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' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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### I. INTRODUCTION.

At the conclusion of the first hearing held in this matter, the Court reserved its ruling on the State Defendants' Motion to Dismiss Counts 1 through 10 "upon a full hearing of evidence and facts."[1] The Court's suggestion that there would be a trial in this matter was hardly a promise. Indeed, the Court subsequently entered two stipulated scheduling orders which include deadlines for the filing of summary judgment motions, and a hearing on the summary judgment motions is currently scheduled for April 8, 2010.[2] The Plaintiffs' explicit agreement to the scheduling orders leaves no doubt that they did not understand anything that the Court has said to be a promise that there will be a trial or that any dispositive motion will necessarily be denied. Moreover, the fact that all parties including the Plaintiffs have filed summary judgment motions indicates the parties' agreement that this case should be decided on summary judgment. For the reasons set forth in the State Defendants' Brief in support of their Motion for Summary Judgment and for the reasons set forth below in response to the Plaintiffs' Motion for Summary Judgment, to the extent that the Plaintiffs have stated any claim(s) in this case, the rational basis standard of review applies. The State Defendants have already set forth in detail the ways in which Act 1 satisfies the rational basis test,[3] and the State Defendants hereby incorporate by reference their Motion for Summary Judgment and Brief in support of that Motion pursuant to Ark.R.Civ.P. 10(c). The Plaintiffs' Motion for Summary Judgment should be denied and summary judgment should be granted in favor of the State Defendants.

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[1] Order on Defendants' and Intervenor-Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, April 16, 2009, ¶ 4.

[2] *See* Stipulated Scheduling Order entered April 16, 2009, and Amended Stipulated Scheduling Order entered October 26, 2009.

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

## II. THE STANDARD GOVERNING THE PLAINTIFFS' DUE PROCESS AND EQUAL PROTECTION CLAIMS IS THE RATIONAL BASIS TEST.

### A. The rational basis test applies to the due process claims brought by the child-Plaintiffs (Counts 1 and 2).

The Plaintiffs argue that the "professional judgment" standard applies to the due process claims brought by the child-Plaintiffs in this case (Counts 1 and 2).[4] While they completely fail to address what level of scrutiny should apply in a traditional analysis of the children's due process challenge to a statute, the Plaintiffs characterize the only options for analysis of their claims in Counts 1 and 2 as either the "professional judgment" standard or the "deliberate indifference" standard, and they proceed to argue that as between those two choices, the professional judgment standard is more appropriate. However, *none* of the bevy of cases cited by the Plaintiffs in the lengthy section of their brief where they argue that the "professional judgment" standard applies to Counts 1 and 2 involves a constitutional challenge to a statute passed by a legislature or by a majority vote of the people. *See Youngberg v. Romeo*, 457 U.S. 307 (1982)(Plaintiffs' Brief at 42, 44, 45)(mother of mentally retarded individual, who was involuntarily committed to a state institution, brought § 1983 suit seeking damages on behalf of her son against the institution officials, claiming that her son had constitutionally protected rights to safe conditions of confinement, freedom from bodily restraint, and training); *Yvonne L. ex rel. Lewis v. N.M. Dep't of Human Services*, 959 F.2d 883 (10th Cir. 1992)(Plaintiffs' Brief at 44)(minors brought action against state agency and officials for injuries sustained while they were in physical and legal custody of the state and placed in a private foster care facility); *K.H. through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990)(Plaintiffs' Brief at 44)(civil rights action brought by foster child who was abused by foster parents, against child welfare workers

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

who placed child in foster homes); *Charlie H. v. Whitman*, 83 F. Supp. 2d 476 (D.N.J. 2000)(Plaintiffs' Brief at 44)(action by children in state foster care against various state officials generally alleging systemic failure to protect the foster children and failure to provide for their health and safety by subjecting them to significant harm); *T.M. ex rel. R.T. v. Carson*, 93 F. Supp. 2d 1179 (D. Wyo. 2000)(Plaintiffs' Brief at 44)(guardians ad litem brought § 1983 action against current and former employees of state's family services agency based on placement of children with foster father later convicted of sexually abusing the children); *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp. 2d 941 (M.D. Tenn. 2000)(Plaintiffs' Brief at 44)(§ 1983 class action brought by foster children against state officials and agencies, alleging violations of constitutional rights due to systemic failure to fulfill legal obligations to provide children with required services under federal law); *Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638 (E.D. Pa. 1999)(Plaintiffs' Brief at 44, 45)(§ 1983 action brought by foster children against social service agencies who placed them, alleging constitutional violations due to placements in foster home where they were sexually abused by teenage son of foster parents); *Braam ex rel. Braam v. Washington*, 81 P.3d 851 (Wash. 2003)(Plaintiffs' Brief at 44, 45, 46)(class action brought against the Washington Department of Social and Health Services seeking to force DSHS to reduce the number of times foster children were moved while in the State's care).

Similarly, the cases relied upon by the Plaintiffs for their contention that the "deliberate indifference" standard does not apply in this case because the Plaintiffs do not seek monetary damages all involve specific acts or omissions of government officials and agencies. *See White v. Chambliss*, 112 F.3d 731 (4th Cir. 1997)(Plaintiffs' Brief at 46)(§ 1983 lawsuit brought by biological mother of daughter who died from abuse at the hands of her foster parents); *Norfleet v. Ark. Dep't of Human Services*, 989 F.2d 289 (8th Cir. 1993)(Plaintiffs' Brief at 46)(§ 1983

lawsuit brought by biological mother on behalf of foster child who died in foster care, alleging that DHS and foster parent were deliberately indifferent to the medical needs of the child, which deprived him of his life without due process). Indeed, the Plaintiffs correctly point out that "a number of courts have noted the deliberate indifference standard only applies to 'episodic' actions or omissions, not 'general conditions, practices, rules.'"[5] However, the Plaintiffs fail to point out the fact that the same is true for the professional judgment standard of review.

As the Washington Supreme Court recognized in a case relied upon by the Plaintiffs, "substantive due process is violated if the *executive action* shocks the court's conscience; both [the deliberate indifference standard and the professional judgment standard] are tailored to assist courts in evaluating *executive action in specific factual contexts*." *Braam ex rel. Braam v. Washington*, 81 P.3d at 858 (emphasis added)(citing *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)). As set forth in *Youngberg*, which the Plaintiffs cite repeatedly, under the professional judgment standard, "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 457 U.S. at 323. The Plaintiffs in this case readily admit that they do not seek to hold any particular government agency or official liable for any specific action through their lawsuit, and there is no allegation that any "professional" has made any "decision" that forms the basis of any of the Plaintiffs' claims in this case.

Simply put, neither the "professional judgment" standard nor the "deliberate indifference" standard apply in this case because the Plaintiffs do not complain of any specific

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[5] Plaintiffs' Brief at 46 (citing *Hare v. City of Corinth, Miss.*, 74 F.3d 633, 643 (5th Cir. 1996)(en banc); *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003); *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004)).

acts or omissions by the State Defendants. Rather, as the Plaintiffs well know, they bring a constitutional challenge to a law passed by the citizens of Arkansas. The Plaintiffs concede that "*[n]o court* has applied the 'deliberate indifference' standard to assess the constitutionality of a state statute alleged to cause harm to children in state care."[6] Likewise, as discussed above, *no court* cited by the Plaintiffs has applied the "professional judgment" standard to assess the constitutionality of a state statute alleged to cause harm to children in state care. Obviously, the voters of Arkansas were not exercising "professional judgment" when they voted to enact Act 1. Rather, Arkansas citizens exercised their rights as citizens to make a policy judgment.

As explained in detail in both the State Defendants' and the Intervenor-Defendants' briefs in support of their Motions for Summary Judgment, the appropriate standard for reviewing the constitutionality of Act 1 under both the state and federal constitutions is the rational basis test.[7] In a very famous footnote in *U.S. v. Carolene Products Co.*, the United States Supreme Court articulated the idea that different constitutional claims would be subjected to varying levels of review. *Id.*, 304 U.S. 144, 152 n. 4 (1938)(The judiciary will defer to the legislature unless there is discrimination against a "discrete and insular" minority or infringement of a fundamental right.). All *laws* challenged under the federal due process clause or equal protection clause must meet at least rational basis review. Under the rational basis test, a *law* will be upheld if it is rationally related to a legitimate government purpose. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988); *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 187 (1980); *Allied Stores*

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[6] Plaintiffs' Brief at 46.

