children be adopted by cohabitating individuals would be in hearings on petitions by those individuals to adopt the parent Plaintiffs' children. Such hearings are contingent on the occurrence of several events that may never occur: 1) both members of a set of parent Plaintiffs predecease their child before the child reaches adulthood; 2) the designated cohabitating individual(s) outlive both parent Plaintiffs; and, 3) at the time of the death of the last surviving parent Plaintiff, the designated cohabitating individual remains willing and able to adopt the child. These events, individually or in combination, may never occur. Counts 5 and 6 are not ripe and should be dismissed.

Throughout this lawsuit, the parent Plaintiffs have not cited a single case that holds that they have any liberty interest, including a fundamental liberty interest, in making a testamentary recommendation for the adoption of their children by cohabitating individuals that would be given weight by courts.[41] Moreover, adoption was unknown to the common law and is governed by statute. *E.g.*, *Reid v. Frazee*, 61 Ark. App. 216, 218, 966 S.W.2d 272, 272-73 (1998). Therefore, the purported substantive right that the parent Plaintiffs assert is entirely founded on

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[41]The closest the Plaintiffs can come are two out-of-state cases that they have cited concerning testamentary guardianships. In *Comerford v. Cherry*, the Supreme Court of Florida held that *a statute* authorized parents to name a guardian for their children, pursuant to that *statute* guardians derived their authority from testators—not court appointment, and challengers to the guardianship had the burden of proving the guardians unfit. *Id.*, 100 So.2d 385, 390 (Fla. 1958). In *Bristol v. Bundage*, the Appellate Court of Connecticut similarly held that *a statute* mandated appointment of a sole surviving parent's testamentary choice of guardian for his or her child and created a rebuttable presumption that the appointment was in the child's best interests. *Id.*, 24 Conn. App. 402, 406, 589 A.2d 1, 2 (Conn. App. Ct. 1991). Because the Florida and Connecticut cases relied upon by the Plaintiffs concerned a right that parents would not have possessed but for a statute—not a right granted to them by the Constitution, they lend absolutely no support to the Parent- Plaintiffs' assertion of any liberty interest with regard to naming in their wills adoptive parents for their children. *See Bagley v. Rogerson*, 5 F.3d 325, 328 (8th Cir. 1993)(state statute cannot give rise to substantive right under Due Process Clause; at most, state statute granting individual benefit contingent on existence of particular facts creates procedural—not substantive—right to determination if those facts exist).

Arkansas' adoption statutes. State statutes, however, cannot form the basis of substantive-due-process rights. *See Bagley v. Rogerson*, 5 F.3d at 328. The parent Plaintiffs' purported right does not exist as a matter of law and Courts 5 and 6 should be dismissed for failure to state facts upon which relief could be granted. *See* Ark.R.Civ.P. 8(a) & 12(b)(6). Even assuming *arguendo* that this alleged right in some way did exist, which it does not, Act 1 easily satisfies rational basis review for the reasons discussed below in Section III.

D. The Defendants are entitled to summary judgment on Counts 7 and 8.

Similar to the claims raised by the parent Plaintiffs in Counts 5 and 6, the children of those Plaintiffs allege that their own rights are violated by Initiated Act 1 because they do not have "the security and stability of knowing that they will be adopted by the people chosen by their parents in the event that something happens to their parents."[42] The Plaintiffs bring this allegation pursuant to the Equal Protection Clauses of the United States Constitution,[43] and the Arkansas Constitution.[44] For the reasons discussed in the section above, these allegations should be dismissed for failure to state facts upon which relief can be granted. The premise on which this set of allegations is based, i.e., that biological parents have the sole legal authority to direct and control who will be the adoptive parents of their biological children, is patently false. Parents simply do not have the sole legal authority to determine who will adopt their children. Thus, Act 1 does not disadvantage children whose designated caregivers are in cohabiting intimate relationships as compared to those children whose designated caregivers are not in such relationships. Neither group of children can possibly *know* that they will be adopted by the

[42]Third Amended Complaint, ¶ 121.
[43]Third Amended Complaint, ¶¶ 120-123.
[44]Third Amended Complaint, ¶¶ 124-126.

people chosen by their parents. The claims of the child Plaintiffs in Counts 7 and 8 should be dismissed.

The child Plaintiffs allege that Act 1 deprives them of "the *possibility* of obtaining the benefits of an adoptive relationship with the adult deemed by their parents best suited to meet their needs[.]"[45] This allegation is, by its own terms, contingent on events that have not, and might not ever, occur. The parent Plaintiffs might not die before the child Plaintiffs reach adulthood. The designated cohabitating individuals might not outlive the parent Plaintiffs. The designated cohabitating individuals, if they were to outlive the parent Plaintiffs, might not be willing and able to adopt the child Plaintiffs at the time of the parent Plaintiffs' deaths. Counts 7 and 8 are not ripe and should be dismissed. *See, e.g.*, *Tex. v. United States*, 523 U.S. at 300; *Ark. Dep't. of Human Services v. Ross-Lawhon*, 290 Ark. at 578, 721 S.W.2d at 658.

Even if Counts 7 and 8 were ripe, they nevertheless should be dismissed. The Equal Protection Clause requires that the government treat all similarly situated people alike. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Act 1 does not discriminate against the child Plaintiffs. It does not treat them any differently than any other child. Act 1 does not permit *any* child to be adopted by cohabitating individuals, regardless of the testamentary wishes of the child's biological parent(s). The fact that Act 1 does not treat the children of deceased parents differently depending on their parents' testamentary wishes is alone reason to dismiss the child Plaintiffs' assertion of an equal-protection violation. Moreover, assuming *arguendo* that Counts 7 and 8 were ripe and that the child Plaintiffs had stated a claim in them, Act 1 is rationally related to legitimate government interests for the reasons discussed below in Section III. For all of these reasons, Counts 7 and 8 should be dismissed.

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[45]Plaintiffs' Opposition to Defendants' Motion to Dismiss, p. 27 (emphasis added).

E. The Defendants are entitled to summary judgment on Counts 9 and 10.

Some of the Plaintiffs claim that the enforcement of Act 1 will violate their rights to engage in private, consensual, non-commercial acts of sexual intimacy and maintain intimate relationships under the federal and state constitutions' due process and equal protection clauses.[46] These Plaintiffs correctly point out that because they currently cohabit with intimate partners to whom they are not married, they are ineligible to adopt or foster children under the terms of Act 1. The Plaintiffs also correctly point out that "Act 1 will disqualify from adopting and fostering both heterosexual and gay individuals who have made a personal *decision* to cohabit with intimate partners to whom they are not married."[47] Thus, according to these Plaintiffs, if they wish to adopt or provide foster homes for children under the terms of Act 1, they must either marry their intimate partners, or "cease living together and sharing a home and intimate family life with their partners."[48] This is true. Finally, according to the Plaintiffs, they are denied a constitutional right to maintain intimate relationships outside of marriage if they elect to cease living with their partners in order to become eligible to adopt. This is where the logic of Claims 9 and 10 fails. Act 1 does not require the Plaintiffs or anyone else to abandon their intimate relationships. Act 1 merely provides that if the Plaintiffs wish to be eligible to adopt or foster a child in Arkansas, *a privilege that is not constitutionally protected*, they cannot cohabit with an intimate partner outside of marriage.

Act 1 does not require the Plaintiffs to choose between two constitutional rights because being an adoptive or foster parent is a privilege, not a constitutionally protected right. *See, e.g.*, *Whalen v. County of Fulton*, 126 F.3d 400, 404 (2nd Cir. 1997)(adoptive parents have no liberty

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[46]Third Amended Complaint, ¶¶ 127-133 (Count 9) and 134-136 (Count 10).
[47]Third Amended Complaint, ¶ 130 (emphasis added).
[48]Third Amended Complaint, ¶ 130.

interest in adopting biological sibling of their adoptive child); *Lindley v. Sullivan*, 889 F.2d at 131 ("[W]e can find neither a fundamental right nor a privacy interest in adopting a child"); *State Dep't of Health v. Cox*, 627 So.2d 1210, 1216 (Fla.Dist.Ct.App. 1993)("[A]doption is not a right; it is a statutory privilege[.]"), *affirmed in part and quashed in part on other grounds*, 656 So.2d 902, 903 (Fla. 1995); *Sherrard v. Owens*, 644 F.2d 542, 543 (6th Cir. 1981)(per curiam), *cert. denied*, 454 U.S. 828 (1981)(holding that foster parents do not possess a constitutionally protected liberty interest in the maintenance of the foster family relationship); *Kyees v. County Dep't of Pub. Welfare*, 600 F.2d 693, 699 (7th Cir. 1979)(holding that foster parents do not possess a constitutionally protected liberty interest in the maintenance of the foster family relationship); *Drummond v. Fulton County Dep't of Family and Children Services*, 563 F.2d 1200, 1207 (5th Cir. 1977)(en banc), *cert. denied*, 437 U.S. 910 (1978)(denying foster parents' constitutional claims and noting that "[t]he very fact that the relationship before us is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adoptive family by any court, demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it."). Because adopting and fostering children are not constitutionally protected rights, Act 1 does not violate the federal and state constitutions by forcing the Plaintiffs to choose between exercising their constitutional rights and becoming adoptive or foster parents. *See, e.g.*, *McGautha v. California*, 402 U.S. 183, 213 (1971)("Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.").

Arkansas courts have the discretion to approve or deny adoption petitions on numerous grounds, including many grounds that could also be characterized as the exercise of a

constitutional right by a prospective parent. For example, United States citizens enjoy a constitutional right to interstate travel and to choose to reside in any state. However, if a person petitions for adoption and cannot meet the relevant residency requirements, the adoption petition will be denied. Surely the Plaintiffs do not claim that the residency requirements in adoption statutes nationwide are unconstitutional because they violate an individual's freedom to travel and reside in the state of their choice.

As another example, many states, including Arkansas, allow biological parents to express a religious preference for placing their child in an adoptive or foster home. *See* Ark. Code Ann. § 9-9-102(c)(allowing child's genetic parent or parents to express a religious preference and stating that if the parent does so, "the court shall place the child with a family that meets the genetic parent's religious preference, or if a family is not available, to a family of a different religious background that is knowledgeable and appreciative of the child's religious background."). Under the Plaintiffs' logic, this statute violates the equal protection rights of a prospective adoptive parent because a prospective parent would not be able to freely exercise the religion of the prospective parent's choice and remain eligible to adopt a child whose biological parents have expressed a different religious preference for their child. Clearly, that is simply not the case. DHS and the courts are constitutionally permitted to take into account a variety of factors in determining whether to approve adoption petitions, including factors that may relate to the prospective adoptive parents' exercise of protected constitutional rights. If the factor is relevant to the best interests of the child to be adopted in the analysis of DHS and the court, then the factor may be considered, whether it relates to the prospective parent's exercise of a constitutional right or not.

