IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

Sheila Cole, *et al.*,
Plaintiffs,

vs.

The Arkansas Department of Human Services, *et al.*,
Defendants,

Family Council Action Committee, *et al.*,
Intervenors.

Case No. CV 2008-14284

INTERVENORS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs misunderstand the deference accorded the exercise of legislative authority and focus the court's attention on the undisputed, but immaterial fact, that individually assessing cohabitors could yield a suitable foster and adoptive placement. Defendants have never disputed that possibility, but that is not material to whether a rational basis exists for forgoing foster and adoptive placements in cohabiting environments. Intervenors do not have the burden to show that all placements of children in cohabiting environments will harm children. Rather in reviewing the constitutionality of a statute, Plaintiffs have the burden to show that it is undisputed that there are no grounds whatsoever to conclude that placing children in cohabiting environments is a greater risk to their welfare. But as demonstrated in Intervenors' Motion for Summary Judgment and Motion to Dismiss and in this Response, it is undisputed that, on average, children are at a higher risk for negative child welfare outcomes and exposure to abuse if placed in a cohabiting environment. Plaintiffs are correct that no trial is necessary to dispose of the case, but they are not entitled to summary judgment on any of their claims. Rather the Intervenors and the State Defendants' summary judgment motions and motions to dismiss Plaintiffs' claims should be granted.[1]

I. ACT 1 DOES NOT DEPRIVE DUE PROCESS TO CHILDREN IN STATE CARE BECAUSE IT COMPORTS WITH THE DUE PROCESS STANDARDS APPLICABLE TO LEGISLATIVE ENACTMENTS

Even assuming, *arguendo*, that Plaintiffs have standing, they apply the wrong standard to their alleged substantive due process claim that children in state care are entitled to be fostered

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[1] To reduce duplication and repetition, Intervenors will refer to their motion for summary judgment and motion to dismiss papers where appropriate, and hereby fully incorporate them by reference in response to the Plaintiffs' motion for summary judgment here. As set out in Intervenors' motion for summary judgment and motion to dismiss papers, Plaintiffs lack standing on all claims alleged in the Third Amended Complaint, and Plaintiffs' claims should otherwise be dismissed on the merits. Intervenors also incorporate all of the State-Defendants' arguments and supporting papers in response to Plaintiffs' motion for summary judgment to the extent they are consistent with Intervenors' positions.

and adopted by cohabitors. The standard for a substantive due process violation "differ[s] depending on whether it is legislation or a specific act of a governmental officer that is at issue." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *see also Putnam v. Keller*, 332 F.3d 541, 547-48 (8th Cir. 2003) (differentiating the standards for substantive due process violations premised on executive action versus a legislative act).

Where the challenged government action is the conduct of a particular government employee or official, the question is whether the conduct "shocks the conscience." *Lewis*, 523 U.S. at 846-47. Where, however, the challenged government action is legislation, as it is here, the question is whether a fundamental right was infringed and, if so, whether the legislation survives strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). If no fundamental right was infringed, the legislation is merely required to bear a rational relation to a legitimate government interest. *Id.* at 728; *see also Reno v. Flores*, 507 U.S. 292, 305 (1993) ("The impairment of a lesser interest . . . demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose.").

Plaintiffs insist that the standard reserved for substantive due process challenges to "specific acts of a government official" should apply here. But the cases they rely upon all involve substantive due process challenges to abusive conduct by government officials, not challenges to legislation. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 193-94 (1989), a mother sued state social workers and other government officials for leaving her child with his father even though they knew he was abusive. In *Youngberg v. Romeo*, 457 U.S. 307, 310-11 (1982), the mother of a mentally disabled child sued state officials for injuries caused to her son while in the custody of the state mental institution. In *Nicini v. Morra*, 212 F.3d 798, 802-03 (3d Cir. 2000), a former ward of the state sued government

officials for knowingly leaving him in the custody of an abusive family member. In *Taylor v. Ledbetter*, 818 F.2d 791, 792-93 (11th Cir. 1987), a foster care child sued state and county officials for injuries received due to knowingly placing her with abusive foster parents. In *Lewis v. New Mexico Department of Human Services*, 959 F.2d 883, 885-86 (10th Cir. 1992), a group of minors sued state officials for injuries suffered while in state custody and placed in a private foster care facility. And in *K.H. v. Morgan*, 914 F.2d 846, 848 (7th Cir. 1990), a child sued state officials for placing him with foster parents that they knew were abusive. Not one of these cases is analogous to the due process challenge brought by the Plaintiffs in this case.