[7] As explained in the State Defendants' Brief, 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).

*v. Bowers*, 358 U.S. 522, 527 (1959); *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955); *Day-Brite Lighting, Inc. v. Mo.*, 342 U.S. 421, 424-425 (1952). In other words, the government's objective only need be a goal that it is legitimate for government to pursue. In fact, a legitimate goal need not even be the *actual* purpose of the legislation but, rather, any *conceivable* legitimate purpose is sufficient under the rational basis test. *See Schweiker v. Wilson*, 450 U.S. 221, 235 (1981).

While all laws must satisfy at least the rational basis test, a law is only subject to higher level "intermediate" scrutiny if the law discriminates in certain ways or regulates certain forms of speech as articulated by the Supreme Court. *See, e.g., U.S. v. Va.*, 518 U.S. 515 (1996)(intermediate scrutiny for laws involving gender discrimination); *Lehr v. Robertson*, 463 U.S. 248 (1983)(intermediate scrutiny for laws involving discrimination against nonmarital children); *Plyler v. Doe*, 457 U.S. 202 (1982)(intermediate scrutiny for laws involving discrimination against undocumented alien children with regard to education); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)(intermediate scrutiny for laws that regulate commercial speech); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)(intermediate scrutiny for laws that regulate speech in public forums). A law is only subject to highest level "strict" scrutiny in a due process challenge if the law directly and substantially interferes with a fundamental constitutionally-protected liberty interest. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Zablocki v. Redhail*, 434 U.S. 374, 387 n. 12 (1978). A law is only subject to strict scrutiny in an equal protection challenge if the law discriminates against a suspect class. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

The Plaintiffs explicitly concede that the child-Plaintiffs have no fundamental right to be adopted or fostered.[8] Of course, Act 1 cannot logically infringe a constitutional right that does not exist. The Plaintiffs make no argument that Act 1 discriminates against a suspect class, or that Act 1 discriminates or regulates speech in any way that has been found by the Supreme Court to warrant heightened scrutiny. Instead, the Plaintiffs argue that the State Defendants have an obligation to "promote and care for, and at a minimum not arbitrarily harm, the well-being of the children in their custody for whom they have assumed the responsibility of caring as a parent[,]" and that "Act 1 violates this obligation by categorically eliminating suitable foster and adoptive parents, thereby depriving children of permanent adoptive and stable foster placements that would occur but for Act 1, leaving children in State care for longer periods than would occur but for Act 1, and doing so all in contravention of the judgment of child welfare professionals in this State and elsewhere."[9] The State Defendants do not deny that they have an obligation to provide adequate medical care, protection, and supervision to children in State custody, and they agree that children in non-punitive state custody are entitled to more considerate treatment than criminals whose conditions of confinement are designed to punish. Indeed, the furtherance of the State Defendants' obligation to children in State care is a rational basis for Act 1, *infra*.[10] However, the Plaintiffs make no argument and cite no case demonstrating that Act 1 discriminates or regulates in any way that subjects the law to heightened scrutiny. Indeed, in their own words, the Plaintiffs "respectfully ask only that same-sex and cohabiting heterosexual couples be treated as any other [foster or adoptive] applicants[.]"[11] However, the Plaintiffs are

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[8] *See* Plaintiffs' Brief at 54, FN 28 ("*Plaintiffs do not claim a fundamental right to adopt or foster children, or a right to be adopted or fostered.*")(emphasis in original).

[9] Plaintiffs' Brief at 42.

[10] *See also* the State Defendants' Brief.

[11] Plaintiffs' Brief at 47.

unable to cite a single case holding that cohabiting couples have any constitutionally protected right to apply or serve as foster or adoptive parents, and they concede that no such right exists.[12]

The Plaintiffs tacitly concede that if the well-established "level of scrutiny" analysis applies to Act 1, which it does, then the appropriate level of scrutiny on Counts 1 and 2 is the rational basis test. For the reasons described below and in the State Defendants' Brief, Act 1 easily satisfies the rational basis test. Accordingly, the Plaintiffs' motion for Summary Judgment should be denied, and summary judgment should be granted in favor of the State Defendants.

### B. The rational basis test applies to the due process and equal protection claims brought by the adult plaintiffs seeking to foster or adopt children while cohabiting with a sexual partner outside of marriage (Counts 9 and 10).

The adult Plaintiffs who seek to foster and/or adopt children in Arkansas while living with intimate partners argue that Act 1 violates their due process and equal protection rights by burdening their right to privacy, and therefore Act 1 should be subject to strict scrutiny.[13] The State Defendants agree that citizens enjoy a constitutionally protected right to engage in certain consensual intimate conduct in the privacy of their homes. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003)(holding that state law criminalizing certain sexual conduct between persons of the same sex is unconstitutional); *Jegley v. Picado*, 349 Ark. 600, 638, 80 S.W.3d 332, 353-354 (2002)(holding that Arkansas law criminalizing certain sexual conduct between persons of the same sex is unconstitutional). However, Act 1 does not infringe on anyone's right to engage in private intimate conduct or enter into intimate relationships, either directly or indirectly. Act 1 simply does not prohibit the Plaintiffs or anyone else from maintaining intimate relationships or engaging in intimate conduct in the privacy of their homes. Counts 9 and 10 should be dismissed

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[12] *See* Plaintiffs' Brief at 54, FN 28 ("*Plaintiffs do not claim a fundamental right to adopt or foster children, or a right to be adopted or fostered.*")(emphasis in original).

[13] *See* Plaintiffs' Brief at 52-56.

accordingly, and to the extent the Plaintiffs have any liberty interest that is infringed by Act 1, Counts 9 and 10 must be analyzed under the rational basis standard of review.

The Plaintiffs argue that Act 1 "penalizes" their exercise of their right to privacy because Act 1 "absolutely excludes individuals from applying to adopt or foster on the basis of engaging in an intimate relationship with a partner."[14] The Plaintiffs' argument mischaracterizes the true nature and the explicit language of Act 1. Nothing in Act 1 prohibits anyone from engaging in an intimate relationship, and nothing in Act 1 excludes individuals from applying to adopt or foster because they engage in an intimate relationship. Under the plain terms of Act 1, the Plaintiffs can maintain an intimate relationship, and engage in acts of intimacy in their own homes or elsewhere, and remain eligible to foster or adopt. Act 1 merely states that if the Plaintiffs wish to be eligible to foster or adopt, they cannot *cohabit* with a sexual partner outside of marriage.[15] Act 1 does not prohibit intimate relationships or intimate conduct, not as a condition precedent to eligibility to foster or adopt or otherwise.

The Plaintiffs do not have a fundamental liberty interest in cohabiting with an unmarried partner. Indeed, even biological parents do not have a fundamental liberty interest in cohabiting with an unrelated individual – Arkansas courts routinely and consistently hold 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

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[14] Plaintiffs' Brief at 53.

[15] Act 1 states: "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 (emphasis added).

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)). Clearly, if courts can deny custody to parents on the basis of their unmarried cohabitation, then the people of Arkansas can enact a policy that prevents foster and adoptive parents from cohabiting with a sexual partner outside of marriage.