The Plaintiffs have fallen far short of establishing that Act 1 infringes to any constitutionally significant degree on *any* liberty interest that they may have in residing with an intimate partner. The United States Supreme Court has held that a law does not infringe on a fundamental liberty interest in family living arrangements to a constitutionally significant degree unless the infringement is direct and substantial. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)(holding that statute governing allocation of food stamps that advantaged unrelated individuals who resided together over related individuals who resided together did not '"directly and substantially' interfere with family living arrangements and thereby burden a fundamental right."). On its face, the law challenged in *Lyng* did not prohibit family members from residing together, thus it did not directly and substantially interfere with their living arrangements, even though some family members could conceivably have chosen to move in order to receive benefits as individuals. *Id.*

If a statute's indirect and insubstantial infringement upon a fundamental liberty interest in family living arrangements is not constitutionally significant, then such an infringement upon a lesser liberty interest, particularly cohabitation with an unrelated individual, is not constitutionally significant. Act 1 does not prohibit the Plaintiffs from residing with whomever they may choose. It does not directly and substantially infringe upon any liberty interest that the Plaintiffs may have in residing with an unrelated person of their own choosing. Thus, even if the Plaintiffs had a fundamental liberty interest in residing with an intimate partner (and they do not), as a matter of law, any infringement by Act 1 upon a liberty interest in residing with such a partner is, at most, indirect and insubstantial, and thus not unconstitutional.

As a matter of law, Initiated Act 1 does not burden the Plaintiffs' liberty interests in engaging in private, consensual, non-commercial acts of sexual intimacy, or to maintain intimate

relationships, under the United States and Arkansas Constitutions. As a matter of law, Counts 9 and 10 should be dismissed as to all Defendants for failure to state a claim. Ark.R.Civ.P. 8(a) & 12(b)(6). In addition, even if the Plaintiffs had stated a claim in these two counts, Act 1 should be upheld because it is rationally related to legitimate government interests for the reasons discussed below in Section III.

F. The Court has already dismissed Count 11.

For the reasons described in the State Defendants' prior briefing to the Court and for the reasons argued at the hearing on March 17, 2009, the Court has already dismissed Count 11.[49]

G. The Defendants are entitled to summary judgment on Counts 12 and 13.

Act 1 states, in part, that "[a] minor may not be adopted or placed in a foster home if the individual seeking to adopt or to serve as a foster parent is cohabiting with a sexual partner outside of a marriage which is valid under the constitution and laws of this state."[50] The Plaintiffs recently amended their Complaint, over a year after they filed their original Complaint and after the close of discovery in this case, to add a federal-law claim (Count 12) and a state-law claim (Count 13) alleging that the terms "cohabiting" and "sexual partner" are "so vague that individuals of common intelligence must necessarily guess at their meaning and differ as to their application."[51] Neither of these new claims has any merit, and both should be dismissed.

A statute is presumed to be constitutional and courts resolve any doubts about the statute in favor of constitutionality. *Night Clubs, Inc. v. Fort Smith Planning Comm'n*, 336 Ark. 130, 132, 984 S.W.2d 418 (1999); *see also Cockrell v. Union Planters Bank*, 359 Ark. 8, 194 S.W.3d 178 (2004)(If a court can construe a statute as constitutional, the court will do so provided that

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[49]Order on Defendants' and Intervenor-Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, filed April 16, 2009, ¶ 2.

[50]Ark. Code Ann. § 9-8-304(a).

[51]Third Amended Complaint, ¶¶ 145-151 (Count 12) and 152-155 (Count 13) and 146.

such a construction does not contravene the intent of the legislature.). The party challenging a statute has the burden of proving that the statute is unconstitutional. *Craft v. City of Fort Smith*, 335 Ark. 417, 984 S.W.2d 22 (1998). A statute will pass constitutional scrutiny under a "void for vagueness" challenge if the language conveys sufficient warning when measured by common understanding and practice. *Night Clubs, Inc. v. Fort Smith Planning Comm'n*, 336 Ark. at 133. "It is well settled that a law is unconstitutionally vague under due process standards if it does not give a person of ordinary intelligence fair notice of what is prohibited and is so vague and standardless that it allows for arbitrary and discriminatory enforcement." *Craft v. City of Fort Smith*, 335 Ark. at 424 (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Thompson v. Ark. Social Serv.*, 282 Ark. 369, 669 S.W.2d 878 (1984); *Davis v. Smith*, 266 Ark. 112, 583 S.W.2d 37 (1979)). "Stated another way, a statute must not be so vague and standardless that it leaves judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis." *Benton County Stone Co., Inc. v. Benton County Planning Bd.*, 374 Ark. 519, 522, 288 S.W.3d 653, 655 (2008)(citing *Ark. Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 166 S.W.3d 550 (2004)). "A statute is not to be struck down as vague only because marginal cases could be put where doubts might arise." *Holloway v. Ark. State Bd. of Architects*, 352 Ark. 427, 437-438, 101 S.W.3d 805, 811-812 (2003)(citing *Thompson v. Ark. Social Serv.*, *supra*; *Davis v. Smith*, *supra*).

The word "cohabiting" is not vague. It is the present participle of the intransitive verb "cohabit." The noun form is "cohabitation." The word "cohabiting" has a plain and ordinary meaning. The *American Heritage Dictionary* defines "cohabit" as meaning "[t]o live together in a sexual relationship, especially when not legally married." *Id.* (4th ed. 2009). The *Merriam-Webster Online Dictionary* defines "cohabit" as "to live together as or as if a married couple."

Id. (2010), <http://www.merriam-webster.com/disctionary/cohabit>. The *Oxford Dictionary and Thesaurus, American Edition* defines "cohabit" as "live together, esp. as husband and wife without being married to one another." *Id.* at 269 (1st ed. 1996). *Random House Webster's Unabridged Dictionary* defines "cohabit" as "to live together as husband and wife, usually without legal or religious sanction," or "to live together in an intimate relationship." *Id.* at 400 (2d ed. 1998). *Black's Law Dictionary* defines "cohabitation" as meaning "[t]he fact or state of living together, esp. as partners in life, usu. with the suggestion of sexual relations." *Id.* at 277 (8th ed. 2007). The common element of all of these definitions is that cohabiting persons live together.

The Plaintiffs themselves have a very clear understanding of the word "cohabiting." They repeatedly use that word and variations of that word to describe the living arrangements of both themselves and of those persons whom they have designated in their wills to adopt their children.[52] Consistently with the dictionary definitions cited above, the Plaintiffs interchangeably use that term with the phrases "live with" and "live together."[53] They plainly know what it means to "live together/with" because they use that phrase throughout their most recent amended complaint. In fact, the Plaintiffs who seek to foster or adopt children define

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[52]Third Amended Complaint, ¶¶ 107 ("Because Sheila cohabits in an intimate relationship with her partner, the terms of Act 1 – were they to be applied to Sheila – would bar Sheila from adopting or fostering her own granddaughter. . ."); 114 ("Act 1 would prevent these parents from having their children adopted by a relative or other individual of these parents' choosing in the event they could no longer care for their children because the individuals these Plaintiffs have designated are in unmarried cohabiting intimate relationships.").

[53]Third Amended Complaint, ¶¶ 55 ("Neither the terms of Act 1 nor any other provision of Arkansas law prohibits unmarried adults who are in intimate relationships from serving as foster or adoptive parents; only those who live with the person with whom they have an intimate relationship are excluded."); 56 ("Likewise, neither the terms of Act 1 nor any other provision of Arkansas law prohibits unmarried people who live together from serving as foster or adoptive parents unless they have a sexual relationship."); 66 ("[T]he wording of Act 1 will prohibit fostering and adopting not just by gay couples but by all unmarried couples cohabiting in intimate relationships[.]").

themselves as living together/with.[54] The Plaintiffs obviously know what the word "cohabiting" means and any claim to the contrary is plainly a last-ditch effort to salvage their lawsuit.

Like the widely regarded dictionaries cited above and the Plaintiffs themselves, Arkansas' appellate courts define the word "cohabitating" in terms of "living with" someone. In *Alphin v. Alphin*, the Arkansas Supreme Court changed custody of the biological child of a mother who had "*lived with*" one boyfriend and then another after divorcing the child's father. *Id.*, 364 Ark. at 336, 219 S.W.3d at 162 (emphasis added). The court made clear that "extramarital *cohabitation* in the presence of children 'has never been condoned in Arkansas, is contrary to the public policy of promoting a stable environment for children, and may itself constitute a material change of circumstances warranting a change of custody.'" *Id.*, 364 Ark. at 341, 219 S.W.3d at 165 (emphasis added). That the child's mother had "*lived with*" her boyfriends out of wedlock and thus engaged in "extramarital *cohabitation*" justified removing the child from her mother's custody, even though there was no divorce decree nor custody agreement defining, or even prohibiting, cohabitation. *Id.*, 364 Ark. at 341 n.2, 219 S.W.3d at 165 n.2 (emphasis added). Thus, the Arkansas Supreme Court, uses the terms "cohabitation" and "lived with" synonymously.

In *Brock v. State*, the issue was whether there was sufficient evidence that a man convicted of domestic battery had been a member of the victim's household. *Id.*, 90 Ark. App. 164, 169, 204 S.W.3d 562, 565 (2005). The domestic-battery statue prohibits purposefully causing physical injury to a "household member." *Id.*, (citing Ark. Code Ann. §§ 5-26-304(a)(1)

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[54]Third Amended Complaint, ¶¶ 14 ("[Plaintiff Sheila Cole] has *lived* in a committed relationship *with* her same-sex partner there for nine years.")(emphasis added); 19 ("[Plaintiffs Stephanie Huffman and Wendy Rickman] have *lived together* in a committed relationship for ten years.")(emphasis added); 22 ("[Plaintiffs Frank Pennisi and Matt Harrison] have *lived together* in a committed relationship for eight years.")(emphasis added).

& 5-26-305(a)(1)). The statue defines "household member" as including "[p]ersons who presently or in the past have resided or cohabited together." *Id.*, (quoting Ark. Code Ann. § 5-26-302(6)). The man argued that his conviction should be reversed because he had not been cohabiting with the victim when he assaulted her. The court rejected his argument because it is "irrelevant whether or not [the man] *cohabited* with [the victim] at the time of the offenses as there was proof that they *lived together* for a period of about three months before the first offense was committed." *Id.*, 90 Ark. App. at 170, 204 S.W.3d at 566. Like the Arkansas Supreme Court, the Arkansas Court of Appeals thus defines the terms "cohabiting" and "living together" synonymously.

Both of those courts, as well as numerous widely consulted dictionaries and the Plaintiffs themselves, make clear that the commonly understood definition of the word "cohabiting" is "living together." Accordingly, Act 1's use of the word "cohabiting" is not at all vague.

