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**

STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Come now the State Defendants, and offer the following Reply in support of their Motion for Summary Judgment filed on February 8, 2010.

1. For the reasons set forth in the State Defendants' Response to the Plaintiffs' Motion for Summary Judgment,[1] the rational basis standard of review applies to any claims the Plaintiffs have stated in Counts 1-10. The State Defendants have already set forth the ways in which Act 1 satisfies the rational basis test,[2] and the State Defendants hereby incorporate by reference their Motion for Summary Judgment and Brief, and their Response to Plaintiffs' Motion for Summary Judgment pursuant to Ark.R.Civ.P. 10(c). There are no disputed issues of material fact and Act 1 satisfies the rational basis test as a matter of law. Summary judgment should be granted in favor of the Defendants.[3]

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[1] *See* State Defendants' Response to Plaintiffs' Motion for Summary Judgment, March 1, 2010 ("State Defendants' Response") at 2-27.

[2] *See* Brief in Support of State Defendants' Motion for Summary Judgment, February 8, 2010 ("State Defendants' Brief") at 42-70.

[3] As used herein and in all of the State Defendants' pleadings, the term "Defendants" includes the State Defendants and the Intervenor-Defendants (Jerry Cox and Family Council Action Committee).

2. In both the Plaintiffs' Brief[4] and their Opposition Brief,[5] the Plaintiffs argue that the "professional judgment" standard applies to the due process claims brought by the child-Plaintiffs in Counts 1 and 2. The State Defendants have already responded to this argument, demonstrating plainly that neither the professional judgment standard nor the deliberate indifference standard applies to the Plaintiffs' constitutional challenge to Act 1, a law passed by voter initiative.[6] In their Opposition Brief, the Plaintiffs cite no cases that have not been cited before.[7] The Plaintiffs have failed to cite any authority from any jurisdiction indicating that the professional judgment standard applies to this case. The professional judgment standard does not apply to the Plaintiffs' constitutional challenge of Act 1 in Counts 1 and 2, because that standard applies only to specific acts or omissions of government officials, not to laws passed by the legislature or by the people. Because there is no fundamental right that is directly and substantially infringed by Act 1, and because Act 1 does not discriminate against a suspect class, the appropriate standard applicable to Counts 1 – 10 is the rational basis test.

3. The Plaintiffs falsely accuse the State Defendants of claiming that they have "no duty" to children in State care.[8] In fact, the State Defendants have explicitly agreed that they have "an obligation to provide adequate medical care, protection, and supervision to children in State custody," and that "children in non-punitive state custody are entitled to more considerate

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[4] *See* Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment, February 10, 2010 ("Plaintiffs' Brief"), at 42-47.

[5] *See* Plaintiffs' Opposition to the State Defendants' and Intervenor-Defendants' Motions for Summary Judgment and Renewed Motions to Dismiss, March 1, 2010 ("Plaintiffs' Opposition Brief"), at 2, 23-26.

[6] *See* State Defendants' Response at 2-8.

[7] *See* Plaintiffs' Opposition Brief at 23-26 (citing only cases that have been previously cited by the parties).

[8] *See* Plaintiffs' Opposition Brief at 25-26 ("Defendants' argument that Act 1 is acceptable because the State Defendants have 'no duty' to children in their care disregards the intent of the legislature, the practices of DHS, and the State Defendants' own representations to the courts."). The Plaintiffs offer no citation to where the State Defendants have claimed that they have "no duty" to children in their care. The State Defendants have never asserted that they have no duty to such children.

treatment than criminals whose conditions of confinement are designed to punish."[9] However, the State Defendants have no duty to take every conceivable action necessary to ensure the realization of the absolute best circumstances for each child in state care.[10]

4. The Plaintiffs' assertion that "DHS already has a long history of placing children with cohabiting heterosexual and same-sex couples"[11] is patently false. The Affidavit of DHS/DCFS Director Cecile Blucker, Exhibit 23 to the State Defendants' summary judgment motion, states as follows:

> I am unaware of any licensed DCFS foster or adoptive placements of children into homes occupied by unmarried cohabitants at any time prior to the passage of Act 1. Any licensed placement by DCFS of a child into a home occupied by an unmarried cohabitant prior to the effective date of Act 1 would have violated the Executive Directives discussed above and would have thus required a DCFS policy waiver to authorize such placement. In my capacity as DCFS Director, I review DCFS policy waivers and I decide whether to approve or deny DCFS policy waiver requests. I have never received or approved a policy waiver request to approve a licensed foster or adoptive placement that would be barred by the DCFS Executive Directives attached to my Affidavit as Exhibits A, B, and C. I have reviewed the policy waivers granted by DCFS Executive Directors over the last five years and there were no policy waivers requested or approved to allow the placement of a child into a licensed foster or adoptive home occupied by an unmarried cohabitant.[12]

In any event, whether DHS has or has not licensed cohabiting homes as approved foster homes is completely immaterial to the issues before the Court. Similarly, whether any child welfare workers at DHS support or oppose the Act 1 policy is completely immaterial because the only issue before the Court is whether there is a rational basis for the policy that the voters of Arkansas have enacted.