A liberty interest is not fundamental, and thus does not trigger strict-scrutiny analysis, unless it is so deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed. *Washington v. Glucksberg*, 521 U.S. at 720-721 (holding that there is no fundamental right to assisted suicide). The Plaintiffs' purported liberty interest in living with an unmarried partner, upon which Counts 9 and 10 are based, finds absolutely no support in judicial decisions. Neither *Jegley v. Picado* nor any other case cited by the Plaintiffs hold, or even suggest, that either the United States or Arkansas constitutions include a fundamental right to cohabit with a sexual partner. *Jegley v. Picado* actually holds "that the fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults." *Id.*, 349 Ark. at 632, 80 S.W.3d at 350. Thus, the Arkansas Supreme Court struck down a statute that criminalized sodomy between same-sex persons. *Id.* Similarly, in *Lawrence v. Texas*, the United States Supreme Court noted that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" in striking down a Texas statute that criminalized sodomy between same-sex persons. 539 U.S. at 572. The Plaintiffs

have not cited a single case for the proposition that they enjoy a fundamental constitutional right to live with an unrelated person outside of marriage. In addition to failing to cite any judicial authority in support of this supposed fundamental liberty interest, the Plaintiffs also have failed to demonstrate that it is deeply rooted in either America's or Arkansas' history and tradition. In fact, several judicial decisions plainly hold that there is no fundamental liberty interest in cohabiting with a person or persons to whom you are not related.

In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), a zoning ordinance restricted land-use to one-family dwellings, defining the word "family" to mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons. 416 U.S. at 2. The owners of a house in the village alleged that the ordinance violated their rights to equal protection and rights of association, travel, and privacy after they were cited for leasing their house to six unrelated college students. 416 U.S. at 2-3. Although the ordinance allowed two unrelated persons to cohabit but no more than two, the plaintiffs argued that if two unmarried people can constitute a "family," there is no reason why three or four may not. 416 U.S. at 8. In response to this argument, the Court noted that "every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." *Id.* Notably, the Court made no mention of any fundamental right of two unmarried people to reside together, and the ordinance was upheld under rational basis review. 416 U.S. at 7-8. The Court in *Village of Belle Terre v. Boraas* also noted an additional argument made by the plaintiffs that the ordinance "reeks with animosity to unmarried couples who live together," but the Court dismissed this argument due to lack of any evidence and because the ordinance included two unmarried people within the definition of family. 416 U.S. at 8.

In *Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), the plaintiffs brought a class action challenging a provision of the Food Stamp Act of 1964 which excluded from participation in the program any household containing an individual who is unrelated to any other member of the household. 413 U.S. at 529. Two of the plaintiffs lived together as a couple but were not married or related, and they were denied assistance solely because they lived together and were unrelated. *Id.* at 531-532. The Court began its analysis by noting that "[u]nder traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest." *Id.* at 533 (citations omitted). Notably, the Court made absolutely no mention of any fundamental liberty interest the unmarried couple might have in living together as an unmarried couple, but simply assessed the constitutionality of the law under the rational basis test.

The Plaintiffs cite *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), for the proposition that they have a protected right to form intimate relationships.[16] However, even though the Plaintiffs may have the right to form intimate relationships, Act 1 merely says they may not *cohabit* with those with whom they form intimate relationships *if* they wish to foster or adopt children. Of course, if the Plaintiffs have no constitutionally protected privacy right of intimate association in their nonmarital and nonfamilial *cohabitation*, and they cite no authority indicating that they have such a fundamental right, then the Plaintiffs have failed to state a claim for which relief can be granted and Counts 9 and 10 should be dismissed as a matter of law.

Even if the Plaintiffs had a constitutionally-protected privacy right in their cohabitation, or if Act 1 prohibited *related* individuals who live together from fostering or adopting children,

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[16] *See* Plaintiffs' Brief at 53.

the law would not be subject to heightened scrutiny.[17] An alleged infringement on a familial right is unconstitutional only when an infringement has a direct and substantial impact on the familial relationship. *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986). The federal Constitution prevents fundamental rights from being targeted by legislation; it does not, however, prevent side effects that may occur if the government is aiming at some other objective. For example, in *Califano v. Jobst*, 434 U.S. 47 (1977), a federal disability-benefits program terminated benefits when disability beneficiaries got married. The Court held that this does not violate the Constitution, even though it could be seen as a penalty on marriage (especially so when both spouses are disabled), because it reflects a view that one spouse usually supports the other. The program's incidental effect on marriage when both spouses are disabled, the Court held, differs from the sort of penalty that occurs when a law is designed to penalize the fundamental liberty interest. 434 U.S. at 52-54; *see also Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)(a government intends to achieve a particular result only when the law has been adopted because of, rather than in spite of or with indifference to, that result). Act 1 is clearly not designed to prevent the Plaintiffs from residing together in an intimate relationship outside of marriage, and Act 1 does not prohibit anyone from residing together in an intimate relationship. Rather, the purpose of Act 1 is explicitly stated in the language of the law. Act 1 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

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[17] There are numerous cases discussing the liberty interest that *related family members* have in their family living arrangements. Of course, Act 1 does not burden any such right because it does not apply to related family members who reside together unless they are also engaging in an incestuous relationship. Any privacy interest one may have in residing with an unrelated individual is far afield from the intimate concern of a family living arrangement. That said, many cases discussing family living arrangements demonstrate that a law such as Act 1 would not be subject to heightened scrutiny even if it somehow burdened familial relationships.

cohabiting outside of marriage." Ark. Code Ann. § 9-8-301. Nothing about Act 1 directly *or* substantially interferes with the Plaintiffs' exercise of their choice to cohabit outside of marriage. Act 1 is not designed to deter the Plaintiffs from exercising that choice, and Act 1 does not prevent the Plaintiffs from exercising that choice. The Plaintiffs argue that Act 1 is subject to heightened scrutiny because Act 1 conditions the benefit or privilege of fostering or adopting children upon the cessation of the fundamental right to privacy.[18] Notwithstanding the fact that this argument is premised upon the existence of a fundamental right to cohabit with an intimate partner, for which the Plaintiffs fail to offer a scintilla of legal support, the argument fails even if the Plaintiffs have such a right because Act 1 does not directly and substantially infringe upon the Plaintiffs' exercise of their choice to cohabit. Counts 9 and 10 must be analyzed under the rational basis standard of review.

The Plaintiffs cite two recent cases from U.S. Courts of Appeals in which present and former members of the U.S. armed services brought actions challenging the military's "Don't Ask, Don't Tell" statute, 10 U.S.C. § 654. The Plaintiffs contend that both *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008), and *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), support their argument that the Court should apply strict scrutiny to their claims in this case.[19] In *Witt v.*

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[18] *See* Plaintiffs' Brief at 54 [FN 28], 55-56.

[19] Specifically, the Plaintiffs' Brief states as follows:

> If a law burdens "the personal and private lives of homosexuals [or heterosexuals], in a manner that implicates the rights identified in *Lawrence* [*v. Texas*,] the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest." *Witt v. Dep't of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008); *see also Cook v. Gates*, 528 F. 3d 42, 52-56 (1st Cir. 2008) (holding that *Lawrence* "did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy" and that government action penalizing same-sex couples for forming intimate relationships requires heightened scrutiny). Act 1 thus cannot stand unless the State

*Dep't of the Air Force*, an Air Force reservist nurse filed a lawsuit after she was suspended from duty on account of her sexual relationship with a civilian woman. 527 F.3d at 809. The plaintiff argued that the statutory policy commonly known as "Don't Ask, Don't Tell" ("DADT") violates substantive due process, equal protection, and procedural due process, in light of the Supreme Court's decision in *Lawrence v. Texas*. *Id.* at 811. The Ninth Circuit began its analysis by considering the proper level of scrutiny to apply to the plaintiff's substantive due process claim in light of *Lawrence*, noting that "*Lawrence* is, perhaps intentionally so, silent as to the level of scrutiny that it applied[.]" *Id.* at 814. The Ninth Circuit then noted that the only case cited by the Air Force where a court actually determined the level of scrutiny applied in *Lawrence* explicitly held that *Lawrence* did not apply strict scrutiny:

> Only one of the three courts of appeals that the Air Force claims to have "decided this question" actually has done so. In *Lofton v. Sec'y of the Dep't of Children & Family Services*, 358 F.3d 804, 817 (11th Cir. 2004), the Eleventh Circuit upheld a law that forbade homosexuals from adopting children, explicitly holding that *Lawrence* did not apply strict scrutiny.