Like the term "cohabit," the term "sexual partner" has a plain and ordinary meaning that people of common intelligence readily understand. Indeed, that exact term is often used by witnesses and courts alike without any difficultly or misunderstanding. *See, e.g.*:

- *Turner v. State*, 355 Ark. 541, 543-44, 141 S.W.3d 352, 354 (2004)(victim "told police that she had lied about Turner being her first sexual partner, and she explained that she previously had sex with a boyfriend from Little Rock before she met Turner.");
- *Smith v. State*, 354 Ark. 226, 237, 118 S.W.3d 542, 548 (2003)(holding that "[t]he legislature could have rationally concluded that persons such as appellant should not use their positions as school and school-district employees to find and cultivate their underage sexual partners.");
- *Echols v. State*, 326 Ark. 917, 943, 936 S.W.2d 509, 521 (1996)(psychologist's notation of statement by murder suspect said, "He typically drinks the blood of a sexual partner[.]");
- *Holmes v. Holmes*, 98 Ark. App. 341, 349, 255 S.W.3d 482, 488 (2007)("[T]he instant record shows that appellant had six different sexual partners in a four-and-a-half year period.");

- *Ratliff v. Ratliff*, No. CA 02-844, 2003 WL 1856408 (Ark. App. Apr. 9, 2003) (unpublished)("appellant had his sexual partner in the home while the younger daughter was with him for overnight visitation.");

- *Bearden v. Bearden*, No. CA 01-1255, 2002 WL 31259796 (Ark. App. Oct. 9, 2002) (unpublished)("Appellee explained, however, that the overnight guest was just a friend and not a sexual partner. Appellee admitted that she had seven sexual partners since the separation but explained that her activities were conducted outside the presence of the children.");

- *Presley v. Presley*, 66 Ark. App. 316, 321, 989 S.W.2d 938, 940 (1999)(Hart, J., dissenting opinion)("The chancellor declined to change custody of the children, finding that the appellee had rectified his immoral behavior by marrying his female sexual partner and that it would not be in the best interest of the children to again be moved.");

- *Weaver v. State*, 56 Ark. App. 104, 108, 939 S.W.2d 316, 318 (1997)("The number of sexual partners of the victim would only be relevant if appellant could show that one or more had HIV and that the victim was exposed to it through them or that the victim knew they had HIV and disregarded the dangers associated with having sexual intercourse with them. However, appellant did not proffer any evidence that the suspected sexual partners of the victim did have the virus or that the victim contracted the virus by anything other than the relationship she had with appellant.");

- *Wilkins v. Schoonover*, No. CA 93-41, 1993 WL 367059 (Ark. App. Sept. 15, 1993) (unpublished)(explaining that in an earlier case "the chancellor decided that custody should be with the father primarily because the mother had been entertaining sexual partners while her children were in the house, thus making it undesirable for the children to be in her custody.");

- *Pruett v. Pruett*, No. CA 87-240, 1988 WL 14095 (Ark. App. Feb. 24, 1988) (unpublished)(appellant argued that "appellee's lack of residential, employment, financial and moral stability, coupled with a lack of stability in sexual partners, manifests an overall lack of stability in Jeremy's life warranting a change of custody.");

- *Hall v. State*, 15 Ark. App. 309, 312, 692 S.W.2d 769, 770-71 (1985) (psychologist testified "that, in her opinion, an adult's abuse of a child is not sexually motivated, and not gratifying, but is an abuse of power; that the 'psychological profile of a perpetrator' is usually heterosexual and they have an adult sexual partner; the first offense is virtually always committed before the age of 40; and alcohol or drugs is 'often a dynamic.'");

- *Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530 (Cir. Ct. of Pulaski Co., Ark., Dec. 29, 2004)(Fox, J.)(Memorandum Opinion)(plaintiffs' expert testified "that there are a number of demographic factors correlating with number of sexual partners[.]");

- *id.* at 2004 WL 3200916 (Findings of Fact and Conclusions of Law)("There are a number of demographic factors correlating with the number of sexual partners of an individual; age and cohort difference, ethnicity, religiosity, and gender being some of the variables.")

The fact that the simple, non-technical term "sexual partner" is used so frequently by witnesses and Arkansas' appellate courts, without any apparent misunderstanding, completely contradicts the Plaintiffs' assertion that the term is somehow vague.

The Plaintiffs have completely neglected to explain what it is that they do not understand about any of Act 1's well-defined and commonly understood terms. Whatever their confusion may be, they do not attempt to state some sort of "as applied" void-for-vagueness claim by professing to be confused about whether the Act's terms describe their own circumstances. Rather, the Plaintiffs readily admit in their recently amended complaint that Act 1 does in fact apply to their circumstances. They contend that the Act either disqualifies them from adopting and fostering children or from having their testamentary wishes about who upon their deaths would adopt their children honored. The Act is not vague as applied to them because they admit that it does in fact apply to them. Accordingly, to the extent that the Plaintiffs might attempt to state an "as-applied" void-for-vagueness claim, the very fact that they assert that the Act applies to them is alone sufficient reason to dismiss that claim. *See Parker v. Levy*, 417 U.S. 733, 756 (1974)("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

Nor can the Plaintiffs state a claim that Act 1 is in any way vague on its face. It is black-letter law that to prevail on a facial void-for-vagueness challenge a plaintiff must prove that the challenged statute is "is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *see also Craft v. City of Fort Smith*, 335 Ark. at 424, 984 S.W.2d at 26 (same). The Plaintiffs cannot possibly state a

facial void-for-vagueness claim regarding Act 1 because, as just discussed, their very own pleading alleges that the Act applies to their circumstances by either prohibiting them from adopting and fostering children or from having their testamentary wishes regarding their own children honored. Thus, the Plaintiffs' Third Amended Complaint makes clear that the Act is not at all vague when applied to the Plaintiffs themselves and thus Act 1 is not impermissibly vague in all of its applications. The Plaintiffs have fallen far short of stating a void-for-vagueness claim. Counts 12 and 13 should be dismissed as a matter of law.

III. THE DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE ACT 1 IS RATIONALLY RELATED TO LEGITIMATE GOVERNMENT INTERESTS.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion." Ark.R.Civ.P. 56(c)(2). Although the courts view the evidence in the light most favorable to the party opposing the motion, "[o]nce the moving party has established a prima facie case showing that no genuine issue of material fact remains to be litigated, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact." *Skallerup v. City of Hot Springs*, 2009 Ark. 276, 2009 WL 1354577. Because the Plaintiffs have failed to allege any fundamental right that subjects Act 1 to heightened scrutiny, *supra*, summary judgment should be granted if the Defendants are able to demonstrate *any* rational basis for Act 1.

A. The Rational-Basis Standard.

"Under the rational-basis test, the party challenging the constitutionality of the statute must prove that the statute is not rationally related to achieving any legitimate governmental

objective under any reasonably conceivable fact situation." *Ark. Dep't of Corr. v. Bailey*, 368 Ark. at 533, 247 S.W.3d at 861-862 (accepting General Assembly's findings that "sex offenders pose a high risk of reoffending after release from custody, that protecting the public from sex offenders is a primary governmental interest, that the privacy interest of persons adjudicated guilty of sex offenses is less important than the government's interest in public safety, and that the release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting the public safety."); *see also Ark. Charcoal Co. v. Ark. Pub. Serv. Comm'n*, 299 Ark. 359, 361-362, 773 S.W.2d 427 (1989)(accepting legislative findings that "there is at present and will continue to be a growing need for electric and gas public utility services which will require the construction of major new facilities[;]" "it is essential in the public interest to minimize any adverse effect upon the environment and upon the quality of life of the people of the state which such new facilities might cause[;]" and, "[p]resent laws and practices may result in undue costly delays in new construction, may encourage the development of energy technologies which are relatively inefficient and may increase costs, which will eventually be borne by the people of the state in the form of higher utility rates.")(emphasis omitted).

The rational basis test is satisfied if "any state of facts either known or which could reasonably be assumed affords support for" the challenged legislation. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). The issue is not the actual basis of the legislation. *Streight v. Ragland*, 280 Ark. at 215, 655 S.W.2d at 464. Rather, the issue is whether "any rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose." *Id.* A statute passes the test if the Court can

"reasonably conceive" of a lawful purpose for it. *Id.* The Court is "not limited to the rational bases suggested by the parties, rather [the Court has] the power to hypothesize a rational basis for the legislation." *Weiss v. Geisbauer*, 363 Ark. 508, 514, 215 S.W.3d 628, 632 (2005). The party challenging the statute has the burden of proving that the legislature acted arbitrarily or irrationally. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

A court conducting a rational-basis review must not sit "as a superlegislature to judge the wisdom or desirability of legislative policy determinations[.]" *Heller v. Doe*, 509 U.S. 312, 319 (1993); *see also Citifinancial Retail Services Div. of Citicorp Trust Bank, FSB v. Weiss*, 372 Ark. 128, 136, 271 S.W.3d 494, 499 (2008)("This court has repeatedly held that the determination of public policy lies almost exclusively with the legislature, and the courts will not interfere with that determination in the absence of palpable errors."); *Southwestern Bell Tel. Co. v. Roberts*, 246 Ark. 864, 868, 440 S.W.2d 208, 210 (1969)("[T]he question of the wisdom or expediency of a statute is for the Legislature alone. The mere fact that a statute may seem unreasonable or unwise does not justify a court in annulling it, as courts do not sit to supervise legislation. Courts do not make the law; they merely construe, apply, and interpret it."); *Cone v. Garner*, 175 Ark. 860, 865, 3 S.W.2d 1, 5 (1927)("The courts cannot hold an act void because it may be thought to be bad policy. The policy of the legislation, the expediency of it, are questions peculiarly within the province of the lawmaking power."). The Legislature has "absolutely no obligation to select the scheme that a court later would find to be the fairest, but simply one that was rational and not arbitrary." *Nat'l R.R. Passenger Corp. v. A.T.& S.F.R. Co.*, 470 U.S. 451, 477 (1985). "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Okla.*, 348

U.S. 483, 487-88 (1955). Thus, Act 1's advancement of even a single legitimate governmental interest would require that the Act be upheld and the lawsuit be dismissed.

The Plaintiffs are likely to argue that although Act 1 may advance some identifiable interest, there are other ways of advancing the interest preferred by the Plaintiffs and the Act is irrational for not adopting their preferred approach. However, as a matter of law, the existence of alternative methods of advancing the identified interest does not render a law irrational or unconstitutional. *See Heller v. Doe*, 509 U.S. at 330 (quoting *Schweiker v. Wilson,* 450 U.S. 221, 235 (1981)("As long as Kentucky 'rationally advances a reasonable and identifiable governmental objective, we must disregard' the existence of alternative methods of furthering the objective 'that we, as individuals, perhaps would have preferred.'")). Act 1 does not have to be perfect in order to be constitutional. *See McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961)("State legislatures are presumed to have acted within their constitutional power despite the fact that in practice, their laws result in some inequality."). The presumption that a law is constitutional even though it may be imperfect is even stronger with regard to laws passed by the citizens themselves at the ballot box. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)(upholding an initiated act approved by California voters).