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[9] State Defendants' Response at 7.

[10] *See* State Defendants' Brief at 8-13.

[11] Plaintiffs' Opposition Brief at 27. The Plaintiffs offer no citation to evidence explaining this alleged "long history" of child-placement with unmarried cohabitants.

[12] State Defendants' Motion for Summary Judgment, Exhibit 23, at ¶ 8.

5. Summary Judgment should be granted to the Defendants on Counts 1 and 2[13] because the state has fully satisfied its duties to the children in its custody,[14] the Plaintiffs have stated no claim for illegal exaction,[15] and Act 1 easily satisfies the rational basis test.[16] The Plaintiffs' argument that harm to children cannot be presumed when considering a custody request by an unmarried cohabitant is a misstatement of the law.[17] The Plaintiffs cite *Taylor v. Taylor*, 353 Ark. 69, 110 S.W.3d 731 (2003), for the proposition that Arkansas has recently adopted an "evidence-based standard" which precludes courts from presuming that cohabiting living arrangements are harmful to children.[18]

In *Taylor v. Taylor*, a mother asserted that the circuit court erred in transferring custody of her children to the children's father. 353 Ark. at 72. The circuit court found that the father was "much more financially secure than [the mother]" and concluded that the "residence of [a lesbian roommate] with [the mother] and the children even without sex is inappropriate behavior and is a circumstance that justifies changing of custody[.]" *Id.* at 75. On appeal, the Arkansas Supreme Court first considered the financial and educational situations of the parents and concluded that a modification of the original custody agreement was not warranted. *Id.* at 78-79. The Supreme Court next considered the mother's living arrangement with an acknowledged lesbian, noting that the trial court credited the two women's testimony that they did not have a sexual relationship and grounded its decision instead on the "appearance of inappropriate behavior" and the trial court's conclusion that the public's assumptions "would subject the children to ridicule and embarrassment and could very well be harmful to them." *Id.* at 79-80.

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[13] *See* State Defendants' Brief at 8-18; State Defendants' Response at 2-8.
[14] *See* State Defendants' Brief at 8-13.
[15] *See* State Defendants' Brief at 13-15.
[16] *See* State Defendants' Response at 2-8.
[17] *See* Plaintiffs' Opposition Brief at 30-32.
[18] *See* Plaintiffs' Opposition Brief at 30-31.

The Supreme Court noted that "this court has held that a parent's unmarried cohabitation *with a romantic partner*, or a parent's promiscuous conduct or lifestyle, in the presence of a child cannot be abided." *Id.* at 80 (emphasis added)(citing *Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001); *Campbell v. Campbell*, 336 Ark. 379, 985 S.W.2d 724 (1999); *Walker v. Walker*, 262 Ark. 648, 559 S.W.2d 716 (1978)). The Court then stated as follows:

> The instant case, however, is altogether different. Here, it appears from the circuit court's statements that the court was trying to protect the children from future harm based on future public misperception. A review of our caselaw reveals that this court has yet to address a situation in which a parent's current actions might bring about a future harm for a child based on the public's erroneous perception.
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> We note that in the case before us, there is no proof of a sexual relationship between [the mother and her lesbian roommate]. In fact, both women denied that any sexual contact had occurred in the past or was presently occurring. Moreover, the circuit court did not base its decision on the fact that the women were engaged in a sexual relationship. [The father] correctly points out that this court has held that a trial court did not err in determining it was not in the children's best interest for their primary custodian who was involved in a homosexual relationship to "continue cohabiting with another adult with whom she admitted being romantically involved." *Taylor v. Taylor*, 345 Ark. at 305, 47 S.W.3d at 225. But we contrast those circumstances with the instant case, where the circuit court credited [the mother's and her roommate's] testimony that they were not romantically involved or sexually involved.
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> Furthermore, [the father] has failed to demonstrate any actual harm or adverse effect to the boys attributable to [the roommate's] presence in the household. Because no harm has been shown to the children, because there was no showing that the two women are engaged in a lesbian relationship, and because [the roommate] is no longer sleeping in [the mother's] bed, we disagree that a change of custody premised on appearances and on the potential for teasing in the future is sufficient to constitute a material change in circumstances.

Id. at 80, 82-83. Clearly, the erroneous "public misperception" to which the *Taylor* Court referred was the false inference that the mother and her lesbian were cohabiting *and maintaining a sexual relationship.* The Court's opinion indicates plainly that if this were the case, the Court would have held as it has repeatedly held before that "a parent's unmarried cohabitation with a romantic partner . . . in the presence of a child cannot be abided." *Id.* at 80. Thus, the Plaintiffs are dead wrong when they assert that *Taylor v. Taylor* somehow changed the long line of Arkansas custody cases holding that a parent's unmarried cohabitation *with a sexual partner* in the presence of a child is not condoned. By attempting to twist and mischaracterize the true holding of *Taylor v. Taylor*, the Plaintiffs merely concede that Arkansas courts have presumed and will continue to presume that unmarried cohabitation with a sexual partner in the presence of children is harmful to the children.