The challenged government action here is legislative—the adoption of Act 1 by the people of Arkansas—not abusive conduct by a government official. The due process standard for misconduct by a government official "is not applicable to cases in which plaintiffs advance a substantive due process challenge to a *legislative* enactment." *Dias v. City & County of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009). When, as here, legislative action is at issue, *Glucksberg* continues to govern, and only the traditional two-part substantive due process framework is applicable. "[W]e ask whether a fundamental right is implicated. If it is, we apply strict scrutiny to test the fit between the enactment's means and ends. Otherwise, we use a rational basis test." *Id.* (citing *Glucksberg*, 521 U.S. at 728). The Intervenors clearly demonstrated in their opening brief that Act 1 satisfies this standard. It implicates no fundamental rights, and is rationally related to the State's interest in protecting child welfare. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss 20-28, 35-63.) Accordingly, under the properly applicable due process standard, Plaintiffs' due process claim fails and the Intervenors are entitled to summary judgment.

Even if this case were treated as a challenge to misconduct by a government official (which it clearly is not), the question would be whether Act 1's limitation of the privilege of adopting and fostering children "shocks the conscience," not whether it fails to meet "accepted professional judgment, practice, or standards." The Eighth Circuit Court of Appeals has repeatedly held that, in the foster care context, "a substantive due process violation will be found to have occurred only if the official conduct or inaction is so egregious or outrageous that it is conscience-shocking." *James v. Friend*, 458 F.3d 726, 730 (8th Cir. 2006). *See also Burton v. Richmond*, 370 F.3d 723, 729 (8th Cir. 2004) ("Before official conduct or inaction rises to the level of a substantive due process violation it must be so egregious or outrageous that it is conscience-shocking."); *Moore v. Briggs*, 381 F.3d 771, 773 (8th Cir. 2004) ("[a] substantive due process violation requires proof that a government official's conduct was conscience-shocking"); *Norfleet v. Arkansas Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (discussing need for evidence "of deliberate or conscious indifference" to make out due process claim against state officials); *S.S. v. McMullen*, 225 F.3d 960, 964 (8th Cir. 2000) ("In order to succeed, a complaint for a violation of substantive due process rights must allege acts that shock the conscience, and merely negligent acts cannot, as a constitutional matter, do that.").

Act 1 is plainly designed to spare children from enduring higher risk living environments and it cannot even begin to approach any level of "conscience shocking." Even conduct by government officials that is "grossly negligent or even reckless," according to the Eighth Circuit, is not sufficient to "shock the conscience." *McMullen*, 225 F.3d at 964; *see also Moore*, 381 F.3d at 773. Deliberate indifference by government officials might well "shock the conscience," but even that will "depend[] on the circumstances and the kind of deliberation and indifference involved." *McMullen*, 225 F.3d at 964. Act 1 is based on the legislative decision that placing

children with unmarried, cohabitating couples is harmful to children. It is a logical legislative choice that protects children, rather than harms them, and thus cannot be said to "shock the conscience."

Plaintiffs' citation to cases such as *Taylor*, 818 F.2d 791, actually support the logic of Act 1 in at least two ways. For example, *Taylor* held that a caseworker could be sued in his individual capacity for acting with deliberate indifference to the safety of a child placed in an abusive foster home. Far from being irrational or deliberately indifferent, Act 1 tracks the *Taylor* court's concern that foster home placements remove the child from the immediate protection of state supervision to a foster home where the risk of harm is high:

> In the foster home setting, recent events lead us to believe that the risk of harm to children is high. We believe the risk of harm is great enough to bring foster children under the umbrella of protection afforded by the fourteenth amendment. Children in foster homes, unlike children in public schools, are isolated; no persons outside the home setting are present to witness and report mistreatment. The children are helpless. Without the investigation, supervision, and constant contact required by statute, a child placed in a foster home is at the mercy of the foster parents.