*Id.* at 815.[20] Despite the Eleventh Circuit's decision in *Lofton*, the Ninth Circuit in *Witt* concluded that the Supreme Court applied "something more than traditional rational basis review" in *Lawrence*. *Id.* at 817. However, the Ninth Circuit noted that it "hesitate[d] to apply strict scrutiny when the Supreme Court did not discuss narrow tailoring or a compelling state interest in *Lawrence*," and elected not to address the issue. *Id.* at 817-818. Accordingly, if anything, *Witt v. Dep't of the Air Force* stands for the proposition that strict scrutiny does *not*

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> establishes that it is narrowly tailored to meet a compelling justification, which, as discussed below, it is not.

Plaintiffs' Brief at 55-56.

[20] Further analysis of the Eleventh Circuit's decision in *Lofton* is contained in the State Defendants' Brief at 9-12.

apply to the Plaintiffs' due process claims in Counts 9 and 10 of their Complaint. Notably, the Ninth Circuit also explicitly held that DADT does not violate equal protection *under rational basis review*. *Id.* at 821 (citing *Philips v. Perry*, 106 F.3d 1420, 1424-1425 (9th Cir. 1997) and noting that "*Philips* clearly held that DADT does not violate equal protection under rational basis review (citation omitted), and that holding was not disturbed by *Lawrence* which declined to address equal protection[.]"). Thus, under *Witt*, strict scrutiny does *not* apply to substantive due process challenges to DADT, and equal protection challenges to DADT are subject to rational basis review.

In *Cook v. Gates*, the second recent Court of Appeals case that the Plaintiffs claim warrants strict scrutiny in the instant case and the second Court of Appeals case involving a challenge to DADT after *Lawrence*, twelve former members of the U.S. military who were separated from service under DADT brought an action alleging that DADT violated their right to substantive due process and denied them equal protection of the law on the basis of sexual orientation. 528 F.3d at 47. The district court dismissed the complaint, finding that the Supreme Court employed rational basis review in *Lawrence*, and concluding that Congress set forth a rational reason for DADT and therefore the plaintiffs' due process and equal protection claims failed. *Id.* at 47-48. On appeal, the First Circuit began its analysis by reviewing basic substantive due process principles as enunciated in cases leading up to and including *Lawrence*. *Id.* at 48-55. The First Circuit noted that courts and commentators disagree about whether the Supreme Court in *Lawrence* employed a rational basis approach, strict scrutiny, or "a balancing of state and individual interests that cannot be characterized as strict scrutiny or rational basis." *Id.* at 51-52. As the Plaintiffs correctly note, the First Circuit concluded that in *Lawrence*, the Supreme Court "recognize[d] a protected liberty interest for adults to engage in private,

consensual sexual intimacy and applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label." *Id.* at 52. However, the First Circuit also concluded that "[t]o say, as we do, that *Lawrence* recognized a protected liberty interest for adults to engage in consensual sexual intimacy in the home does not mean that the Court applied strict scrutiny[.]" *Id.* at 55. Rather, according to the First Circuit, *Lawrence* is "another in this line of Supreme Court authority that identifies a protected liberty interest and then applies a standard of review that lies between strict scrutiny and rational basis." *Id.* at 56.

Having identified the proper scrutiny of DADT under *Lawrence*, the First Circuit in *Cook* held that the plaintiffs' facial due process challenge of DADT failed as a matter of law:

> The plaintiffs' facial challenge fails. *Lawrence* did not identify a protected liberty interest in all forms and manner of sexual intimacy. *Lawrence* recognized only a narrowly defined liberty interest in adult consensual sexual intimacy in the confines of one's home and one's own private life. *Lawrence*, 539 U.S. at 567, 123 S.Ct. 2472. The Court made it abundantly clear that there are many types of sexual activity that are beyond the reach of that opinion. *Id.*, at 578, 123 S.Ct. 2472. Here, the Act includes such other types of sexual activity.

*Id.* Logically, if the Supreme Court in *Lawrence* recognized "only a narrowly defined liberty interest" in only certain types of sexual activity but explicitly declined to recognize a liberty interest in other types of sexual activity, *Lawrence* simply does not stand for the proposition that the Plaintiffs in this case have a fundamental liberty interest in cohabiting with an unrelated person. Again, Act 1 does not restrict sexual activity in any way. The DADT cases cited by the Plaintiffs and the Supreme Court's decision in *Lawrence* simply do not apply by analogy or otherwise to the instant case. The Plaintiffs' due process claims in Counts 9 and 10 should be analyzed under the rational basis standard of review. Notably, as the Ninth Circuit determined in *Witt*, the First Circuit in *Cook* also determined that the plaintiffs' equal protection claims were

subject to the rational basis test, and the First Circuit concluded that DADT survives rational basis review. 528 F.3d at 60-62. If the *Witt* and *Cook* decisions are instructive in the instant case (though they are certainly not controlling because they offer no insight into any liberty interest in cohabiting with an unrelated person), they indicate that the Plaintiffs' equal protection claims are at most subject to rational basis review, and the Plaintiffs' due process claims are *not* subject to strict scrutiny review.

The Eighth Circuit Court of Appeals has also recently considered a case involving constitutional claims related to sexual conduct that may be instructive for the Plaintiffs' claim that they have a protected privacy interest in cohabiting with an unrelated person. In *Sylvester v. Fogley*, 465 F.3d 851 (8th Cir. 2006), an Arkansas State Police officer brought suit under state and federal law alleging that members of the State Police violated his constitutional right to privacy by investigating an allegation that he had sexual relations with a crime victim during the course of the underlying criminal investigation. 465 F.3d at 852. The Eighth Circuit began its analysis with a discussion of *Lawrence*, indicating the Eighth Circuit's belief that in *Lawrence*, the Supreme Court applied the rational-basis test:

> Even if "certain intimate conduct" is protected as a liberty/privacy right, the exact contours of that right are unknown and identifying the precise standard of review to be applied to the government's interference with that right can be formidable. For example, in *Lawrence* the Supreme Court struck down a Texas statute criminalizing homosexual sodomy because the "statute further[ed] no *legitimate state interest* which can justify its intrusion into the personal and private life of the individual." 539 U.S. at 578, 123 S.Ct. 2472 (emphasis added). This language implies that the Court applied a rational-basis standard of review instead of a strict-scrutiny standard, inferring that the right to engage in homosexual sodomy is not a fundamental right.

465 F.3d at 857 (emphasis in original). The Eighth Circuit then noted the plaintiff's argument that he has a fundamental right to engage in the sexual conduct in which he engaged. *Id.* at 858.

However, the Eighth Circuit declined to hold that there was such a fundamental right: "In our view, however, we need not determine whether Sylvester's sexual conduct is protected as a fundamental privacy right because we would reach the same result applying either the strict-scrutiny standard of review or the rational-basis standard of review." *Id.* Thus, the Eighth Circuit, in which Arkansas sits, believes that the Supreme Court applied rational basis review in *Lawrence* and has refused to explicitly recognize a fundamental privacy right in certain forms of sexual conduct. The Eighth Circuit has not held that individuals have a fundamental privacy right in cohabiting, and the *Fogley* decision indicates that the Eighth Circuit would analyze any claim of a right to cohabit with an unrelated person under the rational basis test.

The Plaintiffs have failed to cite a single case holding that there is a fundamental privacy right to reside with an unmarried partner. The cases the Plaintiffs do cite, which deal with sexual conduct and not any alleged right to reside with an unmarried partner, do not support the proposition that there is any such fundamental right. Indeed, the only reasonable conclusion that can be drawn from these cases about sexual conduct is that even if residing with an unmarried partner were a protected right to the same degree as the privacy right to engage in certain intimate conduct, and it is not, any law that burdens cohabitation would be subject to the rational basis standard of review and not the strict scrutiny standard of review. Moreover, the choice to live with an unmarried partner is *not* a protected privacy right, *supra*, and even if the Plaintiffs did have a fundamental liberty interest in residing with an unmarried partner, which they do not, Act 1 would be subject to rational basis review because Act 1 does not directly and substantially infringe on anyone's choice to reside with an unmarried partner.