Indeed, as recently as February 17, 2010, *less than one month ago*, the Arkansas Court of Appeals confirmed that "cohabitation by unwed or non-blood relatives" in the presence of children is not in the best interests of children. *See Medina v. Roberts*, 2010 Ark. App. 165, 2010 WL 546711 at *2 (Feb. 17, 2010)("The court's rulings banning alcohol, drugs, and cohabitation by unwed or non-blood relatives adequately address any other issues about Roberts's custody being in J.'s best interest."). Counts 1 and 2 are subject at most to rational basis review, and summary judgment should be granted to the Defendants.

6. Summary judgment should be granted to the Defendants on Counts 3 and 4[19] because Act 1 does not burden any constitutionally protected right to family integrity. The Plaintiffs argue that they are not seeking to enforce any familial right related to grandparental foster care or adoption.[20] The Plaintiffs then proceed to proclaim just such a right: they "assert

[19] *See* State Defendants' Brief at 19-23.
[20] *See* Plaintiffs' Opposition Brief at 32.

the violation of the uncontroverted constitutional right to family integrity."[21] The Plaintiffs contend that they seek to assert the fundamental right of Plaintiffs Cole and W.H. "to remain within already existing" family relationships and that "but for luck of geography, Act 1 created a significant risk that W.H. would be removed from her grandmother's care[.]"[22] However, the Plaintiffs have admitted through their pleadings and through Plaintiff Cole's deposition[23] that Plaintiff Cole never had any form of custody of Plaintiff W.H. prior to January 13, 2009, when W.H. was placed with Ms. Cole in Oklahoma. Simply put, there was no "already existing" family integrity for Act 1 to burden when Act 1 took effect, and in fact, the integrity of the Cole-W.H. family has only strengthened after the effective date of Act 1.

In a last-ditch effort to further confuse the issues in Counts 3 and 4, the Plaintiffs seem to argue that Act 1 could theoretically burden the integrity of Plaintiff Cole's "family" she has formed with her cohabiting partner if she chose to abandon that relationship in order to be eligible to foster or adopt her biological grandchild.[24] However, the Plaintiffs cite absolutely no authority characterizing a cohabiting relationship as "family" where the cohabitants are unrelated and have no legally recognized familial relationship. There is no fundamental right to cohabit with an intimate partner.[25] Counts 3 and 4 are subject at most to rational basis review, and summary judgment should be granted to the Defendants.

7. Summary judgment should be granted to the Defendants on Counts 5 and 6[26] because the parent-Plaintiffs have no fundamental liberty interest in controlling who might adopt their children if the parents die or become incapacitated, nor any right to have their wishes

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[21] *See* Plaintiffs' Opposition Brief at 33.
[22] *See* Plaintiffs' Opposition Brief at 34, 36.
[23] *See* State Defendants' Motion for Summary Judgment, Exhibit 1.
[24] *See* Plaintiffs' Opposition Brief at 38 ("Act 1 requires that Plaintiff Cole abandon part of her family in order to remain together with another family member.").
[25] *See* State Defendants' Response at 8-20.
[26] *See* State Defendants' Brief at 23-29; State Defendants' Response at 20-24.

followed by the courts. The Plaintiffs argue inconsistently that, on one hand, Act 1 "violates the parent-Plaintiffs' rights to make decisions about their own children,"[27] because the parent-Plaintiffs cannot designate unmarried cohabitants to adopt their children. On the other hand, the parent-Plaintiffs concede "that a court must make the final determination whether such an adoption lies in the best interests of their children,"[28] and further say they "have never asserted the right to dictate the adoptive placement of their children through their testamentary wishes."[29] Despite these caveats and concessions, the Plaintiffs confusingly proceed to argue that "determinations of parents" about the placement of their children are "sacred." The Plaintiffs also proclaim, with no legal support, that the interest of parents in controlling the placement of their children, which they had just disavowed, requires the Defendants to prove a compelling interest for Act 1. The parent-Plaintiffs appear to concede with one breath that the law does not support their arguments, and then nonetheless insist upon those unsupported arguments with their very next breath.[30] As the Plaintiffs concede by citing no authority to the contrary, the scope of the fundamental right to parental autonomy simply does not include the right to control who may adopt one's children through a testamentary instrument. Any right the parent-Plaintiffs may have to make a testamentary adoptive appointment would be purely statutory, and a statute cannot give rise to a fundamental constitutionally protected right. Counts 5 and 6 are subject at most to rational basis review, and summary judgment should be granted to the Defendants.

8. Summary judgment should be granted to the Defendants on Counts 7 and 8[31] because the child-Plaintiffs have no right under the Equal Protection Clauses of the state and federal Constitutions to have their parents' wishes considered with regard to their adoption.

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[27] Plaintiffs' Opposition Brief at 38.
[28] Plaintiffs' Opposition Brief at 40.
[29] Plaintiffs' Opposition Brief at 40-41.
[30] Plaintiffs' Opposition Brief at 41, 42.
[31] *See* State Defendants' Brief at 29-30; State Defendants' Response at 25-26.