818 F.2d at 797. Consistent with the court's finding that the risk of harm in placing children in foster care is high, Act 1 seeks to minimize the harm to children by keeping them from being placed in environments, which on average, are more unstable and volatile than other foster care settings. The people of Arkansas could have also acted to minimize the risk to DHS workers who can be sued for unsafe foster care placements, which risk might be exacerbated if caseworkers, acting under the strain of limited resources, were forced to place children with cohabitants. In addition to alleviating stress on caseworkers, Act 1 serves the government interests in minimizing damage awards and the loss of its limited number of caseworkers to time consuming litigation defending foster and adoptive placements in higher risk environments. Act 1 is rationally related to the legitimate government interest of minimizing the risk of harm to

children placed in higher risk environments and the government interest in minimizing the risk of liability for its agents placing children in higher risk cohabiting environments.

A. Plaintiffs' proof fails to negate every conceivable rational basis for Act 1's purpose of placing children in the best home environments

Plaintiffs' reliance on DHS witnesses' individual opinions and professional associational statements do not negate every conceivable basis for Act 1. In fact, Plaintiffs' experts concede the material facts in support of its rational basis. Keeping in mind that legislative acts and ballot initiatives are given every presumption of constitutionality, *Rose v. Arkansas State Plant Board,* 363 Ark. 281, 293, 213 S.W.3d 607, 618 (2005), Plaintiffs' burden is to show that there is no conceivable rational basis whatsoever for the act challenged. *Hamilton v. Hamilton,* 317 Ark. 572, 576, 879 S.W.2d 416, 418 (1994) (the party challenging the legislation has the burden of proving that the act is not rationally related to achieving *any* legitimate objective of state government under any reasonably conceivable state of facts). The standard is not as Plaintiffs have argued in most of their brief, whether the act agrees with the opinions of DHS employees or the viewpoints of some private professional associations. Regardless of any divergent views, the classification is constitutional if "the question is at least debatable." *Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 868 (8th Cir. 2006) (citation omitted). To put it another way, legislation is not subject to veto by dissenting experts and professional organizations because they disagree with its means or ends. *Vance v. Bradley,* 440 U.S. 93, 111 (1979) (Under rational basis review, the trial court does not resolve conflicts in the evidence against the legislature's judgment and conclusion). Plaintiffs are right that there is no disputable issue of fact for trial, but they are wrong that raising a policy disagreement over the placement of children in cohabiting environments entitles them to summary judgment on their claims because Plaintiffs cannot "negative every conceivable basis which might support it." *Lehnhausen v. Lake*

Shore Auto Parts Co., 410 U.S. 356, 364 (1973). Act 1 is supported by an undisputed rational basis whether or not the Plaintiffs' witnesses and sources agree.

B. The professional association statements Plaintiffs rely upon do not contradict Act 1's legitimate and compelling child welfare purposes in protecting children from the risks of cohabiting environments

The professional association statements Plaintiffs seek to rely upon to show a disagreement with Act 1 do not contradict the placement policy of Act 1. According to Plaintiffs, the Child Welfare League of America (CWLA) says that applicants for foster parenting should not be denied solely on the basis of marital status or sexual orientation; the North American Council on Adoptable Children (NACAC) says that applicants for foster care and adoption should be considered without regard to gender, marital status, or sexual orientation; and the National Association of Social Workers (NASW) says that "barriers to foster and adoptive parenting *unsupported by evidence* should be removed, including barriers to single parents, gay and lesbian parents, and other non-traditional families." (Pls.' Mem. 33-34 (emphasis added).) The terms of Act 1 do not preclude individual applicants because of gender, or because they are single, unmarried, or gay and lesbian.

Act 1 does not even mention gender. And it specifically states that it "applies equally to cohabiting opposite-sex and same-sex individuals." Ark. Code Ann. § 9-8-304(b). It does not turn on marital status because both married and unmarried individuals are eligible to become foster or adoptive parents. (*See* FCAC MSJ Ex. 52, Third Am. Compl. ¶ 51.) And both married and unmarried individuals *who are cohabiting outside of a valid marriage* are prohibited from adopting or fostering children. To the extent "non-traditional families," referenced only by the NASW, means unrelated cohabitants, Act 1's wariness of placing children in those environments is certainly not "unsupported by evidence." Thus, accepting Plaintiffs' characterization of these associational statements, Act 1 is not inconsistent with any of them and they do not otherwise

negate Act 1's purpose or basis. But even if Act 1 were inconsistent, the legislative authority of the State of Arkansas is not judged by these associational views as if they were inviolate extensions of the Arkansas and Federal Constitutions.