Accordingly, as a matter of law, the Plaintiffs have fallen far short of establishing the existence of a fundamental right to reside with an unmarried partner. Thus, regardless of

whether Act 1 burdens or infringes on the Plaintiffs' efforts to live with a partner outside of marriage, the rational basis test applies. And of course, Act 1 does not require anyone to forego their cohabiting relationship. Even if the Plaintiffs have a constitutionally protected right to cohabit, the rational basis test applies because Act 1 does not directly and substantially infringe upon the Plaintiffs' exercise of their choice to cohabit.

### C. The rational basis test applies to the due process claims brought by biological parents seeking to enforce decisions about the adoption of their children (Counts 5 and 6), and the equal protection claims of their children (Counts 7 and 8).

The parent-Plaintiffs argue that Act 1 infringes on their fundamental rights of parental decision making and Act 1 is therefore subject to strict scrutiny.[21] The biological children of the parent-Plaintiffs argue in Counts 7 and 8 that Act 1 violates their equal protection rights.[22]

Despite their plea for strict scrutiny, the parent-Plaintiffs are unable to cite a single case even analyzing any supposed right the parents may have to receive consideration of their testamentary wishes regarding the *adoption* of their children.[23] Although parental autonomy and parental decision making are fundamental rights in certain respects, the scope of that fundamental right simply does not include the ability to control who may adopt one's children posthumously through a testamentary instrument. Thus, Counts 5 and 6 warrant only rational basis review of Act 1.

In support of their plea for strict scrutiny on the parent-Plaintiffs' claims in Counts 5 and 6, the Plaintiffs argue that they "have a protected right to have their caregiver designation at least considered by the State in determining the best interests of their children[,]" and Act 1 should be

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[21] *See* Plaintiffs' Brief at 60-64.

[22] *See* Plaintiffs' Brief at 64-67.

[23] Cases discussing testamentary *guardianship* designations by biological parents are inapposite because guardianship is explicitly *not* affected by Act 1. *See* Ark. Code Ann. § 9-8-305 ("This subchapter will not affect the guardianship of minors.").

strictly scrutinized because the application of Act 1 fails to give "special weight" or a "presumption" in favor of their decisions about the care of their children.[24] The Plaintiffs rely primarily on *Troxel v. Granville*, 530 U.S. 57 (2000) and *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002) in support of this argument. Neither of these cases involves testamentary designation of child caregivers by biological parents, much less testamentary *adoptive* designations like the Plaintiffs seek to make. In *Troxel*, a state law permitted "any person" to petition for visitation rights "at any time" and authorized state courts to grant such rights whenever "visitation may serve the best interest of a child." 530 U.S. at 60. Pursuant to the law, the grandparents of two children petitioned for visitation rights and the mother of the children opposed the grandparents' petition. *Id.* at 61. The Supreme Court recognized the fundamental right of parents to make decisions concerning the care, custody and control of their children, and held that the state law, as applied to the biological mother and her family, unconstitutionally infringed on that fundamental parental right. *Id.* at 66-67. The *Troxel* opinion is not applicable to the claims levied by the parent-Plaintiffs in Counts 5 and 6 of this case because there is no discussion whatsoever regarding any rights parents may or may not have to make testamentary designations regarding the posthumous care, custody and control of their children. Moreover, *Troxel* represents an as-applied challenge to a statute, and the Court explicitly declined "to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." *Id.* at 73. Act 1 has not been applied to the parent-Plaintiffs or their children in this case, so although the Plaintiffs are reluctant to specify the form of their constitutional challenge, they clearly bring a facial challenge to Act 1.

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[24] Plaintiffs' Brief at 62.

Similarly, in *Linder v. Linder*, another grandparents visitation-rights case, the Arkansas Supreme Court held that the Arkansas Grandparental Visitation Act was constitutional on its face, but violated a mother's fundamental liberty interest as applied to her. The Court applied strict scrutiny to the "one fundamental right at issue – [the mother's] right to raise her child." 348 Ark. at 348, 72 S.W.3d at 855. The parent-Plaintiffs in this case are not asserting any right to raise their child, and Act 1 certainly does not limit their ability to raise their children in any way whatsoever. Rather, the parent-Plaintiffs claim that they have a speculative and conditional right to have their testamentary wishes considered with regard to who will adopt their children in the event of their own death or incapacity. The Plaintiffs cite no authority indicating that this represents a fundamental parental right that warrants strict scrutiny. This is probably because, as noted in a case cited by the Plaintiffs themselves, in the determination of who should be appointed as guardian of a child, the welfare of the child is the final test in all cases, not the testamentary wish of the biological parent(s). *See Comerford v. Cherry*, 100 So. 2d 385, 391 (Fla. 1958)("This Court has, of course, consistently held that the welfare of the child is the final test in determining who should ultimately be appointed guardian or given custody. . . We conclude that this sound rule applies equally to testamentary guardians."). The same is true in adoption cases: The preference of a biological parent, testamentary or otherwise, does not control; the paramount consideration is the best interest of the child. *See In the matter of the Adoption of A.M.C.*, 368 Ark. 369, 246 S.W.3d 426 (2007)(upholding grant of adoption to stepfather over objection of biological father and noting that even if consent of the biological parent is not required, the court must find from clear and convincing evidence that the adoption is in the best interest of the child); *Adoption of Irene*, 767 N.E.2d 91, 96 (Mass. App. Ct. 2002)("[W]here alternative plans for adoption are presented . . . [a] plan proposed by a parent is

not entitled to any artificial weight as opposed to alternative plans."); *In re Petition of J.D.K.*, 37 P.3d 541, 544 (Colo. App. 2001)("In an adoption proceeding, the primary consideration is the welfare of the child, secondly the rights of the parents."); *S.F. v. M.D.*, 751 A.2d 9, 14 (Md. Ct. Spec. App. 2000)("We are fully aware that the Supreme Court of the United States and the Maryland Court of Appeals have recognized that a natural parent has a fundamental right regarding the care and custody of his or her child. (Citations omitted). Nevertheless, the best interest of the child may take precedence over a parent's liberty interests in a custody, visitation, or adoption dispute."); *Stroud v. McSwain*, 384 S.E.2d 206, 207 (Ga. App. 1989)("Neither the achievement of a legally recognized benefit nor the achievement of testamentary intent is the standard applied to the grant of an adoption. Rather, the trial court must, as it did here, determine whether the petitioners are capable of assuming responsibility for the child, whether the child is suitable for adoption, and whether adoption is in the best interest of the child."). The cases consistently indicate that the primary interest that must be considered is the best interest of the child being adopted, *supra*, and Act 1 explicitly finds children's best interests are not served by adoption by unmarried cohabitants.[25]

Moreover, any right to make a testamentary *guardianship* appointment is a statutory right, not a fundamental constitutional right. *See In re Guardianship and Conservatorship of McDowell*, 762 N.W.2d 615, 619 (Neb. App. 2009)("We hold that, irrespective of the circumstances of the parents' deaths, under Nebraska law, the determination of who shall be guardian and conservator is ultimately dependent upon the best interests of the children, although a testamentary nomination of a guardian or conservator may have statutory priority."); *In re*

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[25] Act 1 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.

*Slaughter*, 738 A.2d 1013, 1017 (Pa. Super. Ct. 1999)("[T]he appointment of a testamentary guardian by a parent is a right granted by the legislature which the parent need not exercise . . . we find that the statute necessarily raises a *prima facie* presumption in favor of the testamentary appointment. However, the presumption, as with similar presumptions in favor of the parent, is not irrebuttable."); *In re Estate of Suggs*, 501 N.E.2d 307, 309 (Ill. App. Ct. 1986) ("Testamentary guardianship, however, does not exist at common law; it is purely statutory."); *In re Kosmicki*, 468 P.2d 818, 820 (Wyo. 1970)("As a general proposition it is well established that the right of a testator to appoint a guardian by deed or by will is wholly statutory.").