Moreover, Act 1 does not treat these children differently than any other children because *no* children enjoy such a right, whether their parents have designated adoptive parents who are barred from adopting or not. And, Act 1 does not permit *any* child to be adopted by an unmarried cohabitant. Counts 7 and 8 are subject at most to rational basis review, and summary judgment should be granted to the Defendants.

9. Summary judgment should be granted to the Defendants on Counts 9 and 10[32] because Act 1 does not directly or substantially burden any fundamental constitutional rights of the adult-Plaintiffs bringing Counts 9 and 10. Act 1 does not require these Plaintiffs or anyone else to abandon their intimate relationships. Act 1 does not regulate or limit the sexual conduct of these Plaintiffs or anyone else. Act 1 does not prohibit these Plaintiffs or anyone else from residing with whomever they choose. Act 1 does not require these Plaintiffs to choose between two constitutional rights because fostering and adopting are privileges, not constitutional rights. Moreover, cohabiting with an unrelated person is not a fundamental constitutional right, and therefore Act 1 does not implicate a single fundamental constitutional right even indirectly.

The Plaintiffs' argument that Act 1 penalizes them for exercising their constitutional right to maintain intimate relationships with their partners[33] mischaracterizes both the nature of any fundamental right to privacy the Plaintiffs may have and the true language and effect of Act 1 in relation to that right. The Plaintiffs cite cases involving an array of fundamental rights[34], but, notably, the Plaintiffs are unable to cite any cases at all, much less any controlling cases, holding that the fundamental right to privacy includes a right to cohabit with an unrelated person. Again, Act 1 does not bar individuals from fostering or adopting because of their intimate relationship

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[32] *See* State Defendants' Brief at 31-35; State Defendants' Response at 8-20.

[33] *See* Plaintiffs' Opposition Brief at 44-51.

[34] *See* Plaintiffs' Opposition Brief at 46 (discussing cases involving fundamental rights to interstate travel, procreation, freedom of speech, and freedom of religion).

or because of their sexual conduct. Rather, Act 1 is triggered only where a person *cohabits* with a sexual partner outside of marriage. Therefore, Act 1 does not condition a statutory privilege or anything else upon the cessation of the exercise of a fundamental right, and Act 1 is not subject to heightened scrutiny. Because Act 1 clearly does not prohibit the Plaintiffs from exercising their right to maintain intimate relationships, or to engage in consensual sexual conduct, even as a condition of eligibility to foster or adopt, any burden on those constitutional rights is indirect and insubstantial.

The Plaintiffs' argument that Act 1 discriminates on the basis of sexual orientation is also unavailing.[35] The Plaintiffs know that Act 1 does not condition eligibility to foster or adopt on being married, and Act 1 has nothing whatsoever to do with who is eligible to marry in Arkansas. Moreover, Act 1 explicitly "applies equally to cohabiting opposite-sex and same-sex individuals." Ark. Code Ann. § 9-8-304(b). And, Act 1 does not exclude homosexual individuals from eligibility to foster or adopt. The Plaintiffs' persistent attempts to construe Act 1 as a law that targets homosexuals belie the explicit language and stated purposes of the law. Even if Act 1 did condition eligibility to foster and adopt upon sexual orientation, the law would be subject to the rational basis test and would survive rational basis review.[36] But Act 1 does not

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[35] *See* Plaintiffs' Opposition Brief at 50 ("[W]here a state limits marriage to heterosexual couples *and then conditions a privilege on being married*, it cannot be said that this is not discrimination on the basis of sexual orientation.")(emphasis in original).

[36] The Plaintiffs continue to reference the findings of the trial court in *Howard* for their argument that "there is no rational connection between excluding gay people, including gay couples, from serving as foster parents and promoting the health, safety or welfare of foster children." Plaintiffs' Opposition Brief at 51. But Act 1 does not exclude gay people from serving as foster parents. Moreover, the trial court in *Howard* determined that even with regard to the regulation that *did* condition eligibility to foster or adopt upon sexual orientation, the law was subject to rational basis review on both the equal protection and due process claims brought by the *Howard* plaintiffs, and the regulation survived rational basis review of those constitutional claims. *See Howard v. CWARB*, No. CV 1999-9881, 2004 WL 3154530 at *13 (Ark. Cir. Ct. Dec. 29, 2004)(The homosexual exclusion "does not violate the Equal Protection provisions of the United States Constitution or the Arkansas Constitution" and "does not violate the plaintiffs' constitutional rights to privacy or intimate association under either the United States Constitution or the Arkansas Constitution.").

discriminate on the basis of sexual orientation, and the Plaintiffs have not challenged the marriage laws of the State of Arkansas. Counts 9 and 10 are subject at most to rational basis review, and summary judgment should be granted to the Defendants.