B. Act 1 is in the best interests of Arkansas children in need of adoption or foster care.

Act 1 explicitly states that "[t]he people of Arkansas find and declare that it is in the best interest of children in need of adoption or foster care to be reared in homes in which adoptive or foster parents are not cohabiting outside of marriage." Ark. Code Ann. § 9-8-301. Essentially, the Plaintiffs disagree with this finding and declaration adopted by the people of Arkansas, and it is their disagreement with this finding that forms the basis of their lawsuit. However, by enacting Initiated Act 1, the people of Arkansas acted as their own legislature, and their

determination is entitled to considerable judicial deference. Indeed, where, as here, the legislative determination does not affect a fundamental right, the judiciary may not interfere with the determination. *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."); *Gallas v. Alexander*, 371 Ark. 106, 125-128, 263 S.W.3d 494, 508-510 (2007)(holding that statute was rational based upon legislative findings expressed in the statute itself); *Holloway v. Ark. State Bd. of Architects*, 352 Ark. at 441, 101 S.W.3d at 814-815 ("[T]he statute itself contains a legislative determination that the unauthorized practice of architecture is a threat to the public health and safety . . . therefore, in order to safeguard life, health, and property, no person may practice architecture without having secured a certificate of registration and a license."); *City of Lowell v. M & N Mobile Home Park, Inc.*, 323 Ark. 332, 336, 916 S.W.2d 95 (1996)("The legislative power includes discretion to determine the interests of the public as well as the means necessary to protect those interests."); *Winters v. State*, 301 Ark. 127, 132, 782 S.W.2d 566, 569 (1990)("The test is whether there is a conceivable basis for the rule, so that it can be said the action was not arbitrary. The Constitution is not violated so long as a law is not premised upon a patently irrational basis. Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question of whether it so lacks any reasonable basis as to be arbitrary.")(internal quotation marks omitted); *McClelland v. Paris Public Schools,* 294 Ark. 292, 299, 742 S.W.2d 907 (1988)("Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question of whether it so lacks any reasonable basis as to be arbitrary.")(citing *Cook County College Teacher Union Local 1600 v. Taylor*, 432 F.Supp. 270 (N.D. Ill. 1977)); *Stone v. State*, 254 Ark. 1011, 1017, 498

S.W.2d 634 (1973)("We cannot overturn the legislative fact-finding unless its action can be said to be arbitrary."); *Parkin v. Day*, 250 Ark. 15, 16-17, 463 S.W.2d 656, 657 (1971) (constitutionality of statute upheld where legislative finding was supported by testimony for the State defendant and disputed by testimony for the plaintiff). The State Defendants respectfully submit that the Court is without authority to reexamine or review the wisdom of the majority of Arkansas voters who have expressly determined that Initiated Act 1 is in the best interest of children in need of adoption or foster care in Arkansas. This lawsuit should be dismissed accordingly. And, because the Act *is* in the best interest of those children, it easily passes the rational basis test and must be upheld.

1. 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.

The Defendants have retained three expert witnesses in this case, and each expert has submitted an expert report.[55] The Plaintiffs have retained seven expert witnesses, four of whom have prepared both expert reports and rebuttal reports in response to the Defendants' expert reports, and three of whom have prepared only rebuttal reports. All ten experts in this case have been deposed. The salient material fact is that the Defendants' experts have concluded that Act 1 is rationally related to the legitimate government interest of serving the best interests of children

[55] Dr. Paul L. Deyoub is a clinical forensic psychologist who practices in Arkansas and routinely evaluates DHS dependency and neglect cases, including the evaluation of children and adolescents who have been the victims of abuse and neglect. His expert report ("Deyoub Report") is attached to the State Defendants' Motion for Summary Judgment as Exhibit 11. Dr. Jennifer Roback Morse is a former professor of economics at Yale University, George Mason University, and Cornell University, and is currently the founding President of the Ruth Institute, a non-profit educational organization devoted to promoting lifelong married love to the young. Her expert report ("Morse Report") is attached to the State Defendants' Motion for Summary Judgment as Exhibit 12. Dr. W. Bradford Wilcox is a professor of sociology and the Director of the National Marriage Project at the University of Virginia. His expert report ("Wilcox Report") is attached to the State Defendants' Motion for Summary Judgment as Exhibit 13.

in the Arkansas foster care system for a variety of reasons. Although the Plaintiffs' experts may disagree with some of the opinions of the defense experts, this case is not a battle of the experts. The fact that *any* expert has found that Act 1 promotes the best interests of children in the foster care system proves that the Act is not arbitrary or irrational.[56] Act 1 therefore passes constitutional muster as a matter of law. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 460, 464, 469-470 (1981)(statute upheld despite the fact that evidence presented by the parties was "in sharp conflict;" statute will be upheld as long as its constitutionality is "at least debatable"); *Benton County v. City of Bentonville*, 373 Ark. 356, 360, 284 S.W.3d 52, 55 (2008)(constitutionality of ordinance upheld despite conflicting testimony and evidence presented by party challenging the ordinance); *Johnson v. Sunray Services, Inc.*, 306 Ark. 497, 506, 816 S.W.2d 582, 588 (1991)(constitutionality of law upheld despite conflicting expert testimony); *Parkin v. Day*, 250 Ark. at 16-17, 463 S.W.2d at 657 (constitutionality of statute upheld where legislative finding was supported by testimony for the state defendant and disputed by testimony for the plaintiff.). That even one expert has determined that Act 1 promotes the best interests of children in the foster care system is itself a rational basis for upholding the Act.

Again, if there is a single rational basis for Act 1, the Act must be upheld. In this case, the defense experts have set forth a bevy of ways in which Act 1 serves the best interests of

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[56] In fact, the Plaintiffs have the burden of proving that Act 1 bears no rational relation to any legitimate state interest. *See Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955); *Streight v. Ragland*, 280 Ark. 206, 214, 655 S.W.2d 459, 464 (1983). Arkansas Courts presume that the law being challenged is constitutional, even if the state presents no evidence of a rational relation to a legitimate government interest. *See Streight v. Ragland*, 280 Ark. at 213. The Court is "allowed to hypothesize" a rational relation of the law to a legitimate government interest. *Id.*, 280 Ark. at 214. And, where the law includes a finding that the law supports a legitimate government interest, as is the case with Act 1, the Court should defer to that finding, and no proof of the rationality of the finding is required. *Williamson v. Lee Optical*, 348 U.S. at 488.

children, and the Plaintiffs' experts even agree with some of these conclusions of the Defendants' experts. Summary judgment should be granted accordingly.

Under Act 1, a married person is eligible to foster or adopt a child, while a person who is cohabiting with a sexual partner outside of marriage is not eligible to foster or adopt a child. The policy expressed in Act 1 is rationally related to serving the best interests of Arkansas children because there is a strong scientific consensus, as admitted by the Plaintiffs' experts in this case, that children generally experience better outcomes on a range of factors when children are raised in married households as compared to cohabiting households.[57] The fact that children experience better outcomes in married households than in cohabiting households is succinctly explained in the following passage from one of the Defendants' expert reports:

> The benefit of marriage for children is indisputable. Adults who marry live longer, healthier, happier lives, with lower rates of suicide, substance abuse, alcoholism, mental illness, depression, anxiety, and poverty. Married couples earn more money, build more wealth, and provide greater stability to their children. Cohabitation and marriage are not equivalent, and even cohabitants who later marry are not as satisfied as married individuals who never cohabited. The benefit to children of living in a married household versus a cohabiting household is irrefutable with regard to their social, emotional, and financial stability.[58]

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[57] *See* Wilcox Report (Exhibit 13), ¶ 8 ("Research conducted in the last decade indicates that children in cohabiting households are significantly more likely to suffer from social, psychological, and educational problems, compared to children in intact, married households."); ¶ 13 ("On average, children living outside of an intact, married family are two to three times more likely to suffer from social, psychological, and educational problems like delinquency, depression, teen pregnancy, imprisonment, and dropping out of high school."); ¶ 14 ("Research focusing specifically on cohabitation and children's well-being . . . indicates that children in cohabiting families do worse than children in intact, married households when it comes to a wide range of social, psychological, and educational outcomes.").

[58] Deyoub Report (Exhibit 11), § II.2. *See also id.*, § III.2. ("Children whose parents are not married or do not stay married are more likely to fail at school, to drop out, to slip into poverty, to become welfare dependent, to be physically and sexually abused, to experience both physical and mental health problems, to be involved in criminal activity, to abuse drugs and alcohol, to become sexually active at young ages with multiple partners, and to become young unwed mothers, or fathers, themselves.").

Specifically, children raised in cohabiting households are significantly more likely than children raised in married households to experience a host of social problems,[59] educational problems,[60] psychological problems,[61] and both physical and sexual abuse.[62] Each of these facts, that each of these poor child outcomes are more likely in cohabiting homes than in married homes, is an independent rational basis upon which the voters of Arkansas reasonably determined that it is in the best interests of children not to be placed in foster homes or adoptive homes with cohabiting adults.[63]

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[59] *See* Wilcox Report (Exhibit 13), ¶ 15(a) ("In the social domain, studies find that children in cohabiting families are significantly more likely to experience delinquency, drug use, lying, problems relating to peers, and trouble with the police, compared to children in intact, married families.").

[60] *See* Wilcox Report (Exhibit 13), ¶ 15(b) ("In the educational domain, studies find that children in cohabiting families are significantly more likely to experience difficulties with concentrating, dropping out of high school, low grades, low levels of school engagement, and school suspension, compared to children raised in intact, married households.").

[61] *See* Wilcox Report (Exhibit 13), ¶ 15(c) ("In the psychological domain, studies find that children in cohabiting families are significantly more likely to experience depression, difficulty sleeping, feelings of worthlessness, nervousness, and tension, compared to children in intact, married households."). *See also* Deyoub Report (Exhibit 11), § III(5) ("Children living with cohabiting parents suffer significantly poorer mental health than children living with married parents. . . Children who live with cohabiting parents have a lower standard of living, more signs of emotional problems, and poorer emotional health.").

[62] *See* Wilcox Report (Exhibit 13), ¶ 15(d) ("In the abuse domain, studies find that children in cohabiting households are significantly more likely to experience physical and sexual abuse than are children in intact, married households."). *See also* Deyoub Report (Exhibit 11), § II(5) ("Child abuse is more likely and occurs more frequently in cohabiting homes than in married homes. One of the most dangerous places for any child to live is with a live-in boyfriend of the child's mother. This is true whether the mother is the foster, adoptive, or biological mother of the child."); § III(3) ("Cohabiting couples have a higher rate of assault than married couples. These findings persist even after controls for age, education, and occupational status. Violence is more severe in cohabiting than married couples, not just more frequent."); § III(5) ("Marriage is the safest place for a mother and her children, and the rates of serious child abuse are lowest in intact married families. Abuse is six times higher in stepfamilies, 14 times higher with a single mother, 20 times higher in cohabiting families, in which both parents are biological but not married, and 33 times higher when the mother is cohabiting with a boyfriend, who is not the father of her children.").

[63] *See* Deyoub Report (Exhibit 11), § III(6) ("[A]ccording to the social science research and my clinical experience, excluding cohabiting couples from fostering or adopting children protects children from harm and increases the stability of their lives, because they are less likely to see their foster or adoptive parents separate, they are less likely to experience physical and mental abuse, and they are less likely to see domestic abuse between their cohabiting parents.").