C. The rationale of Act 1 is not voided because some DHS employees disagree

While it is ultimately irrelevant to the legitimacy of Act 1, Plaintiffs grossly exaggerate the significance of the DHS and CADC[2] witness statements which they rely on to claim Act 1 violates professional standards. These witnesses answering "no" to whether they knew of a child welfare purpose served by Act 1 does not negate the existence of any, especially where the witnesses have no frequent need to weigh the matter because DHS has not made child placements with cohabitants and there have been few, if any, requests. These witnesses admit to having no experience with the efficacy of such placements, total ignorance of the pertinent social science, and even little contemplation of the matter. The fact that some DHS witnesses fail to recognize a child welfare purpose in Act 1 at best presents a debatable issue, but not a triable one. *Citizens for Equal Protection,* 455 F.3d at 868 (citation omitted).

Many of the DHS employees Plaintiffs feature in their brief to suggest that Act 1 does not serve a child welfare purpose have not routinely studied or considered the implications of placing a foster or adoptive child in cohabiting environments. The Director of DCFS, the division overseeing adoption and foster care, is "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." (STATE MSJ Ex. 23, Blucker Affidavit 4 ¶ 8.) Cassandra Scott, a 10-year employee, with field experience, verified that has been the policy of DHS since she was hired. (FCAC Resp. MSJ Ex. 11, Scott Dep. at 21:3-22:19 and 51:11-52:11.)

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[2] Crimes Against Children Division of the Arkansas State Police.

Employees with field experience admit that they have not either conducted a home study of, or recommended placement in, a cohabiting environment. Long-term employee, Sandi Doherty stated that she had not supervised, either directly or indirectly, the placement of a child with a cohabiting couple or with a gay or lesbian. (PLS MSJ Ex. 21, Doherty Dep. at 29:2-9.) (*See also* Marilyn Counts, the administrator of adoptions, FCAC MSJ Ex. 14, Counts Dep. at 147:15-23; Libby Cox, who handles out-of-state placements, FCAC Resp. MSJ Ex. 4, Cox, Libby Dep. at 64:5-66:12 and Anne Wells, Mental Health Professional, FCAC Resp. MSJ Ex. 15, Wells Dep. at 94:18-95:17.) And Ed Appler, the current chairman of the Child Welfare Agency Review Board, testified that to his knowledge, he had not conducted an adoptive home study on cohabitants. (FCAC MSJ Ex. 12, Appler Dep. at 125:11-12, 127:13-17 and 130:12-131:2.)

In addition to no personal experience making cohabiting placements, DHS officials have not studied or have not read the literature comparing cohabitants and married couples and do not know what the social science literature reveals on these issues. (*See* FCAC Resp. MSJ Ex. 9, Huddleston Dep. at 82:15-25; FCAC Resp. MSJ Ex. 4, Cox, Libby Dep. at 64:14-66:12; FCAC Resp. MSJ Ex. 15, Wells Dep. at 96:1-97:3; and FCAC Resp. MSJ Ex. 16, Zalenski Dep. at 175:13-178:5.) (*See also*, CWARB Chairman Appler, FCAC MSJ Ex. 12, Appler Dep. at 135:22-137:14, 138:24-139:2, and 143:2-9.) With no experience evaluating or studying foster or adoptive placements in cohabiting environments it is not surprising that DHS employees would fail to identify the child-welfare purposes supporting Act 1.

Plaintiffs also cited and mischaracterized deposition testimony of state police employees and DHS witnesses responsible for investigating abuse against children. But these witnesses also admitted that they do not conduct home studies on cohabitants, do not evaluate them, do not

personally track statistics on family structure in their investigations, and do not read any of the studies comparing married and cohabiting home environments because that is not peculiar to their professional role. Then, of course, it makes sense that these witnesses might not recognize a child welfare purpose in excluding child placements in cohabiting environments. (*See* FCAC Resp. MSJ Ex. 14, Thormann Dep. at 60:6-61:21; PLS MSJ Ex.10, Beall Dep. at 55:20-56:14; FCAC Resp. MSJ Ex. 10, Newton Dep. at 29:16-31:4; FCAC Resp. MSJ Ex. 6, Davidson Dep. at 23:4-26:18.)