10. Summary judgment should be granted to the Defendants on Counts 12 and 13[37] because the terms "cohabiting" and "sexual partner" have plain and ordinary meanings, with consistent dictionary definitions and common usage by Arkansas courts and persons of ordinary intelligence, including the Plaintiffs themselves. The Plaintiffs' argument that various DHS officials have offered differing testimony regarding what they understand cohabiting with a sexual partner to mean[38] does not render the statute vague as a matter of law. The Plaintiffs rely primarily on a case decided by this Court, *Ark. Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 166 S.W.3d 550 (2004). In *Sitton*, this Court determined that a law was void for vagueness *as applied* by a state Board to a retailer. 357 Ark. at 361. On appeal, the Arkansas Supreme Court noted that there was no allegation that the law was void on its face, and affirmed this Court's ruling that the law was unconstitutionally void as applied to the retailer. *Id.* at 363, 367.

Although the Plaintiffs dedicate six pages of their Opposition Brief to their vagueness challenge, the Plaintiffs never specify whether they are challenging Act 1 as applied to them or on its face. However, as explained in the State Defendants' Brief,[39] in a point ignored by the Plaintiffs, Act 1 is clearly not void as applied to the Plaintiffs because the Plaintiffs have long conceded throughout their many Amended Complaints that Act 1 does apply to them.[40] "One to whose conduct a statute clearly applies may not challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974); *see also Broadrick v. Okla.*, 413 U.S. 601, 608 (1973)(noting that "even if

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[37] *See* State Defendants' Brief at 35-42.
[38] *See* Plaintiffs' Opposition Brief at 67-72.
[39] *See* State Defendants' Brief at 41-42.
[40] *See* State Defendants' Brief at 37 [FN 52 & FN 53].

the outermost boundaries of [the law] may be imprecise, any such uncertainty has little relevance . . . where appellant's conduct falls squarely within the hard core of the statute's proscriptions"); *McCullen v. Coakley*, 571 F.3d 167, 183 (1st Cir. 2009)("Although the word [] may be vague at the margins [citation omitted], that uncertainty would have no relevance here. After all, the plaintiffs, by their own admission, want to engage in anti-abortion protests; and that conduct, as they must know, falls squarely within the hard core of the proscriptions spelled out in the guidance letter. We need go no further."). Neither do the Plaintiffs characterize any of their allegations in a way indicating a belief that Act 1 does not apply to them. Rather, quite to the contrary, the Plaintiffs have consistently asserted that Act 1 *does* apply to them.[41] Of course, if the Plaintiffs who seek to foster or adopt believed that Act 1 did not apply to them, then there would be no need for them to bring Counts 9 and 10. Accordingly, although the Plaintiffs decline to specify the nature of their vagueness challenge, the Plaintiffs clearly bring a facial challenge to the constitutionality of Act 1.

In order to establish that Act 1 is vague on its face, the Plaintiffs must demonstrate that Act 1 is "impermissibly vague in all of its applications[,]" i.e., that Act 1 provides no ascertainable standard whatsoever to give notice of its reach. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494-495 (1982); *see also Craft v. City of Ft. Smith*, 335 Ark. 417, 424, 984 S.W.2d 22, 26 (1998)(to prevail on a facial void-for-vagueness challenge a plaintiff must prove that the challenged statute is "impermissibly vague in all of its applications."). The

[41] For example, the Plaintiffs argue in their Opposition Brief that Act 1 is vague because it "does not assist persons of ordinary intelligence in determining whether any particular living situation, such as staying over five nights versus four nights per week, will disqualify them from fostering or adopting or is permitted." *Id.* at 69. However, none of the Plaintiffs who seek to foster or adopt allege that they stay over only four or five nights per week, or even that they are unsure whether they qualify as cohabitants or not. Rather, the Plaintiffs simply allege that they have lived together for periods of years, indicating their belief that they are unambiguously cohabiting under both Act 1 and their own common understanding. *See* State Defendants' Brief at 37-38 [FN 52, 53 & 54].

Plaintiffs cannot possibly prevail on a facial void-for-vagueness challenge of Act 1 where their own pleading demonstrates their belief that the law applies to them. The Plaintiffs completely fail to address the fact, as conceded by the Plaintiffs through their pleadings, that they understand what the terms of Act 1 mean because they understand that Act 1 applies to them. The Plaintiffs also completely fail to respond to the fact as outlined in detail by both the State Defendants and the Intervenor-Defendants that Arkansas' appellate courts frequently use these terms without any difficulty or misunderstanding.[42]

"Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). Act 1 is not void for vagueness. Summary judgment should be granted to the Defendants on Counts 12 and 13.

11. The Plaintiffs' belabored arguments about the Defendants' "statistics"[43] miss the point and completely fail to alter the conclusion that Act 1 is rationally related to legitimate government interests. The Plaintiffs offer no evidence countering the fact, as admitted by the Plaintiffs' own experts,[44] that cohabiting households are less stable than married households, and present greater risks of poor child outcomes than married households. Thus, Act 1 passes the rational basis test because Act 1 is rationally related to the legitimate government interest of promoting the safety and well-being of children in state custody.

