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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

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INTRODUCTION

Plaintiffs have asked this Court to veto the political process by which Act 1 was enacted because they deem it to be entirely insufficient, as if rendering absurd results, when in their view the Act serves "no permissible purpose whatsoever." In Plaintiffs' minds there can be no child welfare purpose for a classification denying them their perceived "right" to foster or adopt children in Arkansas while cohabiting with a sexual partner. Nonetheless, no fundamental right or suspect class is implicated by Act 1, and the Act *is* rationally related to the governments' interest in promoting child welfare. The passage of the Act 1 reveals Arkansans' recognition that family structure *does* matter. And indeed, there is strong scientific consensus that family structure matters for the social, psychological, and educational welfare of children. The undisputed facts show that children living in cohabiting households suffer lower child-adjustment outcomes and are at a higher risk of abuse than children in both married and single-parent households. Instead of addressing the blatant fact that no fundamental right is implicated by the Act, nor any suspect class employed, Plaintiffs continually mischaracterize *their rights* as they seek to impose on the Act a higher standard of review than is warranted. Plaintiffs also fail to remedy or adequately respond to their lack of standing on all claims alleged in the Third Amended Complaint. Intervenors' Motion for Summary Judgment and Motion to Dismiss should be granted, and Plaintiffs' claims should be dismissed on the merits.[1]

[1] Intervenors may refer to their motion for summary judgment and motion to dismiss memorandum, as well as their response to Plaintiff' motion for summary judgment, and hereby fully incorporate these papers by reference in reply to the Plaintiffs' opposition to summary judgment. Intervenors also incorporate all of the State-Defendants' arguments and supporting papers in response to Plaintiffs' motion for summary judgment and in reply to Plaintiffs' opposition to summary judgment to the extent they are consistent with Intervenors' positions.

I. PLAINTIFFS' CLAIMS ARE NON JUSTICIABLE

Arkansas has adopted the federal "case and controversy" requirement of Article III of the United States Constitution such that "[o]nly a claimant who has a personal stake in the outcome of a controversy has standing to invoke jurisdiction of the circuit court in order to seek remedial relief; his injury must be concrete, specific, real and immediate rather than conjectural or hypothetical." *Estes v. Walters*, 269 Ark. 891, 894, 601 S.W.2d 252, 254 (Ark. App. 1980) (citing *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 714 (D.C. Cir. 1977)). Plaintiffs do not have standing to challenge the constitutionality of Act 1 because they have not suffered any concrete, specific, real or immediate injury in relation to the passage of the Act.

A. Plaintiffs Cole and W.H.'s claims are moot

This court need not address Cole and W.H.'s claims because they have already received the relief they requested and the issues they present are now moot. *Shipp v. Franklin*, 370 Ark. 262, 267, 258 S.W.3d 744, 748 (2007). A case becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy. *Id.* To maintain an action in Arkansas courts "there must exist a justiciable controversy that [the court's] decision will settle." *Richardson v. Arkansas Dep't of Human Servs.*, 86 Ark. App. 142, 143, 165 S.W.3d 127, 128 (2004).

Here, while Cole and W.H. might have had standing at the filing of this lawsuit, Sheila Cole was subsequently awarded legal custody of W.H. on January 13, 2009, a fact not disclosed by Plaintiffs at the March 2009 hearing on the motions to dismiss. By the time Cole was deposed in September 2009, W.H. was no longer in the protective custody of the Arkansas DHS. (FCAC MSJ Ex. 2, Conf. Cole Dep. at 23:13-24:2.) Since W.H.'s ICPC case in Benton County was already closed, and because Cole believed that W.H.'s ICPC case in Oklahoma would be closed sometime in October 2009, Cole admitted at her September 2009 deposition that she was

already taking steps to adopt her granddaughter in Oklahoma. (*Id.* at 17:10-18:7; 24:3-13, 24:24-25:9.) Simply put, W.H. is no longer subject to the laws of the State of Arkansas or the oversight of Arkansas courts and agencies.