Plaintiffs also failed to mention that there are DHS employees who do understand the child welfare purpose of Act 1. DHS Supervisor, Cassandra Scott, who has ten years of experience at DHS, believes Act 1 serves the best interests of children by helping to ensure that there is stability in the home. (FCAC Resp. MSJ Ex. 11, Scott Dep. at 37:8-16 and 47:21-48:16.) And Milton Graham, currently an Area Director, has worked for DHS since 1991 in a variety of positions, also stated that Act 1 serves the best interests of children. (FCAC Resp. MSJ Ex. 8, Graham Dep. at 17:21-18:12.)

But in the end, all this shows is that whether Act 1 serves a child welfare purpose is something that can be debated. Laws are validated or invalidated by polling the entire electorate; they are not invalidated by polling the witnesses in a case. Even if these opinions were informed by personal experience and a diligent study of the social science, it would still not create a disputable issue for trial because "a legislative choice is not subject to courtroom fact-finding." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Knapp v. Hanson*, 183 F.3d 786, 789 (8th Cir. 1999) (as long as a plausible reason exists for the classification, the Court's scrutiny must end); *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 21 F.3d 237 (8th Cir. 1994) (affidavit testimony disagreeing with statute's rational submitted in opposition to

motion to dismiss irrelevant). Dissenting witnesses do not negate the fact that Act 1 is solidly justified on multiple legislative facts as the record undisputedly attests.

Rather, the people of Arkansas could have reasonably concluded that DHS was ignoring the data about children being placed in cohabiting environments and acted precisely because DHS leadership was unaware or unwilling to recognize its potentially threatening impact on children. In addition, the people, knowing that DHS has finite resources could have acted to spare DHS caseworkers from undertaking additional duties to screen a high-risk group of applicants, which in turn could increase the risk that some children might be placed in a high risk cohabiting environment.

D. Plaintiffs' expert witnesses demonstrate that Act 1 serves legitimate and compelling child welfare purposes in protecting children from the risks of cohabiting environments

Notwithstanding the voices of those who have not studied the relationship between cohabiting environments and poorer child outcomes, Plaintiffs' expert witnesses who have studied the relationship, are accorded silence in Plaintiffs' opening brief. That is likely because their testimony and reports concede that Act 1 is supported by a rational basis.[3] Plaintiffs' experts acknowledge that cohabitants as a group have lower relationship quality than married couples (FCAC MSJ Ex. 22, Osborne Dep. at 243:4-19), and that on average cohabitors score lower on measures of relationship satisfaction (FCAC MSJ Ex. 23, Peplau Dep. at 206:22-207:2). Plaintiffs' expert Dr. Michael Lamb admits that there is evidence that relationship quality between cohabiting adults is lower than among married couples (FCAC MSJ Ex. 20, Lamb Dep. at 94:14-19, 102:24-103:11), and that there is a correlation between the quality of the

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[3] Intervenors do not cite all relevant admissions here or the rational basis provided by their own experts, which are undisputed, but incorporate those which were included in earlier filings by reference. (*See* Mem. of Law in Support of Intervenors' Mot. for Summ. J. and Mot. to Dismiss 39-63.)

parental relationship and stability in the family: "individuals who have high-quality relationships are more likely to stay together" (FCAC MSJ Ex. 20, Lamb Dep. at 121:24-122:8.) He also concedes that the higher quality of the relationships among married couples compared to cohabiting couples is more likely to have a positive impact on child outcomes. (*Id.* at 100:24-102:2.) Dr. Lamb also admits that, on average, the quality of a child's relationship with his parents is better if his parents are married than if his parents are cohabiting. (*Id.* at 105:9-21.) This is true even where the father is unrelated to the child -- data suggests that married stepfathers are more involved in the care of their children than are cohabiting stepfathers. (*Id.* at 142:10-13, 142:25-143:4.) Certainly, the relatively lower quality of cohabiting relationships compared to married persons is rationally related to family instability and the legitimate government interest in placing children in more stable home environments.