The Plaintiffs' accusation that the Defendants presume that "every single individual who is in a same-sex and heterosexual relationship is unfit to serve as a foster or adoptive parent"[45] is

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[42] *See* State Defendants' Brief at 38-41; Memorandum of Law in Support of Intervenors' Motion for Summary Judgment and Motion to Dismiss at 67-69, 71-72. The Intervenors also cite cases from other jurisdictions in which courts have considered and rejected challenges to the term "cohabiting," Intervenors' Memorandum at 70-71, and the Plaintiffs cite no cases from *any* jurisdiction where the term "cohabiting" has ever been found to be impermissibly vague.

[43] *See* Plaintiffs' Opposition Brief at 52-66.

[44] *See* State Defendants' Brief at 47-63.

[45] Plaintiffs' Opposition Brief at 52.

unfounded. The State Defendants admit that some unmarried cohabitants barred from fostering or adopting children by Act 1 may be suitable adoptive or foster parents. In that way, Act 1 may, in addition to barring individuals who would not make good parents, also bar some individuals who could make good parents.[46] However, it is undisputed, based upon social science research and data admitted by the Plaintiffs and their own experts, that the likelihood of poor child outcomes is greater in cohabiting homes than in married homes. Given this undisputed fact, it was entirely rational for Arkansas voters to decide to avoid the risk of harm to children by excluding adults cohabiting outside of marriage. As courts have repeatedly held, every statute necessarily draws lines; those lines can never be perfect and need not be perfect to be constitutional. *See 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); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006)(upholding state constitutional provision limiting marriage to heterosexual couples, finding that a "reasonable line" was drawn in restricting marital benefits to only those couples).

Similarly, the fact that Act 1 may not prohibit all potentially unfit individuals from applying to serve as foster and adoptive parents does not render the Act unconstitutional. The Plaintiffs' attempt to manufacture a disputed issue of fact on this point is entirely unavailing.[47] Act 1 bars only cohabiting adults. It is undisputed that cohabiting adults are more likely to pose

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[46] For example, the Plaintiffs who bring Counts 9 and 10 may make good parents if they were allowed to foster and adopt (and if they actually applied to do so). The State Defendants do not doubt Plaintiffs' counsel's ability to identify and recruit such Plaintiffs for this lawsuit. However, there is no reason for a trial at which these Plaintiffs will testify about all of the reasons they would make good parents, because no testimony from the Plaintiffs and no other evidence will change the fact that Act 1 is constitutional as a matter of law.

[47] *See* Plaintiffs' Opposition Brief at 60-62.

risks to children than homes where the couples are married. Although in other parts of their brief the Plaintiffs argue (wrongly) that unwed homosexuals are targeted, here the Plaintiffs argue that Act 1 is infirm because all single adults should also be prevented from fostering or adopting a child. As already discussed, the law is well-established that the lines drawn by a statute need not be perfect. Act 1 protects the interests of children, and that is sufficient to render Act 1 constitutional on rational basis review. The fact that the voters did not also decide to bar all single persons from fostering and adopting is a policy decision they were entitled to make. Perhaps, if future experience demonstrates that it would be desirable to bar single adults as well as adults cohabiting outside of marriage, the voters will enact such a policy. The fact that a statute takes only one step and does not address every potential or conceivable problem does not render the statute unconstitutional. *See Bowen v. Owens*, 476 U.S. 340, 347 (1986)(a legislature may take "one step at a time" in addressing a problem)(quoting *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955)); *Clements v. Fashing*, 457 U.S. 957, 960-970 (1982)(legislatures are free to regulate "one step at a time" and do not have to remedy "every evil."); *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).

Likewise, the Plaintiffs' argument that the social science research cannot be trusted because it involves many biological parents of children, as opposed to foster and adoptive parents,[48] is unavailing. Even if all of the available research involved only biological parents, if that research showed that married biological parents enjoyed better child outcomes than cohabiting biological parents, then Act 1 would be rational because it is a reasonable proposition that the same would be true for non-biological foster and adoptive parents. Notably, the

[48] *See* Plaintiffs' Opposition Brief at 59-60.

Plaintiffs offer no evidence demonstrating that cohabiting foster and adoptive parents enjoy child outcomes equal to or better than married foster or adoptive parents.

For the same reasons – that Act 1 can be overinclusive, underinclusive, and/or incremental in its approach – the Plaintiffs' argument that the research on same-sex cohabiting couples is sparser than the research on heterosexual cohabiting couples[49] is unavailing. Simply put, it does not matter if a subcategory of unmarried cohabiting couples may be more fit to parent on average than the whole of unmarried cohabiting couples, any more than it matters if an individual unmarried cohabitant is fit to be a parent, *supra*. In the same vein, the Plaintiffs argue that Act 1 is unfair because cohabiting heterosexuals are a heterogeneous group.[50] The Plaintiffs appear to argue that only heterosexual cohabiting couples as opposed to same-sex cohabiting couples, and only the admittedly less-stable forms of heterosexual cohabitants as defined by the Plaintiffs' experts, should be barred from fostering or adopting. By making these arguments, the Plaintiffs concede that it is rational to prohibit a higher-risk group from fostering or adopting children. It is undisputed that unmarried cohabitants, on average as a whole group, are a higher-risk group than married individuals, on average as a whole group. With a voter initiative, the citizens of Arkansas are not required to define categories into subcategories upon subcategories in order to arrive at a more perfect solution that excludes only unfit parents, and includes only fit parents, *supra*. If this were a constitutional requirement of legislation, then there would be no such thing as constitutional legislation by the people or the legislature. Act 1 is constitutional.