A state statute cannot give rise to a substantive due process right. *See Bagley v. Rogerson*, 5 F.3d 325, 328 (8th Cir. 1993)("We have held several times that a violation of state law, without more, does not state a claim under the federal Constitution or 42 U.S.C. § 1983[;]" at most, state statute granting individual benefit contingent on existence of particular facts creates procedural—not substantive—right to determination if those facts exist)(citing *Meis v. Gunter*, 906 F.2d 364, 369 (8th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991)). If a parent's testamentary designation is not even the paramount factor the court should consider, and any right of a parent to make a testamentary guardianship designation is purely statutory, then the parent-Plaintiffs clearly do not have any fundamental constitutionally-protected right to make testamentary *adoptive* designations or even to have their testamentary adoptive designations considered by a court. Even if the Plaintiffs have some liberty interest in making testamentary designations of adoptive parents for their children, the relevant authority indicates that such an interest would not rise to the level of a fundamental constitutionally-protected right. To the extent that the parent-Plaintiffs have stated any claim in Counts 5 and 6, those Counts must be analyzed under the rational basis standard of review.

The Plaintiffs argue for heightened scrutiny yet again on the equal protection claims levied by the children of the parent-Plaintiffs in Counts 7 and 8, but the cases cited by the Plaintiffs demonstrate plainly that the claims of the biological children are also subject to rational basis review because there is no fundamental right at stake. None of the cases the Plaintiffs cite in support of strict scrutiny under Counts 7 and 8 have held that a law regulating state adoptions can possibly give rise to any equal protection claim by children whose biological parents may have made testamentary designations of who they wish to adopt their children. None of the cases cited by the Plaintiffs indicate that children have a constitutionally protected right of any degree to have their parents' wishes honored or even considered with regard to the children's adoption or guardianship. Rather, the Plaintiffs rely on a series of U.S. Supreme Court cases considering laws that directly and explicitly treated children born out of wedlock differently from children born to married parents. *See Clark v. Jeter*, 486 U.S. 456 (1988)(Plaintiffs' Brief at 66)(invalidating state law requiring illegitimate children to bring paternity suit within six years of birth while legitimate children were subject to no time limitation); *Mills v. Habluetzel*, 456 U.S. 91 (1982)(Plaintiffs' Brief at 66)(invalidating state law requiring illegitimate children to bring paternity suit within one year of birth); *U.S. v. Clark*, 445 U.S. 23 (1980)(Plaintiffs' Brief at 66)(construing section of Civil Service Retirement Act under which a deceased federal employee's illegitimate child could recover survivor benefits only if they "lived with" the employee in a regular parent-child relationship, whereas legitimate children automatically qualified for survivors' benefits); *Lalli v. Lalli*, 439 U.S. 259 (1978)(Plaintiffs' Brief at 66)(upholding proof requirement imposed by state law on illegitimate children, but not imposed on legitimate children, in order for illegitimate children to inherit from their natural fathers); *Gomez v. Perez*, 409 U.S. 535, 538 (1973)(Plaintiffs' Brief at 66)(considering state law that

granted legitimate children a judicially enforceable right to support from their natural fathers but denied that right to illegitimate children); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972)(Plaintiffs' Brief at 66, 67)(invalidating state law that assigned lower priority status for the distribution of benefits to illegitimate children than legitimate children, for the sake of punishing the illicit relations of the parents of illegitimate children). The Plaintiffs also rely upon a single case in which the Supreme Court invalidated a state law that explicitly treated children who were not "legally admitted" into the United States differently from other children. *See Plyler v. Doe*, 457 U.S. 202 (1982)(Plaintiffs' Brief at 67).

These cases cited by the Plaintiffs regarding laws that explicitly treat illegitimate and alien children differently from other children are inapposite in the context of the instant case. The Plaintiffs' cases involve laws that directly and explicitly penalize children due to their illegitimate or alien status. Act 1 does not treat any classes of children differently from other children, in any way whatsoever. Act 1 does not even identify any different classes of children, and Act 1 explicitly treats all children exactly the same. Again, the single sentence in Act 1 upon which all claims in this case are based, states: "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. Absolutely nothing in this sentence differentiates any children on the basis of anything. Counts 7 and 8 fail to state an equal protection claim as a matter of law and should be dismissed accordingly. If Act 1 did create a statutory classification of children, the classification would be subject to rational basis review because there is no fundamental right at stake to warrant strict scrutiny, and there is no discriminatory classification based upon a characteristic that warrants intermediate scrutiny.

To the extent that the Plaintiffs have stated any claim(s) in Counts 5, 6, 7 or 8, the claim(s) must be analyzed under the rational basis standard of review.

## III. THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE STATE DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW AND SUMMARY JUDGMENT ON EACH OF THE PLAINTIFFS' COUNTS.

The Plaintiffs devote over half of their summary judgment brief to a detailed recitation of the Arkansas child welfare system and the opinions of DHS officials and purported experts regarding the wisdom of Initiated Act 1.[26] However, under rational basis review, the opinions of individuals, even state officials who work in the child welfare system and outside experts, are absolutely irrelevant to the question that the Court must consider. 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. 206, 215, 655 S.W.2d 459, 464 (1983). 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).

Moreover, the Plaintiffs cannot prevail under the rational basis test simply because they believe that Act 1 is a bad policy, even if they demonstrate that certain DHS officials and outside experts also believe that Act 1 is a bad policy. A court conducting a rational basis review must

[26] *See* Plaintiffs' Brief at 1-40.

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 to be more or less unreasonable or unwise does not justify a court in annulling it, as courts do not sit to supervise legislation."); *Cone v. Garner*, 175 Ark. 860, 870, 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."). "[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. at 487-88.

"Rational basis review does *not* permit consideration of the strength of the individual's interest or the extent of the intrusion on that interest caused by the law; the focus is entirely on the rationality of the state's reason for enacting the law." *Cook v. Gates*, 528 F.3d at 55 (emphasis in original)(citing *Heller v. Doe*, 509 U.S. 312, 324 (1993)(a law "fails rational-basis review" only when it "rests on grounds wholly irrelevant to the achievement of the State's objectives" or the State's objectives are themselves invalid). "[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Thus, if Act 1 is supported by any *conceivable* rational basis, the Court must uphold the constitutionality of Act 1, and the Plaintiffs' only remedy is to seek to change the law through the democratic process. The Plaintiffs argue that the Court should defer to the opinion of various DHS officials, but the most basic principle of our form of government is democracy, not bureaucracy. The citizens of Arkansas exercised their most fundamental democratic rights by passing Act 1 themselves, and the voice of the citizen majority must prevail over bureaucratic opinion.

### A. Act 1 is rationally related to promoting the welfare of children in State custody (Counts 1 and 2).

The child-Plaintiffs argue that they should prevail on their substantive due process claims in Counts 1 and 2 because according to them, Act 1 serves no child-welfare purpose.[27] However, the citizens of Arkansas determined precisely the opposite in the explicit language of the law they passed by voter initiative: "The people of Arkansas find and declare that it is in the best interest of children in need of adoption or foster care to be reared in homes in which adoptive or foster parents are not cohabiting outside of marriage." Ark. Code Ann. § 9-8-301. The Court may not question the wisdom of this policy determination by the people, *supra*,[28] and Act 1 must be upheld if it survives the rational basis test.

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[27] Plaintiffs' Brief at 47-52.

[28] *See also 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); *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

In their own summary judgment brief, the State Defendants demonstrate in detail how Act 1 passes the rational basis test because it is reasonably conceivable that Act 1 promotes the interests of children in the Arkansas child welfare system.[29] There is absolutely no dispute about the fact that households headed by unmarried cohabiting adults are generally less stable and generally present greater risks of poor outcomes for children than households headed by married adults.[30] Thus, as a matter of law, there is a rational basis for Act 1, i.e., it is reasonably conceivable that Act 1 promotes the interests of children in the Arkansas child welfare system because Act 1 prohibits child placements into cohabiting homes but allows placements into married homes.