Plaintiffs' expert Dr. Cynthia Osborne admits that as a group, cohabitants are less committed to their partners than married individuals are to their spouses; cohabitation is selective of people with lower levels of commitment. (FCAC MSJ Ex. 22, Osborne Dep. at 105:12-24, 144:3-10.) She also acknowledges that marriage relationships on average last longer than cohabiting relationships. (*Id.* at 111:9-112:14.) She testified that cohabitation has increased, and there is an increase in the proportion of cohabiting couples who separate and a decrease in the proportion of cohabiting couples who transition to marriage. (*Id.* at 150:1-12.) Dr. Osborne unequivocally testified that a married biological family is the most stable family structure. (*Id.* at 203:2-15.)

Plaintiffs' experts Dr. Peplau and Judith Faust both concede that the relationship dissolution rate for heterosexual cohabitants is higher than the relationship dissolution rate for married heterosexual couples. (FCAC MSJ Ex. 42, Dep. Ex. 111, Peplau Expert Report 4 §

II(B)(3); FCAC MSJ Ex. 23, Peplau Dep. at 37:25-38:22, 48:6-10, 50:3-7, 72:16-73:4, and 227:2-229:18; FCAC MSJ Ex. 19, Faust Dep. at 78:22-79:10.) Dr. Peplau also states in her report that the relationship dissolution rate for cohabiting same-sex couples is higher than the relationship dissolution rates for married heterosexual couples. (FCAC MSJ Ex. 42, Dep. Ex. 111, Peplau Expert Report 4 § II(B)(2).) She admits that the lack of studies specifically dealing with cohabiting couples who adopt children makes it impossible to draw the conclusion that even "long-term" cohabiting couples are as stable as married couples: "[D]o long-term cohabiting heterosexual couples who have decided to adopt a child break up at higher rates or at lesser rates than married couples? We don't know." (FCAC MSJ Ex. 23, Peplau Dep. at 65:8-11.) Finally, Dr. Peplau acknowledges that on average, cohabiting relationships are less stable than marriages. (*Id.* at 114:21-115:3, 115:19-22.)

Plaintiffs' expert Dr. Lamb agrees that, on average, married people are more committed to their relationship than people in cohabiting relationships regardless of their sexual orientation. (FCAC MSJ Ex. 20, Lamb Dep. at 109:22-110:10.) Dr. Lamb agreed with the findings in Larry Kurdek's 2005 study, a review of the research on homosexual couples and a reference on which Dr. Peplau relied upon in preparing her expert report, which states: "With controls for demographic variables, the dissolution rate for heterosexual couples was significantly lower than that for either gay or lesbian couples. . . . [A]lthough rates of dissolution did not differ for either gay couples versus lesbian couples or for gay and lesbian couples [versus] cohabiting heterosexual couples, both gay and lesbian couples were more likely to dissolve their relationships than married heterosexual couples were." (*Id.* at 123:1-124:2; FCAC MSJ Ex. 60, Lawrence A. Kurdek, *What Do We Know About Gay and Lesbian Couples?* 14 Current Directions in Psychological Science 251, 253 (2005).)

Plaintiffs' experts also admit that cohabitation is correlated with higher infidelity. Dr. Osborne testified that in her own studies, which employ the Fragile Families data, cohabitation is correlated with higher levels of sexual infidelity. (FCAC MSJ Ex. 22, Osborne Dep. at 113:6-19.) Dr. Peplau concedes in her rebuttal report that studies indicate the rate of infidelity is higher for cohabiting heterosexual couples than for married heterosexual couples. (FCAC MSJ Ex. 43, Dep. Ex. 112, Peplau Rebuttal Report 1 § II(A); FCAC MSJ Ex. 23, Peplau Dep. at 101:9-102:5, 235:2-15.)

As for domestic violence, Plaintiffs' expert Dr. Letitia Peplau concedes that studies indicate the rate of partner domestic violence is higher for cohabiting heterosexual couples than for married heterosexual couples. (FCAC MSJ Ex. 43, Dep. Ex. 112, Peplau Expert Report 5 § C; FCAC MSJ Ex. 23, Peplau Dep. at 79:6-19, 230:14-231:4 (*citing* FCAC MSJ Ex. 62, Jan E. Stets & Murray A. Straus, *The Marriage License as a Hitting License: Comparison of Assaults in Dating, Cohabiting, and Married Couples*, 4 Journal of Family Violence 161 (1989).) Dr. Osborne also concedes that the rate of physical abuse is higher among cohabitors than married couples: "there is generally at the observed level . . . a higher level of conflict observed among our cohabitors – diverse group of cohabitors than our marrieds." (FCAC MSJ Ex. 22, Osborne Dep. at 104:20-105:1, 115:19-116:1.). Limiting the exposure of children to violence in the home is enough of a rational basis to preclude placing children in cohabiting environments, but the interest is even greater when, as Plaintiffs' experts admit, children are more likely to be the targets of the abuse.