12. The Plaintiffs' argument that the screening and waiver processes for foster and adoptive applicants effectively screen out unsuitable parents[51] is also unavailing. The Plaintiffs have said nothing to counter the undisputed fact that screening and evaluation of foster and

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[49] *See* Plaintiffs' Opposition Brief at 55-56.
[50] *See* Plaintiffs' Opposition Brief at 62-63.
[51] *See* Plaintiffs' Opposition Brief at 57-58; 64-65.

adoptive applicants does not eliminate the risk of abuse and neglect of children.[52] The Plaintiffs are completely unable to counter the undisputed fact that some foster and adoptive parents survive the screening process and yet still abuse, neglect, and even murder the children entrusted to their care. No rational individual would ever believe that any screening process can predict with perfect accuracy which applicants to become foster or adoptive parents will or will not someday harm children entrusted to their care. It remains undisputed that children who reside in cohabiting homes are on average at greater risk of being abused than children who reside in married homes. Therefore, it was completely rational for the Arkansas voters to enact legislation preventing children from being placed into cohabiting homes for foster care and adoption.

13. The Plaintiffs' argument that Act 1 is irrational because Act 1 does not also bar unmarried cohabitants from serving as guardians[53] is misconceived. The Plaintiffs concede that if Act 1 barred unmarried cohabitants from all forms of parenting including guardianship, then Act 1 would be rational because Act 1 would exclude from parenting a group that is generally a higher-risk to children than groups that are not excluded from parenting. As a matter of law, if Act 1 would be rational in that form then Act 1 in its true form also satisfies the rational basis test, because Act 1 excludes unmarried cohabitants from certain forms of parenting (fostering and adopting), and a law is not irrational merely because it is underinclusive. *See Vance v. Bradley*, 440 U.S. 93, 108-109 (1979) (upholding underinclusive federal statute); *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").

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[52] *See* State Defendants' Brief at 63-68.

[53] *See* Plaintiffs' Opposition Brief at 4-5 ("Act 1 expressly allows cohabitors to parent children through guardianships. Therefore, the justification for Act 1 cannot be that it is intended to categorically exclude from parenting a group that is purportedly at too high a risk for being 'unfit' parents, because the statute expressly allows this same excluded group (cohabiting individuals) to serve as parents through guardianship."); 52-55; 58 [FN 33].

Moreover, the fact that Act 1 allows unmarried cohabitants to serve as guardians but not as adoptive parents is rational because guardianship is a less permanent form of placement, and guardianship is much easier to change if the placement does not serve the best interest of the child than an adoptive placement. As compared to foster placements, guardianship placements are supervised by courts, while foster placements are not, and guardianships are therefore less likely to fall victim to the inherently imperfect screening process conducted by the State. Thus, there are rational reasons for excluding a higher-risk group from fostering or adopting children while not excluding the same group from serving as guardians, and Act 1 is rational if it excludes *any* higher-risk group from serving as foster *or* adoptive parents, whether Act 1 also excludes the same higher-risk group from other forms of care giving or not. Act 1 is constitutional.

14. The Plaintiffs' argument that Act 1 cannot be rational because it does not require foster or adoptive parents to be married[54] is similarly misconceived. Here, the Plaintiffs appear to concede that if Act 1 required foster or adoptive parents to be married then Act 1 would be rational because it is undisputed that married homes lead to the best outcomes for children.[55] Again, as a matter of law, if Act 1 would be rational if it required all foster or adoptive parents to be married, then Act 1 is rational in its true form because Act 1 allows married individuals to foster or adopt, but Act 1 excludes unmarried individuals who cohabit with a sexual partner. Indeed, in the course of their argument about Act 1 failing to require foster or adoptive parents to be married, the Plaintiffs explicitly concede that unmarried cohabiting households lead to poorer child outcomes than married households: "[T]hese statistics no more justify a blanket ban on

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[54] *See* Plaintiffs' Opposition Brief at 6 ("[T]here is absolutely no requirement that a foster or adoptive parent be married – plenty of children will be placed with single parents regardless of any intention to marry.").

[55] Additionally, although Act 1 does not require foster or adoptive parents to be married, Act 1 certainly encourages foster and adoptive parents to marry, at least if they wish to cohabit in an intimate relationship and are not married. Promoting marriage is, of course, a legitimate state interest. Act 1 is therefore constitutional for this reason alone.

cohabiting couples than they do a blanket ban on other demographic groups who are permitted under Act 1 to foster and adopt, such as singles, people with low income, and people with limited education, who *have comparable or worse average outcomes than cohabitors.*"[56] Of course, the admitted fact that cohabitants have poorer child outcomes than married individuals is a sufficient rational basis upon which to uphold the constitutionality of the law. Act 1 is constitutional.