The opinions of the defense experts and the research upon which they rely indicate that a primary reason why children experience poorer outcomes in cohabiting households as compared to married households is because on average, cohabiting relationships are less stable than married relationships:

> Family structure is linked to the quality and stability of family life for children. On average, cohabiting parents experience lower relationship quality, more domestic violence, more sexual infidelity, and more instability than do married parents; they are also less likely to engage in high-quality parenting with their children, compared to married parents. Accordingly, cohabiting parents are less likely to provide a high-quality, stable home environment for the rearing of children than are married parents.[64]

Of course, the reason for the poorer child outcomes does not matter because the poorer child outcomes are themselves rational bases for the law, but the instability of cohabiting relationships is certainly a phenomenon that many voters in Arkansas have personally observed and experienced, and it is rational for the voters to favor a policy that prevents children from being

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[64] Wilcox Report (Exhibit 13), ¶ 10. *See also id.*, ¶ 22 ("[S]tudies find that cohabiting relationships are typically of lower-quality than married relationships.[FN] Specifically, cohabiting couples typically experience lower levels of happiness and commitment, and higher levels of domestic violence and sexual infidelity, compared to married couples."), ¶ 23 ("The association between family structure and the quality of family life is important because the scientific literature indicates that children are more likely to thrive when their parents enjoy a high-quality relationship."), ¶ 24 ("The scientific literature also suggests that cohabiting parents are less likely to supply high-quality parenting than married parents, and that these differences in parenting help to account for differences in child outcomes between these two different family types."), ¶ 25 ("Cohabiting families are also markedly less stable than married families, in part because cohabiting unions do not enjoy the legal and social status, as well as personal commitment, associated with married unions."), ¶ 26 ("The link between family structure and family stability is important because a large body of scientific research indicates that family instability is harmful to children. Specifically, family instability has been linked to aggression, delinquency, depression, drug use, early sexual activity, loneliness, problems in school, school suspensions, and trouble with the law among preschool and school-aged children."). *See also* Deyoub Report (Exhibit 11), § 2(3) ("Cohabiting couples have a higher risk of domestic violence, abuse, infidelity and relationship instability than married couples. Foster children and adopted children will face abandonment of one of the parents or abuse by one of the parent figures at a higher rate in cohabiting families.").

exposed to unstable relationships and the poor child outcomes associated with unstable relationships.[65]

The Plaintiffs argue that Act 1 is irrational because the Act allows children to be placed into foster and adoptive homes with single adults as well as married adults, and according to the Plaintiffs' experts single homes are not necessarily more stable or safe than cohabiting households. However, a law is not unconstitutional under rational basis review merely because it is underinclusive. *See Central State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 128 (1999)(upholding underinclusive state university policy that created a class of public employees without collective bargaining power as a rational means to avoid delay in implementation of the policy); *Vance v. Bradley*, 440 U.S. 93, 108-109 (1979)(upholding federal statute that required employees covered by the Foreign Service retirement and disability system to retire at age 60, but did not similarly require employees covered by the Civil Service system to retire); *Medlock v. Leathers*, 311 Ark. 175, 179, 842 S.W.2d 428, 430-431 (1992)(refusing to "strike down a classification merely because it is underinclusive" where a state statute imposed state and local sales tax on cable television services, but not on other forms of mass media such as satellite television services). Act 1 should be upheld simply because it is *undisputed* that on average, children experience better outcomes in married households than in cohabiting households, and Act 1 allows children to be placed into married households but forbids the placement of children into cohabiting households. Any dispute about the relative child outcomes for children raised in

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[65] *See* Deyoub Report (Exhibit 11), § IV ("The social science research and my clinical experience reveal the following: the rate of violence for cohabiting couples is twice as high as the violence rate for married couples; aggression is at least twice as common among cohabitants as it is among married partners; sexual aggression is higher among cohabitants compared to married couples; cohabiting couples are more than three times as likely as married couples to experience severe domestic violence; and cohabitants experience significantly more difficulty in their marriages (if they marry) as opposed to married couples who did not cohabitate with respect to adultery, alcohol, drugs, and dissolution of the relationship.").

single homes is not material because even if single homes also result in poorer child outcomes as compared to married homes, Act 1 does not have to exclude single homes in addition to cohabiting homes in order to be constitutional, *supra*.

Further, there is evidence indicating that single-parent households are more stable than cohabiting households. "A number of studies indicate that children in cohabiting households do worse than children in single-parent families – especially when it comes to their risk of physical or sexual abuse."[66] As with married households, the fact that children generally experience better outcomes in single-parent families than in cohabiting households stems from the relative instability of cohabiting households.[67] As with a comparison involving married households, the opinions of the defense experts and the social science research indicates that children raised in cohabiting households are significantly more likely than children raised in single-parent families to experience social problems,[68] educational problems,[69] psychological problems,[70] and both

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[66] Wilcox Report (Exhibit 13), ¶ 9.

[67] *See* Wilcox Report (Exhibit 13), ¶ 11 ("On average, children raised in cohabiting households are more likely to be exposed to family instability than are children raised in married-parent *and* single-parent families. This instability is bad for children in general; it is likely to be particularly problematic for children being placed in adoptive or foster care, precisely because they have often been exposed to instability previously and because the negative effects of instability tend to be cumulative."). *See also id.*, ¶ 18 ("A number of studies indicate that children in cohabiting households do about the same as children in single-parent families on some social, educational, and psychological outcomes."); ¶ 19 ("However, a number of studies indicate that children in cohabiting families do worse than children in single-parent families, especially when it comes to their exposure to physical and sexual abuse.").

[68] *See* Wilcox Report (Exhibit 13), ¶ 19(a) ("In the social domain, studies indicate that children in cohabiting families are more likely to experience behavioral problems, delinquency, and drug use.").

[69] *See* Wilcox Report (Exhibit 13), ¶ 19(b) ("In the educational domain, studies find that children in cohabiting families are more likely to suffer from low grades, low levels of school engagement, and school suspension or expulsion than children in single-parent families.").

[70] *See* Wilcox Report (Exhibit 13), ¶ 19(c) ("In the psychological domain, the research suggests that adolescents in cohabiting households are more depressed than adolescents in single-mother households.").

physical and sexual abuse.[71] Again, even though the Plaintiffs' experts may dispute these social science conclusions, Act 1 is constitutional if it is even conceivable that the defense experts are correct, and in fact, Act 1 is constitutional even if there is no difference in child outcomes as between cohabiting-parent households and single-parent households, because the law does not have to be perfect to be constitutional, and the law may be overinclusive or underinclusive, so long as the law is rationally related to a legitimate government interest. *See Clements v. Fashing*, 457 U.S. 957, 960-970 (1982)(upholding state statute that prohibited justices of the peace from leaving office early to run for the state legislature where the same restriction was not placed on individuals holding other political offices in the state; legislatures are free to regulate "one step at a time" and do not have to remedy "every evil."); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314-317 (1976)(per curiam)(upholding statute requiring state police officers to retire at age 50 as rationally related to the legitimate government purpose of assuring the physical fitness of officers, even though the plaintiff officer was in excellent physical health and could perform the duties of a state police officer; "[t]hat the State chooses not to determine fitness more precisely through individualized testing after age 50 [does not prove] that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation."); *Hawkeye Commodity Promotions v. Vilsack*, 486 F.3d 430, 433 (8th Cir. 2007)(upholding an incremental ban on only one form of gambling on the basis that it was a rational means to regulate gambling).

According to the Plaintiffs, the costs associated with Act 1 outweigh any benefits of Act 1 such that the Act represents a bad policy on the whole. As a threshold matter, this argument is

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[71] *See* Wilcox Report (Exhibit 13), ¶ 19(d) ("In the abuse domain, the research indicates that children are more likely to be physically or sexually abused in cohabiting households than in single-mother households.").

absolutely irrelevant if there is a rational basis for the law. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 464 (states are "not required to convince the courts of the correctness of their legislative judgments."). Moreover, one of the defense experts is an economist who has conducted a cost-benefit analysis of the exclusion of cohabiting couples from foster care and adoption, in terms of the overall well-being of the children of Arkansas, including their stability, safety, emotional health, and school achievement, and she concludes that "the costs of the exclusion of unmarried cohabiting couples from foster care and adoption are outweighed by the exclusion's benefits to children."[72] Using census data relied upon by the Plaintiffs' own experts, the Defendants' expert economist estimates that the total number of households excluded by Act 1 is approximately 5-7% of the total households that are not excluded by Act 1.[73] In other words, cohabitants make up a very small percentage of individuals who might be eligible to foster or adopt children in the absence of Act 1. Of that percentage, the possibility that a fraction of this small percentage of cohabitants might actually want to become foster or adoptive parents, might be otherwise qualified, and might make good foster or adoptive parents, represents a theoretical cost of Act 1.

On the other hand, the benefits of Act 1 are many. Act 1 increases the chance of good outcomes for children and reduces the chance of potentially disastrous outcomes.[74] There are many reasons to support this conclusion drawn by the Defendants' expert economist: cohabiting relationships are substantially less stable than married relationships, which is both directly and indirectly harmful to children raised in cohabiting households;[75] cohabiting couples are more violent than married couples, and mothers' cohabiting boyfriends are the most likely perpetrators

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[72] Morse Report (Exhibit 12), § II.
[73] *See* Morse Report (Exhibit 12), § III(B).
[74] *See* Morse Report (Exhibit 12), § C.
[75] *See* Morse Report (Exhibit 12), § C(1).

of child abuse;[76] cohabiting couples have lower relationship quality than married couples, and as admitted by one of the Plaintiffs' experts, the quality of parents' intimate relationship is a predictive factor of good outcomes for children;[77] cohabitants are more likely than married individuals to have secondary sex partners, which poses a risk to children because children are most likely to be abused by secondary sex partners or unrelated adults in the home;[78] cohabitants have higher rates of mental illness and depression than married individuals, and depressed or mentally ill parents are less likely to meet the needs of children in their care;[79] cohabitants tend to be more socially isolated than married individuals and have lower levels of social support, which increases the risk of maladjustment for children in their care;[80] cohabitants generally have lower incomes and less wealth accumulation than married individuals, and fewer economic resources predicts a higher probability of maladjustment for children;[81] and cohabitants behave differently as parents than married individuals, showing less support and involvement, which correlates to poorer mental health and educational performance for children in cohabiting households.[82] Each of these conceivable benefits of Act 1 represents an independent rational basis for the law that is sufficient to confirm the constitutionality of the law. Again, just because the Plaintiffs and their experts may disagree with some of these conclusions or with the overall conclusion that the benefits of Act 1 outweigh the costs of Act 1, does not render the law arbitrary and unconstitutional and does not create a disputed issue of *material* fact.

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[76] *See* Morse Report (Exhibit 12), § C(2).
[77] *See* Morse Report (Exhibit 12), § C(3).
[78] *See* Morse Report (Exhibit 12), § C(4).
[79] *See* Morse Report (Exhibit 12), § C(5).
[80] *See* Morse Report (Exhibit 12), § C(6).
[81] *See* Morse Report (Exhibit 12), § C(7).
[82] *See* Morse Report (Exhibit 12), § C(8).

In fact, several of the Plaintiffs' experts have conceded in their expert reports[83] that Act 1 has a vast array of conceivable rational bases. The Plaintiffs' experts concede that there are statistically significant disparities in outcomes between cohabiting and married parent families, and that as a group, children raised in cohabiting households experience poorer outcomes than children raised in married households as a group.[84] The Plaintiffs' experts attempt to explain these disparities by analyzing subgroups of cohabitants, arguing that there is correlation without causation, but in the course of these discussions, the Plaintiffs' experts concede beyond the shadow of a doubt that on average, children raised in cohabiting households experience poorer outcomes than children raised in married households.[85] The conceivable fact that children in cohabiting households experience poorer outcomes than children in married households, regardless of any explanation for this undisputed fact, is a rational basis for Act 1. Summary

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[83] Dr. Susan D. Cochran is a Professor in the Department of Epidemiology at the University of California, Los Angeles. Her rebuttal expert report ("Cochran Rebuttal Report") is attached to the State Defendants' Motion for Summary Judgment as Exhibit 14. Dr. Michael E. Lamb is a Professor of Psychology at the University of Cambridge in the United Kingdom. His expert report ("Lamb Report") is attached to the State Defendants' Motion for Summary Judgment as Exhibit 15. Dr. Cynthia Osborne is an Assistant Professor at the University of Texas at Austin. Her rebuttal expert report ("Osborne Rebuttal Report") is attached to the State Defendants' Motion for Summary Judgment as Exhibit 16. Dr. Letitia Anne Peplau is a Professor of Psychology at the University of California, Los Angeles. Her expert report ("Peplau Report") and her rebuttal expert report ("Peplau Rebuttal Report") are attached to the State Defendants' Motion for Summary Judgment as Exhibits 17 and 18, respectively.