One study focusing on fatal child abuse in Missouri found that preschool children were 47.6 times more likely to die in a cohabiting household, compared to preschool children living in an intact, married household. (FCAC MSJ Ex. 76, Patricia G. Schnitzer & Bernard G.

Ewigman, *Child Deaths Resulting from Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 116 Pediatrics e687, e690 (2005).) In a 2001 article entitled *Male Roles in Families at Risk, the Ecology of Child Maltreatment*, Plaintiffs' expert Dr. Michael Lamb wrote that the presence of an unrelated male in the home was a source of risk for maltreatment to children living in the home and that he believes that is true today. (FCAC MSJ Ex. 20, Lamb Dep. at 140:5-22; FCAC MSJ Ex. 61, Michael E. Lamb, *Male Roles in Families "at Risk"; The Ecology of Child Maltreatment*, 6 Child Maltreatment 310-313 (Nov. 2001).)

Plaintiffs' expert Dr. Worley also testified that sex abuse against children occurs more frequently in cohabiting households than in married households where both parents are biologically related to the child. (FCAC MSJ Ex. 24, Worley Dep. at 72:10-18, 81:16-82:13.) One of the studies on which Plaintiffs' expert Dr. Peplau relied in preparing her expert opinion found that "the highest *rate* of assault is among the cohabiting couples" as compared to both married and dating couples. (FCAC MSJ Ex. 62, Stets & Straus, *supra*, at 176.) Furthermore, the study revealed that "violence is the most *severe* in cohabiting couples," compared to both married and dating couples. (*Id.*) These findings persisted after controls for age and socioeconomic status were introduced. (*Id.*)

Plaintiffs' experts also recognize that children do best on a variety of outcomes when raised by their married biological mother and father. There, children show lower levels of school suspension and expulsion, lower levels of child delinquency, lower levels of school problems, and higher cognitive outcomes for children than those belonging to a cohabiting stepfather family. (FCAC MSJ Ex. 22, Osborne Dep. at 145:15-25, 146:17-20, 148:12-24; FCAC MSJ Ex. 50, Dep. Ex. 154, Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 Journal of Marriage and Family

876-893 (2003).) But even children who live with a stepfather who is married to their mother have fewer school suspensions and expulsions than children who live with a cohabiting stepfather. (FCAC MSJ Ex. 22, Osborne Dep. at 36:11-13.) And even when researchers adjust for socioeconomic factors, demographic characteristics, family stability, and parenting measures, "[o]n delinquency there is still a significant difference between married steps and cohabiting steps when this list of covariates is included." (*Id.* at 49:9-15, 50:10-20, 51:13-15.) Thus, marriage does make a substantial difference on delinquency even when the father is unrelated to the children but is married to their mother of the children he is raising.

Osborne's own work with the Fragile Families study reveals that mothers in married households observe more reading in children than biological mothers in cohabiting households, and that "[r]eading is correlated with good cognitive outcomes." (*Id.* at 157:21-158:24.) She also found differences in the measures of "warmth and engagement," or showing "affection" between married biological mothers and cohabiting biological mothers. (*Id.* at 160:7-21.) Ultimately, Dr. Osborne concedes there is a significant association between marriage and improved child outcomes, and even more broadly, between family structure and child outcomes. (*Id.* at 146:17-20; 241:16-23.)

Finally, it is undisputed that a married couple would need to obtain a divorce to formally terminate a relationship, whereas individuals in a cohabiting relationship do not need a legal proceeding to terminate their relationship. (FCAC MSJ Ex. 19, Faust Dep. at 86:6-17.) There are always social and legal consequences to dissolving a marriage, which are absent when dissolving a cohabiting relationship. The public, social, and legal commitment of marriage makes dissolution a last resort. It contributes to keeping a family intact, which provides stability for children. Thus, steering children into married households where the marital relationship is