The Plaintiffs try to argue that the prohibition is not rational because as an alternative DHS could individually assess all adoptive and foster applicants, including cohabiting applicants, to determine those who would make suitable foster or adoptive parents and screen those who would not. However, as the State Defendants have already demonstrated, it was perfectly reasonable for Arkansas voters to conclude that individual assessment of foster and adoptive applicants does not eliminate the risk of abuse and neglect of children in cohabiting foster and adoptive homes and that therefore the policy enacted in Act 1 was the reasonable and preferable choice.[31] The Plaintiffs themselves cite an Arkansas case that supports the reasonable nature of this conclusion drawn by Arkansas voters. The Plaintiffs cite *Norfleet v. Ark. Dep't of*

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(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."); *Stone v. State*, 254 Ark. 1011, 1017, 498 S.W.2d 637 (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).

[29] *See* State Defendants' Brief at 45-68.

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

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

*Human Services*, 989 F.2d 289 (8th Cir. 1993), for the proposition that "it was clearly established in 1991 that the state had an obligation to provide adequate medical care, protection and supervision" to children in foster care.[32]

In *Norfleet*, a DHS caseworker placed a child into the home of a certified foster parent operating a foster home for DHS on the morning of August 19, 1991. 989 F.2d at 290. The child suffered from asthma and had a history of medical problems. *Id.* However, the foster parent neither supervised nor took possession of the child's medication. *Id.* At about 12:30 a.m. on the morning of August 20, the child told the foster parent that he was having trouble breathing and the foster parent told the child to return to bed. Hours later, the foster parent called emergency medical personnel. The foster child was taken to a hospital at 2:37 a.m. and pronounced dead at 3:35 a.m. *Id.* Thus, within 24 hours of placement, an Arkansas foster child died due to neglect by a foster parent who was individually screened and evaluated prior to being licensed to serve as a foster parent. The *Norfleet* case, which the Plaintiffs cite themselves,[33] proves that the voters of Arkansas could reasonably have concluded that individual screening and evaluation of foster and adoptive applicants could not eliminate the risk of abuse and neglect of children in foster and adoptive homes. It follows logically that the voters could reasonably have believed that Act 1 would better protect vulnerable children in the child welfare system by preventing the placement of those children into higher-risk homes.

The Plaintiffs cite another case that recognizes the potential safety risk to children placed into foster care, despite prior individual assessment of foster parents. In *Taylor v. Ledbetter*, 818

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[32] Plaintiffs' Brief at 43.

[33] The Plaintiffs also cite another case documenting a child-death in a state-licensed foster home, where the foster parent was presumably screened individually and approved by the State prior to having a child placed into the home. In *White v. Chambliss*, 112 F.3d 731, 734-735 (4th Cir. 1997), a South Carolina foster child died from abusive blows to the head suffered while the child was in foster care.

F.2d 791 (11th Cir. 1987), child welfare officials in Georgia placed a child into an approved foster home after removing the child from the custody of her natural parents. 818 F.2d at 792. While in the foster home the child suffered severe and permanent personal injuries as a result of being abused by the foster mother, rendering the child comatose. *Id.* Like *Norfleet*, the facts of the *Taylor* case support the reasonable conclusion that individual screening and evaluation of foster and adoptive homes does not eliminate the risk of abuse and neglect of children.[34] Thus, Act 1 is rationally related to promoting the safety of children in the Arkansas child welfare system because Act 1 prohibits the placement of children into homes occupied by unmarried cohabitants, which are categorically more dangerous for children than married homes.

Finally, none of the cases cited by the Plaintiffs overturn *Reno v. Flores*, in which the United States Supreme Court made clear that the best-interest-of-the-child standard does not govern how the government must care for children in its custody. *Id.*, 507 U.S. 292, 304 (1993). Any constitutionally protected due process rights of foster children must be harmonized with the fact that "the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."

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[34] *Taylor* also supports another conceivable rational basis for the Act 1 policy: minimizing potential liability of child welfare workers. In *Taylor*, the Eleventh Circuit recognized that "the child's physical safety was a primary objective in placing the child in the foster home." 818 F.2d at 795. Because "[t]he state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to insure the continuing safety of that environment[,]" the state defendants could be held liable for their failure to meet that obligation, which "constituted a deprivation of liberty under the fourteenth amendment." *Id.* Thus, the state actors were not immune from suit and could be held liable for placing a child into a dangerous foster home where the child suffered severe abuse. Of course, avoiding such child abuse is obviously a legitimate state interest of any policy such as Act 1 designed to prevent such abuse from occurring in foster homes. Additionally, the State has a legitimate interest in avoiding liability for state actions that can be characterized as a deprivation of substantive due process rights. Thus, the voters of Arkansas could reasonably have concluded that Act 1 will help minimize the liability of DHS officials for placing children into dangerous foster homes, by prohibiting such placements into a family structure that is categorically more dangerous for children than other types of family structures and thus minimizing the risk that DHS officials will face lawsuits due to child abuse in cohabiting foster homes.

*County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998). As the State Defendants have shown,[35] the State has no constitutionally mandated duty to take absolutely every conceivable step no matter how impractical or costly, nor to provide a gold-plated or foolproof system of child welfare. Act 1 is constitutional even if it does not lead to perfect results so long as there is a rational basis for Act 1. Thus, for example, Act 1 passes the rational basis test because it promotes child safety even if for a particular child the best placement, safety aside, might be in a cohabiting home. Act 1 also passes the rational basis test because Act 1 is rationally related to the legitimate government interest of promoting marriage.[36] Act 1 is rationally related to promoting the interests of children in the Arkansas child welfare system. Accordingly, Act 1 easily satisfies the rational basis test, the Plaintiffs' Motion for Summary Judgment should be denied, and summary judgment should be granted in favor of the State Defendants.

### B. Act 1 does not violate the due process or equal protection rights of unmarried cohabitants seeking to foster or adopt children in Arkansas (Counts 9 & 10).

The adult Plaintiffs who seek to foster and/or adopt children in Arkansas while living with intimate partners argue that Act 1 is unconstitutional because they contend that it prohibits them from serving as foster or adoptive parents solely because of their intimate relationships and without serving any child welfare purpose.[37] They argue that the State should adopt an alternative system where DHS would be charged with screening cohabiting applicants in the same way as DHS screens other applicants, and therefore Act 1 cannot possibly serve any child

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[35] *See* State Defendants' Brief at 8-13.
[36] *See* State Defendants' Brief at 68-70.
[37] *See* Plaintiffs' Brief at 56-59.

welfare purpose.[38] However, as explained above and in the State Defendants' Brief, and as explicitly stated in the language of Act 1, *supra*, Act 1 *does* promote child welfare.

The Plaintiffs appear to concede that if Act 1 serves a child welfare purpose, then Counts 9 and 10 fail to state a claim. Moreover, as argued at length above[39] and in the State Defendants' Brief,[40] Act 1 does not require the Plaintiffs or anyone else to refrain from protected sexual contact or to abandon their intimate relationships, and the Plaintiffs have no fundamental right to cohabit with unrelated persons in any event. Accordingly, even if Act 1 requires cohabiting adults to choose between cohabiting with unrelated persons or becoming eligible to foster or adopt, there is no violation of their constitutional rights to due process or equal protection. The Plaintiffs' Motion for Summary Judgment should be denied, and summary judgment should be granted in favor of the State Defendants.

### C. Act 1 does not violate any constitutionally-recognized right of the parent-Plaintiffs to make testamentary adoptive designations for their children (Counts 5 & 6).

The parent-Plaintiffs argue that Act 1 infringes on their fundamental rights of parental decision making because their choice to make testamentary designations of unmarried cohabitants as adoptive parents for their children cannot be enforced in light of Act 1.[41] However, as explained above[42] and in the State Defendants' Brief,[43] the parent-Plaintiffs' constitutional right to parental autonomy does not grant them a constitutionally-protected liberty interest in controlling who might someday adopt their children, or even in having their designation considered by a court. Adoption was unknown to the common law and is entirely a

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[38] *See id.* at 59-60.
[39] *See supra*, § II.B.
[40] *See* State Defendants' Brief at 31-35.
[41] *See* Plaintiffs' Brief at 60-64.
[42] *See supra*, § II.C.
[43] *See* State Defendants' Brief at 23-29.

creature of statute, and state statutes cannot form the basis of substantive due process rights. *See Bagley v. Rogerson*, 5 F.3d at 328. Notably, Act 1 does not prohibit courts from considering a parent's testamentary wish that a particular individual be appointed as a child's *guardian*, even if that person would be prohibited from fostering or adopting the child by Act 1. Finally, the parent-Plaintiffs' claims in Counts 5 and 6 are speculative, contingent upon the occurrence of many events that may or may not ever occur, and therefore Counts 5 and 6 are not ripe in any event and should be dismissed.