[84] *See* Osborne Rebuttal Report (Exhibit 16), p. 5 ("[S]tudies of cohabitors as a group show on average poorer outcomes among the cohabiting group than the married group."); Lamb Report (Exhibit 15), ¶ 25 ("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.").

[85] *See* Osborne Rebuttal Report (Exhibit 16), p. 6 ("The disparities in outcomes between heterosexual cohabiting parent families as a group and married parent families as a group has been found largely to be the result of selection effects as opposed to being caused by the couple's marital status."); p. 9 ("The disparities that exist between heterosexual cohabiting and married couples with respect to child outcomes are similar to and often smaller than the disparities that exist between other demographic groups based on education or income level, age, or race/ethnicity."); p. 10 ("The fact that child outcomes in married parent families are better on average than outcomes in cohabiting families does not mean that most children in cohabiting families are doing poorly on measures of their well-being (e.g. psychological, social and academic adjustment).").

judgment should be granted because there can be no possible dispute where the Plaintiffs' own experts concede that there is a conceivable rational basis for Act 1.

The Plaintiffs' experts also concede a variety of other more specific rational bases in support of Act 1. For example, through their experts' reports, the Plaintiffs concede that domestic violence is more common in cohabiting households than in married households, and that children in cohabiting households are more likely to be the victims of physical and sexual abuse than children in married households.[86] The Plaintiffs concede through their experts that cohabiting individuals are more likely to experience mental health problems such as depression than married individuals.[87] The Plaintiffs concede through their experts that cohabiting relationships are less stable than married relationships.[88] The Plaintiffs concede through their experts that cohabiting relationships have greater rates of infidelity than married relationships.[89] Each of these concessions represents an independent rational basis for Act 1 that is sufficient to uphold the constitutionality of the law.

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[86] *See* Osborne Rebuttal Report (Exhibit 16), p. 11 ("Children living in families without both of their biological parents are somewhat overrepresented among abused children . . . [T]he rates of ever being abused are somewhat higher for children living without both of their biological parents (7%) than they are for children living with both of their biological parents (4%)…"); *see also* Peplau Report (Exhibit 17), p. 5 ("Studies indicate that the rate of partner domestic violence is higher for cohabiting heterosexual couples than for married heterosexual couples.").

[87] *See* Cochran Rebuttal Report (Exhibit 14), p. 2 ("Studies indicate that married heterosexuals have lower rates of depressive distress than cohabiting heterosexuals.").

[88] *See* Peplau Report (Exhibit 17), p. 3 ("Another predictor of couple stability involves barriers that deter partners from ending a relationship . . . Marriage is but one way that couples signify their commitment to each other and create legal, financial, social and/or religious obligations toward each other."); p. 4 ("Studies show that breakup rates are higher among heterosexual cohabiters than among married heterosexuals.").

[89] *See* Peplau Rebuttal Report (Exhibit 18), p. 1 ("Studies indicate that the rate of infidelity is higher for cohabiting heterosexual couples than for married heterosexual couples.").

In their depositions,[90] the Plaintiffs' experts had no choice but to concede a variety of ways in which Act 1 could conceivably promote the best interests of Arkansas children. The Plaintiffs' experts have testified that children raised in cohabiting households generally experience poorer outcomes than children raised in married households.[91] This single admission by the Plaintiffs' experts is more than sufficient to uphold the constitutionality of Act 1. The Plaintiffs' experts have also conceded a number of ways in which cohabiting relationships are generally less stable and of lower quality than married relationships, and according to the Plaintiffs' experts there is a wide consensus among both experts and non-experts alike that the quality and stability of parental relationships is directly connected to child outcomes.[92] Specifically, the Plaintiffs' experts have testified that:

- Individuals in cohabiting relationships are more likely to abuse alcohol[93] and illegal drugs[94] than individuals in married relationships.

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[90] Relevant portions of the transcripts of the depositions of Dr. Cochran ("Cochran Deposition"), Dr. Lamb ("Lamb Deposition"), Dr. Osborne ("Osborne Deposition"), and Dr. Peplau ("Peplau Deposition") are attached to the State Defendants' Motion for Summary Judgment as Exhibits 19, 20, 21, and 22, respectively.

[91] *See* Osborne Deposition (Exhibit 21), 153:7-153:12 ("[I]t is important for a child to have adults who are financially and emotionally responsible for them. And so the fact that marriage does create some legal responsibility for that child is good for those children in which – who wouldn't have that outside of marriage."); 207:5-208:20 (Dr. Osborne conceding that there are statistically significant differences in child outcomes for children raised in married households versus children raised in cohabiting households); 241:18-241:23 ("As I've said earlier today, that looking at certain outcomes, considering certain married couples as compared to a whole range of various sorts of other family structures, that there are some positive associations between marriage and outcomes for children.").

[92] *See* Peplau Deposition (Exhibit 22), 19:4-19:11 ("While I'm not an expert, okay, in the area of child welfare, it does seem to me that any social psychologist, and for that matter, probably anyone on the street, would agree that the stability of relationships is something that can affect children and something that experts would want to take into account – you know, child welfare experts."); 213:20-214:4 ("What I think sort of anyone would agree about is that children typically benefit when there's stability in their caretakers; that is kind of widely known. You don't have to be a child care expert to know that having one different child caretaker after another is not a good thing for kids, and that consistency or stability – if that's the word you want to use – in caretakers is a good thing for kids in general."); *see also* Lamb Deposition (Exhibit 20), 71:14-71:17 ("I spent a considerable amount of time talking in my report about the ways in which the quality of relationships are associated with children's well-being.").

[93] *See* Cochran Deposition (Exhibit 19), 139:18-140:3 ("[T]hey say that male cohabitors report higher rates of alcohol problems than both unmarried and married men. I mean, I don't disagree with

- Married individuals generally have better physical health than unmarried individuals.[95]

- Marital status is a factor associated with rates of domestic violence, and the rates of domestic violence are higher for cohabiting couples than for married couples.[96]

- The more barriers that are in place to deter a couple from ending their relationship, the more stable the relationship is likely to be,[97] and by getting married, couples create legal barriers,[98] financial barriers,[99] and social barriers[100] that deter couples from ending their relationships.[101]

- Marriage is an institutionalized relationship, whereas cohabitation is an incompletely institutionalized relationship. The social obligations between parties to a cohabiting relationship are more ambiguous than the social obligations between parties to a marital relationship.[102] Having the benefit of being married brings benefits to the married partners and to the children that they are raising.[103]

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that. I think that they've gone through very carefully looking at those . . .they go on to say that – that cohabiting women report significantly higher rates of alcohol problems than married women[.]").

[94] *See* Cochran Deposition (Exhibit 19), 33:13-33:17 ("[O]n average in these studies, you will see somewhat higher use of marijuana, for example, among people who are in cohabiting relationships versus people who are in married relationships.").

[95] *See* Cochran Deposition (Exhibit 19), 78:4-78:6 ("In general, married people compared to unmarried people, in general, enjoy somewhat better physical health status.").

[96] *See* Peplau Deposition (Exhibit 22), 39:21-40:13; 79:8-79:19. *See also* Osborne Deposition (Exhibit 21), 104:9-105:1 (Testifying that yelling, pushing, and certain forms of physical abuse are more common in cohabiting relationships than in marital relationships).

[97] *See* Peplau Deposition (Exhibit 22), 60:22-61:1.

[98] *See* Peplau Deposition (Exhibit 22), 61:22-61:25.

[99] *See* Peplau Deposition (Exhibit 22), 62:1-62:8.

[100] *See* Peplau Deposition (Exhibit 22), 62:14-62:24.

[101] *See* Peplau Deposition (Exhibit 22), 196:16-197:11.

[102] *See* Peplau Deposition (Exhibit 22), 157:10-158:3.

[103] *See* Lamb Deposition (Exhibit 20), 40:19-41:1 ("[F]or some individuals, the ability to become married and to become associated with a – an institution that is widely recognized and understood is something they aspire to. And for those individuals, you know, having the benefit of being associated with a marriage would bring them psychological benefits and might similarly bring benefits for the same reason to the children that they are raising."); 41:5-41:17 ("[F]or those individuals who – for whom [marriage is] important, there may be benefits for those individuals and that may also influence the quality of their parenting and may affect the quality of the relationship they have with their partners, and in those ways, may influence the children's adjustment. And again, for some individuals, perhaps kids who are – some kids may understand and similarly feel that they benefit from being able to associate themself with, you know, part of a family in which there are two married parents, and so it could be both indirectly and directly influencing the children in those cases."); 56:6-56:25 ("I think that there is a widespread belief that being married is a positive institution or desirable institution . . . it can result in benefits to those who are married . . . it can foster social support for people who are married . . . [Q: And can the social support that it fosters then have a positive impact on child well-being? A:] Yes.").

- Marriage, as opposed to cohabitation, is accompanied by legal and financial rights and responsibilities that automatically strengthen the relationship.[104] Marriage also involves a public pledge by the couple to stay together, involving family and friends, which strengthens the relationship.[105]

- The average level of income among married couples is higher than the average level of income among cohabiting couples.[106]

- The average level of education among married couples is higher than the average level of education among cohabiting couples.[107]

- The average level of relationship conflict among married couples is lower than the average level of relationship conflict among cohabiting couples.[108]

- The average level of relationship quality among married couples is higher than the average level of relationship quality among cohabiting couples.[109]

- The average level of relationship quality between children and the parents raising them is higher in households headed by married couples than in households headed by cohabiting couples.[110]

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[104] *See* Peplau Deposition (Exhibit 22), 196:1-196:15.

[105] *See* Peplau Deposition (Exhibit 22), 197:1-197:6.

[106] *See* Osborne Deposition (Exhibit 21), 71:14-71:20 ("I think it would be fair to say that the average – if we group all cohabitors together as one group and compare them to all married folks as one group, that we would find, on average, a lower level of household income or whatever income it is that you're looking at among cohabitors than we would among marrieds."), 143:14-143:15 ("[C]ohabitation, when viewed in our study, is selective of folks with lower levels of income."). *See also* Lamb Deposition (Exhibit 20), 106:3-106:5 ("[M]arried families, on average, have more economic resources than cohabiting families on average.").

[107] *See* Osborne Deposition (Exhibit 21), 72:1-72:9 (""[I]f you group all cohabitors . . . together as a group, and compare them to all married, together as a group, that most of our studies show that the average level of education among the married folks is higher than the average level of education among the cohabitors."). *See also* Lamb Deposition (Exhibit 20), 106:14-106:18 ("[O]ne of the factors that would drive the differences in economics [between cohabiting couples and married couples] would be the fact that, on average, individuals in cohabiting relationships would have less education [than individuals in married relationships] and education is one of the predictors of income[.]").

[108] *See* Osborne Deposition (Exhibit 21), 115:15-116:1 ("[O]n average, if you group all cohabitors together . . . there is generally at the observed level, before anything else is taken into consideration, a higher level of conflict observed among our cohabitors – diverse group of cohabitors than our marrieds.").