15. As the State Defendants have argued, Act 1 is also rational because it allows DHS to be more efficient when screening foster and adoptive applicants, and 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.[57] The Plaintiffs completely fail to address this argument. Summary judgment should be granted to the Defendants on this ground alone.

16. As the State Defendants have argued, Act 1 is constitutional because it is rationally related to the legitimate government interest of promoting marriage.[58] The Plaintiffs completely fail to address this argument. Summary judgment should be granted to the Defendants on this ground alone.

17. Finally, the Plaintiffs' persistent reliance upon the *Howard* case is misplaced.[59] The Plaintiffs are so enamored with *Howard* that they even cite the trial court's opinion,[60] and they even attempted to have the instant case assigned to the same Circuit Judge. Of course, the trial court in *Howard* ruled that this case is not related to the *Howard* case, and transferred the case back to this Court.[61] If the *Howard* case is in any way instructive, *Howard* indicates that all

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[56] Plaintiffs' Opposition Brief at 6 (emphasis added).
[57] *See* State Defendants' Brief at 67-68.
[58] *See* State Defendants' Brief at 68-70.
[59] *See* State Defendants' Brief at 1-3.
[60] *See* Plaintiffs' Opposition Brief at 30 [FN 20] (citing *Howard v. CWARB*, *supra*).
[61] *See* Order dated January 5, 2009, attached to the Intervenors' Response to Plaintiffs' Motion for Summary Judgment as Exhibit 18.

of the Plaintiffs' equal protection and substantive due process claims in this case are subject to rational basis review, and Act 1 survives constitutional scrutiny as a matter of law.

Although the appellate court in *Howard* ruled only based upon the Separation of Powers doctrine, which is not an issue in this case, the *Howard* plaintiffs brought both equal protection claims and substantive due process claims, and the trial court evaluated all of the plaintiffs' constitutional claims. The trial court applied the rational basis test to the plaintiffs' equal protection claims regarding their rights of privacy and intimate association and found that there was no constitutional violation.[62] The trial court also applied the rational basis test to the

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[62] Regarding the *Howard* plaintiffs' equal protection claims, the trial court opined as follows:

> Unless a challenged classification burdens a fundamental right or targets a suspect class, the Equal Protection Clause requires only that the classification be rationally related to a legitimate state interest, *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 1627 (1996). At this point the law is well settled that in cases involving homosexuals or "gay rights," a suspect class does not exist. Nor is there any precedent for "heightened scrutiny." The plaintiffs argue violation of their fundamental rights of privacy and intimate association, such causes of action addressed below. This case involves the grant of a statutory privilege in a situation in which the state acts in *loco parentis* for minor children. Like adoption, foster parenting is a privilege created by statute and not by common law. There is no fundamental right to apply to be a foster parent.
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> ***
>
> The base level "rational basis" standard is the appropriate standard for resolution of this matter.
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> ***
>
> The ruling of this court is that, in an equal protection challenge in which the State stands *in loco parentis* to minor children, where there is no suspect class, no heightened scrutiny, and no fundamental right involved, that for purposes of a rational basis review, "public morality" is a stand alone legitimate state interest and that rules, regulations, and/or statutes rationally related to furthering the legislatively determined "public morality" are constitutional.

Howard v. CWARB, 2004 WL 3154530 at *10 – *12.

plaintiffs' due process claims regarding their rights to privacy and intimate association and found that there was no constitutional violation.[63]

The rational basis test also applies to all of the Plaintiffs' constitutional claims in the instant case. Because the Defendants have plainly demonstrated rational bases for Act 1, the law is constitutional as a matter of law and summary judgment should be granted to the Defendants accordingly.

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[63] Regarding the *Howard* plaintiffs' due process claims, the trial court opined as follows:

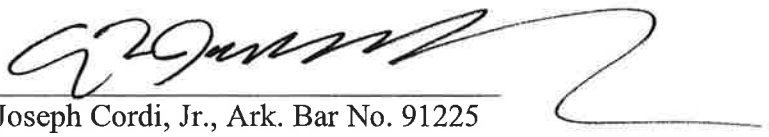
> The plaintiffs also claim that Regulation 200.3.2 violates their rights to privacy and intimate association under both the U.S. and Arkansas Constitutions. In support of such a claim they cite *Lawrence v. Texas*, 123 S.Ct. 2472 (2003). The legal principles addressed by *Lawrence* are different than those presented by this case. [FN3] The balance of the legal argument on these two issues is the same legal argument made to the Eleventh Circuit and rejected by such court in *Lofton v. Gilmore*, 358 F.3d 804 (2004). The *Lofton* court's analysis on the issues of privacy and intimate association is adopted by this court. The plaintiffs' claims for relief under Counts VI and VII are accordingly denied.

Howard v. CWARB, 2004 WL 3154530 at *12.

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 the Court grant their motion for Summary Judgment, deny the Plaintiffs' Motion for Summary Judgment, and for all other just and appropriate relief.

Respectfully submitted,

DUSTIN McDANIEL
Attorney General

By: 

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CERTIFICATE OF SERVICE

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