Even assuming for purposes of argument that the parent-Plaintiffs did have a liberty interest in courts giving weight to their testamentary wishes that their children be adopted by individuals who are cohabitating in intimate relationships, that interest would not be fundamental and thus would not require Act 1 to be analyzed under the strict scrutiny standard. A liberty interest is not fundamental, and thus does not trigger strict scrutiny analysis, unless it is so deeply rooted in the Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if the liberty were sacrificed. *Washington v. Glucksberg*, 521 U.S. at 720-271; *see also Linder v. Linder*, 348 Ark. at 342, 72 S.W.3d at 851. The Supreme Court has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. at 720 (citation and internal quotation marks omitted). The Supreme Court has made clear that "[b]y extending constitutional protection to an asserted right or liberty interest, [the Court], to a great extent, place[s] the matter outside the arena of public debate and legislative action." *Id.* To ensure that the liberty protected by the Due Process Clause is not subtly transformed into the policy preferences of the judicial branch,

the judiciary must exercise extreme care whenever asked to identify a previously unrecognized fundamental right. *Id.*

The Arkansas Supreme Court has recently made clear that Arkansas' judiciary will take great care not to substitute its policy preferences for those of the people and their elected representatives when hearing cases concerning the State's adoption statutes. *King v. Ochoa*, 373 Ark. 600, 603, 285 S.W.3d 602, 605 (2008). In reversing a ruling that a child's unmarried biological father was ineligible under the relevant statute to adopt his child, the court explicitly held that the trial court's concern that if the biological father adopted the child then the biological mother would not be obligated to pay child support or, in the event of the biological father's death, take custody of the child was a "policy concern . . . that should be addressed by the legislature." *Id.* ("We hold that this policy concern of the circuit court is a question that should be addressed by the legislature.").

The Arkansas Supreme Court has recently reaffirmed the fact that not even a statutory preference for a person being considered as a potential guardian of a child can control absolutely whether the child will be placed with a particular person or not: "Any inclination to appoint a parent or relative must be subservient to the principle that the child's interest is of paramount consideration." *Fletcher v. Scorza*, 2010 Ark. 64 at *12 (February 12, 2010)(citing *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000)). If a statute cannot absolutely control who may be appointed as guardian of a child, then certainly parents have no absolute right to control who may serve as guardian for or adopt their children. The Plaintiffs' Motion for Summary Judgment should be denied, and summary judgment should be granted in favor of the State Defendants.

### D. Act 1 does not violate the child-Plaintiffs' equal protection rights (Counts 7 & 8).

The biological children of the parent-Plaintiffs, also plaintiffs themselves, argue that Act 1 violates their equal protection rights and concede that the rational basis test is the appropriate standard for evaluating their claims.[44] The cases cited by the child Plaintiffs concerning laws burdening children of illegal aliens and unwed parents have no relevance to this lawsuit and thus do not support the child Plaintiffs' position that Act 1 should be subjected to intermediate or strict scrutiny.[45] The laws at issue in those cases explicitly classified children and denied certain classifications of children benefits because of decisions made by their parents, specifically the decision to have them out of wedlock and the decision to illegally bring them into the country. Act 1, however, plainly applies to the child-Plaintiffs in the same manner as Act 1 applies to all Arkansas children, regardless of any decision that their parents have ever made or could ever make. Moreover, because neither the parent-Plaintiffs in Counts 5 and 6 nor the child-Plaintiffs in Counts 7 and 8 have any fundamental constitutionally-protected right with regard to the parents' testamentary designations regarding adoption, these claims are all subject to rational basis review and Act 1 is therefore constitutional as a matter of law, *supra*. The Plaintiffs' Motion for Summary Judgment should be denied, and summary judgment should be granted in favor of the State Defendants.

### E. Summary judgment should be granted in favor of the State Defendants on Counts 3, 4, 12 and 13.

The Plaintiffs make no mention or argument in their Motion for Summary Judgment regarding Counts 3 and 4, and Counts 12 and 13. Summary judgment should be granted to the

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[44] Plaintiffs' Brief at 64-67.
[45] *See supra*, § II.C.

State Defendants on Counts 3, 4, 12 and 13 for the reasons set forth in the State Defendants' Motion for Summary Judgment.[46]

## 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*). Act 1 embodies precisely this policy with respect to foster and adoptive children in the State of Arkansas.

The fact that all parties including the Plaintiffs have filed summary judgment motions in this case indicates the parties' agreement that there is no need for a trial, and the case should be decided on summary judgment. The appropriate standard for reviewing the constitutionality of Act 1 under both the state and federal constitutions is the rational basis test. Regarding Counts 1 and 2, neither the "professional judgment" standard nor the "deliberate indifference" standard apply in this case because the Plaintiffs do not complain of any specific acts or omissions by the State Defendants. Rather, as the Plaintiffs well know, they bring a constitutional challenge to a law passed by the citizens of Arkansas. Further, the Plaintiffs explicitly proclaim that the child-Plaintiffs have no fundamental right to be adopted or fostered.

The Plaintiffs bringing Counts 9 and 10 also have no fundamental right to foster and/or adopt children in Arkansas while living with intimate partners. The Plaintiffs do not have a fundamental liberty interest in cohabiting with an unmarried partner to begin with. Even if the Plaintiffs had a constitutionally protected right to cohabit, the rational basis test would apply

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[46] *See* State Defendants' Brief at 18-23, 35-41.

because Act 1 does not directly and substantially infringe upon the cohabiting-Plaintiffs' exercise of their choice to cohabit. Nothing about Act 1 directly *or* substantially interferes with the Plaintiffs' exercise of their choice to cohabit outside of marriage. Act 1 is not designed to deter the Plaintiffs from exercising that choice, and Act 1 does not prevent the Plaintiffs from exercising that choice. Accordingly, even if Act 1 requires cohabiting adults to choose between cohabiting with unrelated persons or becoming eligible to foster or adopt, there is no violation of their constitutional rights to due process or equal protection.

The parent-Plaintiffs bringing Counts 5 and 6 have no fundamental right to control who will adopt their children through testamentary designation, and their children have no fundamental right to have the wishes of the parent-Plaintiffs honored or considered. The paramount consideration in any adoption is the best interests of the child, not the preference of the child's parent. Moreover, any right to make a testamentary adoptive appointment would be wholly statutory, and a state statute cannot give rise to a substantive due process right. To the extent that the parent-Plaintiffs have stated any claim in Counts 5 and 6, those Counts must be analyzed under the rational basis standard of review. The equal protection claims levied by the child-Plaintiffs in Counts 7 and 8 are also subject to rational basis review (to the extent they have even stated a claim) because Act 1 does not directly or explicitly treat any classes of children differently from any other classes of children.

Under rational basis review, the opinions of individuals, including state officials who work in the child welfare system and outside experts, are absolutely irrelevant to the question that the Court must consider. The Plaintiffs cannot prevail under the rational basis test simply because they believe Act 1 is a bad policy. The only question is whether the Court can conceive of a possible rational basis for the law so that the law is not utterly arbitrary and capricious. It is

reasonably conceivable that Act 1 promotes the interests of children in the Arkansas child welfare system. It is also reasonably conceivable that Act 1 promotes marriage, which is a legitimate government interest, and that Act 1 minimizes the potential liability of State officials for making placements that result in child abuse, also a legitimate government interest.

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 Plaintiffs' Motion for Summary Judgment be denied, that the State Defendants' Motion for Summary Judgment be granted, and for all other just and appropriate relief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Colin R. Jorgensen, do hereby certify that I have served the foregoing document by electronic mail attachment pursuant to the service agreement of the parties, to the following, on this 1st day of March, 2010:

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