[109] *See* Lamb Deposition (Exhibit 20), 94:14-94:19 ("[I]f you look at it globally and focus on sort of all individuals in married, as opposed to cohabiting relationships, there's some evidence that the quality of the relationships between the adults may be lower in the cohabiting groups[.]"); *see also* Osborne Deposition (Exhibit 21), 243:4-243:10.

[110] *See* Lamb Deposition (Exhibit 20), 105:18-105:21 ("[T]here would be a difference on average, with the relationship quality [of a child's relationship with his or her parents] on average being better in the married group than in the cohabiting group.").

- The average level of relationship commitment is higher among married couples than the average level of relationship commitment among cohabiting couples.[111]

- Rates of infidelity are higher for cohabiting couples than for married couples.[112]

- Cohabiting relationships are not as long in duration, on average, as marital relationships,[113] and breakup rates are higher among cohabiting couples than among married couples.[114] On average, the breakup of parental relationships has negative effects on children's adjustment.[115]

- Cohabiting relationships are less stable than married relationships.[116]

Each of these admissions by the Plaintiffs' experts is an undisputed rational basis that proves that Act 1 is constitutional. Act 1 is rationally related to the legitimate government interest in promoting the best interests of Arkansas children because Act 1 prevents Arkansas

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[111] *See* Lamb Deposition (Exhibit 20), 110:5-110:10 ("[I]f you were, again, as you've been asking, to sort of focus on averages and ignore all the other sources of those variation, then I think that you'd find that married people were, on average, more committed to a relation – the relationship than people in cohabiting relationships.").

[112] *See* Peplau Deposition (Exhibit 22), 103:6-103:9. *See also* Osborne Deposition (Exhibit 21), 113:9-113:19.

[113] *See* Peplau Deposition (Exhibit 22), 37:25-38:9 ("If we were to look at the longevity of cohabiting heterosexual couples – 'longevity' meaning, for example, you know, how likely they are to be together after five years – we would find that fewer of those couples were together after five years than would be true of married couples, and that would not be surprising because that group of heterosexual cohabiting couples would have included couples whose relationships were pretty tentative in the first place."); *see also* Osborne Deposition (Exhibit 21), 112:5-112:14 ("Given that you want to lump together all cohabitors . . . and compare those to marriage relationships over that time period, then you're going to find that marriage relationships on averages – on average, will be longer.").

[114] *See* Peplau Deposition (Exhibit 22), 48:6-48:10 ("On average, again, if you glom together, as we've mentioned before, all of these cohabiting couples or whoever the cohabiting couples are in a particular study, the breakup rates tend to be higher, yes."). *See also* Osborne Deposition (Exhibit 21), 244:6-244:17 ("I would agree that, on average, if we group all cohabitors together . . . you could find some statistically significant differences between marrieds and not. . . [T]he theory asserts that the reason why that is because if it is a legal bond, then it's harder to leave.").

[115] *See* Lamb Deposition (Exhibit 20), 119:19-119:21 ("On average, the breakup of a parent's relationship has negative effects on children's adjustment[.]").

[116] *See* Peplau Deposition (Exhibit 22), 115:19-115:22 ("Yes, on average, being in any old kind of cohabiting relationship is less likely to – it is a less good predictor of stability than being legally married."); Osborne Deposition (Exhibit 21), 203:6-203:13 ("If you are comparing all groups of family structures, if you wanted to divide them up into certain groups, the – the married bio family is going to be the most stable as compared to a married step-family or the kind of cohabitors, if they're all combined as a group because, as I said before, that includes those who are dating and trial – trying out marriage.").

children from being placed into homes that are generally less stable and generally lead to poorer outcomes for children than marital homes. As stated succinctly by one of the defense experts:

> [T]he scientific research on family life and the welfare of children indicates that the policy of excluding cohabiting couples from adopting or fostering children promotes the interests of adoptive and foster children. Adoptive and foster children are more likely to receive high-quality and stable caregiving in single-parent and especially married-parent homes. Thus, the application of Act 1 ensures that adoptive and foster children are protected from exposure to the instability and relatively poor relationship quality associated with cohabiting households, both of which are inimical to the "best interests of the child."[117]

Summary judgment should be granted because it is reasonably conceivable, and the Plaintiffs' own experts have admitted, that Act 1 is rationally related to serving the best interests of Arkansas children.

2. Individual screening and evaluation of foster and adoptive applicants does not eliminate the risk of abuse and neglect of children.

The fact that DHS screens prospective foster and adoptive parents in an attempt to determine whether they should be approved as foster and adoptive parents does not in any way call for allowing individuals who cohabit with a sexual partner outside of marriage to foster and adopt a child. Nor does the fact that individualized screening might be undertaken make the voters' decision to attempt to eliminate harm to children by excluding certain applicants an irrational or unreasonable decision. It is a sad but true fact that a survey of Arkansas judicial decisions makes clear that some foster and adoptive parents have made it through various screening processes but still were subsequently convicted of abusing the children entrusted to their care. *See Wood v. State*, 248 Ark. 109, 110, 450 S.W.2d 537, 538 (1970)(affirming adoptive mother's conviction for cruelty to a child); *Keck v. State*, 2009 WL 2778008 (Ark.App.,

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[117] Wilcox Report (Exhibit 13), ¶ 12. *See also id.*, ¶¶ 29-32.

Sept. 2, 2009)(unpublished) (affirming father's conviction for raping his adopted daughter); *Campbell v. State*, 2003 WL 1123268 (Ark.App., March 12, 2003)(unpublished)(affirming foster parent's conviction for first-degree domestic battery of foster child); *Daniels v. State*, 2000 WL 486230 (Ark.App., April 26, 2000)(unpublished)(affirming father's conviction for first-degree sexual abuse of his adopted daughter); *see also Fariss v. State*, 303 Ark. 541, 542-43, 798 S.W.2d 103, 103 (1990)(holding that collateral estoppel did not bar criminal prosecution of appellant for incest after civil proceeding to determine whether appellant's adopted child was dependent-neglected). Each of these cases is a rational basis for upholding Act 1 because the voters could rationally have determined that no screening process could possibly be foolproof in identifying all prospective cohabiting foster and adoptive parents who may abuse the children entrusted to their care.

Other Arkansas court decisions similarly make clear that wrongdoers have been able to make it through a screening process only to neglect and abuse children entrusted to their care. *E.g.*, *Griffin v. Ark. Dep't of Health & Human Services*, 2009 Ark.App. 177, 2009 WL 613538 (affirming circuit court's order upholding DHS's administrative decision to list foster parent on State's maltreatment registry for sexually abusing his foster daughter); *Ark. Dep't of Human Services v. R.C.*, 368 Ark. 660, 661, 249 S.W.3d 797, 799-800 (2007)(affirming DHS's administrative decision to place foster parent on State's child-maltreatment registry for abusing four-year old foster child); *S.F. v. Ark. Dep't of Human Services*, 101 Ark.App. 236, 237, 274 S.W.3d 334, 335 (2008)(affirming finding that child adopted by his grandparents was dependent-neglected). Each of these cases is a rational basis for upholding Act 1 because the voters could rationally have determined that no screening process could possibly identify all prospective

cohabiting foster and adoptive parents who may abuse or neglect the children entrusted to their care.

The Arkansas General Assembly has similarly determined that there is a substantial risk that some foster and adoptive parents, despite the fact that all licensed foster and adoptive parents go through a screening process, will in the future abuse and neglect children who are entrusted to them. In the Child Maltreatment Act of 2009, the legislature specifically recognizes this grim possibility by defining "abuse" to mean any of several acts or omissions "by a parent, guardian, custodian, foster parent, person eighteen (18) years of age or older living in the home with a child . . . ." Ark. Code Ann. § 12-18-103(2)(A). If the General Assembly had believed that screening could prevent each and every applicant who would harm a child from becoming a foster parent, then it would not have made the Child Maltreatment Act applicable to foster parents. The fact that the General Assembly decided to make the Maltreatment Act applicable to foster parents is alone a rational basis for upholding Act 1 because both the voters and the legislature recognize that foster parents may abuse children even though they have undergone screening.

The "Arkansas Child Fatality Review 2009" indicates that during state fiscal year 2009, a five-year old child was beaten to death by his foster father.[118] The report further indicates that during that same year a woman who had custody of a child whom she had been approved to adopt shook the child to death.[119] The fact that this report indicates that two previously-screened

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[118] The Affidavit of DCFS Director Cecile Blucker is attached to the State Defendants' Motion for Summary Judgment as Exhibit 23. Exhibit D to Director Blucker's Affidavit is an accurate and correct copy of the "Arkansas Child Fatality Review 2009." *See* Exhibit 23, ¶ 11 & Exhibit 23-D, p. 11 (STATE 9136) ("One of these was a foster father who beat a five-year old child, resulting in the child's death.").

[119] *See* Affidavit of Cecile Blucker (Exhibit 23), ¶ 11 & Exhibit 23-D, p. 11 (STATE 9136) ("One was a pre-adoptive mother who shook a child to death.").

parents not only abused children in their care, but *killed* the children entrusted to their care by DHS, is alone a rational basis for upholding Act 1. The Child Fatality Review also indicates that three of seven child deaths that occurred because of abuse occurred at the hands of unmarried cohabiting boyfriends or girlfriends.[120] Of course, the two children killed in approved foster homes were not killed by unmarried cohabitants because at all times during the 2009 fiscal year, DHS maintained a policy prohibiting foster or adoptive placements with unmarried cohabitants.[121] However, the fact that *three of the remaining five abusive deaths occurred at the hands of cohabiting boyfriends and girlfriends* is alone another rational basis for Act 1.

No rational individual would ever believe that any screening process could predict with perfect accuracy which applicants to become foster and adoptive parents will and will not someday harm a child placed in their custody. Thus, it is not at all surprising that these decisions by Arkansas' Judicial Branch, this law enacted by Arkansas' Legislative Branch, and this report prepared at the request of an agency of the Executive Branch, indicate that the process of screening foster parent applicants and adoptive parent applicants is far from perfect in excluding wrongdoers from the system. If screening were the nirvana suggested by the Plaintiffs, then no child in an Arkansas adoptive or foster home would ever be neglected or abused, and the General Assembly would not have seen fit to make the Child Maltreatment Act applicable to foster parents.

As discussed at length above, children who reside in cohabiting homes are on average at greater risk of being abused than children who reside in either married or single homes. Thus,

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[120] *See* Affidavit of Cecile Blucker (Exhibit 23), ¶ 11 & Exhibit D, p. 11 (STATE 9136) ("Among the seven abuse cases, the perpetrator was a parent in two of the cases. Three of the perpetrators were live-in boy or girl-friends (two male and one female), one was a foster parent and one was a pre-adoptive parent.").

[121] *See* Affidavit of Cecile Blucker (Exhibit 23), ¶¶ 5-8.

instead of relying on some imperfect screening process to predict which particular cohabiting homes will be safe for children and which will not, it was completely rational for Arkansas voters to enact the common-sense safeguard of preventing children from being placed in a cohabiting home for foster care and adoption. After all, individualized predictions about whether a child will be safe in a particular foster or adoptive home are sometimes wrong and result in a child dying a horrific death—which is exactly what the "Arkansas Child Fatality Review 2009" says happened in two appalling incidents just last year. If upheld, Act 1 will almost certainly save the lives of some of the most vulnerable children in our society by preventing them from being placed in cohabiting homes that might be mistakenly judged to be safe. That the life of even one such child might one day be saved is a rational basis for upholding Act 1.

Act 1 is also rational because Act 1 allows DHS to be more efficient and effective when screening prospective foster and adoptive applicants. It is well-settled that state laws and government policies pass the rational-basis test if they allow a state to more efficiently use its resources. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 371 (2001)("[I]t would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities[.]"); *Howard v. City of Fort Smith*, 311 Ark. 505, 509, 845 S.W.2d 497 (1993)("To achieve the objective of efficiency, the establishment of a uniform tax year is certainly rational."). Even though DHS undoubtedly does the best that it can to accurately predict which applicants to be foster and adoptive parents would provide safe and loving homes for children, it is indisputable that DHS's predictions are not, and cannot ever be, correct one-hundred percent of the time. Act 1 rationally addresses this by automatically excluding cohabiting persons, who on average and as a group are more likely to harm a child living in their home. As a result, not only are children in need of

foster and adoptive families not placed in those on-average higher risk homes, but DHS is better able to concentrate its limited screening resources on married and single applicants and thus have better odds of accurately predicting which of those applicants might harm a child if entrusted to care for one. Act 1 should be upheld for both of these reasons. *See Reno v. Flores*, 507 U.S. at 312 (upholding Immigration and Naturalization Service regulation permitting detained juvenile aliens to be released only to their parents, close relatives, or legal guardians except in unusual and compelling circumstances as rational because the agency had neither the expertise nor the resources to conduct home studies for individualized placements).

C. Act 1 is rationally related to the legitimate government interest of promoting marriage.

By enacting Initiated Act 1, the majority of Arkansas voters also determined that "[t]he public policy of the state is to favor marriage as defined by the constitution and laws of this state over unmarried cohabitation with regard to adoption and foster care." Ark. Code Ann. § 9-8-302. Act 1 clearly advances the State's legitimate interest in promoting marriage. Under the terms of the Act, if an unmarried cohabiting person wishes to adopt or foster a child, the person must either marry, or occupy a single home, in order to become eligible to do so. This requirement has the effect of promoting marriage. Further, as discussed above, where the legislature (or in this case, the people themselves) makes an explicit determination that does not affect a fundamental right, the judiciary may not interfere with that determination.

There can be no dispute that the promotion of marriage is a legitimate interest of government. For over a century, the Supreme Court has emphasized the favored status in law of marriage and the importance of marriage to society. *See Reynolds v. United States*, 98 U.S. 145, 165 (1878)("Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to

deal."); *Maynard v. Hill*, 125 U.S. 190, 205-206 (1888)("Marriage, as creating the most important relation in life, [has] more to do with the morals and civilization of a people than any other institution . . ."); *Meyer v. Nebraska*, 262 U.S. 390, 393 (1923)(recognizing that marriage is "without a doubt" one of the liberties protected by the Fourteenth Amendment, and linking marriage with establishing a home and raising children); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)("Marriage and procreation are fundamental to the very existence and survival of the race."); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)("Marriage is the coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967)("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); *Lehr v. Robinson*, 463 U.S. 247, 260 n. 16 (1983)(upholding a state law under which an unmarried father could lose his right to notice of and opportunity to object to the adoption of his biological child because "the absence of a legal tie with the mother may in [some] circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist."). Consistent with the highly favored status of marriage in our society, there are a bevy of state and federal laws providing favored status to married individuals vis-à-vis unmarried individuals.[122]

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[122]*See, e.g.,* Uniform Probate Code § 5-310(a)(4) (establishing order of preference for the appointment of a guardian for an incapacitated person, with spouse ahead of adult children or parents); 26 U.S.C. § 6013, § 2056 (married couples can file joint tax returns and qualify for estate tax deductions under the I.R.S. Code); 29 U.S.C. § 1002(15) (under ERISA, relative entitled to benefits means "a spouse, ancestor, lineal descendant, or spouse of a lineal descendant"); 42 U.S.C. § 402 (married persons are entitled to survivor's benefits under Social Security Act); 38 U.S.C. § 1310 (spouse is entitled to veteran's benefits); 29 U.S.C. § 2612(a)(1)(c) (Family Medical Leave Act requires employers to provide medical leave to care for a seriously ill spouse); 8 U.S.C. § 1151(b)(2)(A)(i) (spouses accorded preferential treatment in connection with immigration); Ark. Code Ann. § 28-9-214(2) (providing that where an

When the favored status of marriage is challenged in court on due process grounds, the favored status is typically upheld due to the government's critical interest in the promotion of marriage. *See, e.g., Califano v. Jobst*, 434 U.S. 47, 58 (1977)("The favored treatment of marriages . . . does not violate the principle of equality embodied in the Due Process Clause of the Fifth Amendment."); *Michael H. v. Gerald D.*, 491 U.S. 110, 127-129 (1989)(upholding the use of marriage to create a nearly irrebuttable presumption of a husband's paternity of children born during marriage and stating that "it is not unconstitutional for the State to give categorical preference" to marriage). Thus, it is well-established that the State may give categorical preference to marriage, and to married individuals, simply because of the State's legitimate interest in promoting the institution of marriage. Initiated Act 1 therefore passes the rational basis test. There are no disputed material facts, and summary judgment should be granted in favor of the Defendants.

IV. CONCLUSION.

Both the Arkansas Supreme Court and the Arkansas Court of Appeals have consistently and repeatedly held that "extramarital cohabitation in the presence of children 'has never been condoned in Arkansas, [and] is contrary to the public policy of promoting a stable environment for children[.]'" *Alphin v. Alphin*, 364 Ark. at 341, 219 S.W.3d at 165 (citing *Word v. Remick*, *supra*; *Hamilton v. Barrett*, *supra*; *Taylor v. Taylor*, *supra*). Initiated Act 1 embodies precisely this policy with respect to foster and adoptive children in the State of Arkansas.

As described in detail in Section II of this Brief, each of the 12 twelve counts that the Plaintiffs currently have pending before the Court turns on well-established law indicating that

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intestate is survived by no descendant, the entirety of the intestate's heritable estate passes to the spouse of the intestate); Ark. Code Ann. § 28-39-201 (homestead exemption for the spouse of an intestate); Ark. Code Ann. § 28-49-117 (allowing spouses to file joint state income tax returns).

the count should be dismissed for failure to state facts upon which relief can be granted. Counts 1 and 2 fail to state a claim because children do not have a fundamental right or liberty interest in being adopted or placed in foster care by the State; the State has no duty to allow children to be adopted or fostered by anyone, certainly not by cohabiting adults; and the State has no duty to place a particular child into a foster or adoptive home that is the best possible placement for that child. Counts 3 and 4 fail to state a claim because Act 1 does not burden any constitutionally protected liberty interest in family integrity. Counts 1, 2, 3, and 4 should also be dismissed because indisputable facts demonstrate that Plaintiff Cole cannot possibly seek to foster or adopt Plaintiff W.H. in Arkansas regardless of Act 1, the Plaintiffs bringing forth the first four claims therefore lack standing to bring those claims, and the first four claims are moot. Counts 5 and 6, brought by the parent Plaintiffs, fail to state a claim because Act 1 does not burden any constitutionally protected right of parents to control who might someday adopt their children. Counts 7 and 8, brought by the child Plaintiffs, fail to state a claim for the same reason. Counts 9 and 10 fail to state a claim because Act 1 does not require the Plaintiffs to abandon their intimate relationships, Act 1 merely states that if the Plaintiffs wish to foster or adopt a child, they cannot engage in the privilege (not constitutionally protected right) of cohabiting with an intimate partner outside of marriage. Count 11 has already been dismissed by this Court. Counts 12 and 13 fail to state a claim because the terms "cohabitating" and "sexual partner" have plain and ordinary meanings, with consistent dictionary definitions and common usage by Arkansas courts and persons of ordinary intelligence.

Even if the Plaintiffs had stated a claim, there is no fundamental liberty interest at stake in this case, and Act 1 does not discriminate against any suspect class. Therefore, in order to prevail, the Plaintiffs must prove that Act 1 is not rationally related to achieving *any conceivable*

legitimate government objective, and that the voters of Arkansas therefore acted arbitrarily and irrationally when a majority of them voted in favor of Act 1. Although the Plaintiffs bear the burden of proof and evidence is not necessary to conceive of a rational basis for Act 1, the Defendants are entitled to summary judgment because undisputed material facts plainly demonstrate that Act 1 is rationally related to legitimate government interests.

The undisputed facts of this case demonstrate a strong scientific consensus that children generally experience better outcomes on a range of factors when children are raised in married households, which Act 1 allows, as compared to cohabiting households, which Act 1 prohibits. Act 1 is therefore rationally related to the State's legitimate interest in promoting the welfare of children because it is reasonably conceivable (and in fact, undisputed) that children raised in cohabiting households are more likely than children raised in married households to experience: social problems such as delinquency, drug and alcohol abuse, teen pregnancy, criminal behavior, imprisonment, and poverty; psychological problems such as depression, mental illness, difficulty sleeping, feelings of worthlessness, nervousness, tension and anxiety; educational problems such as difficulty concentrating, low grades, low levels of school engagement, suspension, and dropping out of school; and physical and sexual abuse. The conceivable (and undisputed) fact that each of these poor child outcomes are more likely to occur in cohabiting homes than in married homes is an independent rational basis upon which the voters of Arkansas could have reasonably determined, as they did explicitly in the language of Act 1, that it is in the best interests of children not to be placed in foster or adoptive homes with cohabiting adults. The fact that DHS screens foster and adoptive applicants prior to placing children into their homes does not render Act 1 irrational, because it is undisputed that the screening process is imperfect and children are sometimes placed into abusive homes despite the screening by DHS. It was

therefore rational for the Arkansas voters to enact the common-sense safeguard of preventing children from being placed into cohabiting homes for foster care and adoption. Act 1 is also rational because it enables DHS to be more efficient and make more effective use of its limited resources when screening prospective foster and adoptive applicants who are eligible to foster and adopt.

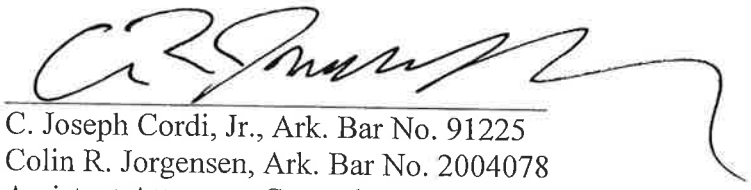
Finally, the undisputed facts of this case demonstrate that the majority of Arkansas voters determined expressly that the public policy of the State of Arkansas favors marriage over unmarried cohabitation with regard to foster care and adoption. Act 1 clearly advances the State's legitimate interest in promoting marriage, and it is indisputable that the promotion of marriage is a legitimate government interest.

Initiated Act 1 passes the rational basis test for a bevy of conceivable and actual reasons. There are no disputed issues of *material* fact in this case. There is no need for a lengthy and grueling trial. Summary judgment should be granted because Act 1 is plainly constitutional.

WHEREFORE, the State Defendants, 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 Ed Appler, Chairman, in his official capacity, and his successors in office, pray that their Motion for Summary Judgment be granted, and for all other just and appropriate relief.

Respectfully submitted,

DUSTIN McDANIEL
Attorney General

By: 

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