Plaintiffs incorrectly cite *Steger v. Franco*, 228 F.3d 889 (8th Cir. 2000), as standing for the proposition that once a court determines that a party has standing in a case there can be no legal basis to reconsider whether there remains a justiciable controversy. In *Steger*, the Court reviewed de novo a district court's determination that plaintiffs lacked standing to seek injunctive relief under the ADA, stating: "Because standing is determined as of the lawsuit's commencement, we consider the facts as they existed at that time." *Steger*, 228 F.3d at 893 (citing *Park v. Forest Serv.*, 205 F.3d 1034, 1038 (8th Cir. 2000)). A simple review of *Park v. Forest Service* demonstrates that the *Steger* Court was merely reaffirming the principle that if standing does not exist at the time of the filing of a lawsuit, it cannot not be gained *as the case progresses*. The *Steger* court, however, did not address the question of mootness when standing can most certainly be lost *as the case progresses*. According to the Plaintiffs, there never could be a basis for finding a case moot once the parties initially allege an injury in fact, regardless of any change in the underlying facts supporting the claims. (*See* Pls.' Opp. Mem. 10 and 15, where Plaintiffs confuse the court's personal and subject matter jurisdiction with the issue of mootness due to changed circumstances.) Plaintiffs' arguments are at odds with the longstanding principle that courts will not render advisory opinions when the issues before the court become moot. *Shipp*, 370 Ark. at 267, 258 S.W.3d at 748; *Richardson*, 86 Ark. App. at 143, 165 S.W.3d at 128.

Just as in *Richardson*, where the appeal of a daughter's removal from her mother's custody was found to be moot when an agreement was reached to restore custody to the mother,

because Cole has gained custody of W.H. and is pursuing adoption under the laws of the State of Oklahoma, "a decision on the merits . . . will have absolutely no legal effect on the issue of [the child's] custody." *Richardson*, 86 Ark. App. at 143, 165 S.W.3d at 128. Plaintiffs' argument that this Court's decision on the merits of Cole and W.H.'s claims "would serve as evidence that could benefit Plaintiff Cole's finalization of W.H.'s adoption in the Oklahoma adoption proceeding," is conspicuously devoid of any explanation as to how the constitutionality of an Arkansas statute could have any legal effect on the adoption of a child in Oklahoma. (Pls.' Opp. Mem. 16.) Cole's qualification as an adoptive parent under the laws of the state of Arkansas is plainly irrelevant to her qualification as an adoptive parent under the laws of the state of Oklahoma.

Furthermore, because Cole is not (and never has been) a resident of the state of Arkansas, Arkansas courts would have no jurisdiction over her adoption of W.H. even if she now alleged that she wished to adopt W.H. under Arkansas law. Pursuant to Arkansas' Revised Uniform Adoption Act, the state has jurisdiction over the adoption of a minor *only* if the person seeking to adopt the child, or the child, is a resident of this state. *See* Ark. Code Ann. § 9-9-205(a)(1). Cole and W.H.'s claims should be dismissed now that Cole has custody of W.H. in Oklahoma because there remains no justiciable controversy before the Court. Remarkably, Plaintiffs' desperate and crafty attempt to join additional child plaintiffs to this lawsuit just one day after all parties had submitted summary judgment motions to the Court, and their outlandish "sur-reply" to Defendants' motions to strike, expose their frantic recognition that the due process claims presented by W.H. have now become moot.

A number of the other Plaintiffs have also alleged under the First and Second claims that Act 1 violates the due process rights of children in state care by reducing their chances of being

fostered or adopted. Since the claims of W.H., a child formerly in state care, are now moot, none of the remaining Plaintiffs can bring suit because they are not children in state care and do not otherwise have a "close relationship" with a child in state care. "Constitutional rights, including the guarantees of due process, are personal rights and may not be asserted by a third party." *Matter of Adoption of B.A.B.*, 40 Ark. App. 86, 88, 842 S.W.2d 68, 69-70 (1992) (quoting *Cox v. Stayton*, 273 Ark. 298, 302, 619 S.W.2d 617, 619-20 (1981)).

The only exception to this rule is where "the party asserting the right has a 'close' relationship with the person who possesses the right," in which case they may assert third-party standing. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *see also Irving v. Clark*, 758 F.2d 1260, 1267 (8th Cir. 1985) (considering "the relationship of the litigant to the person whose right he seeks to assert" for purposes of determining third-party standing). Plaintiffs' claims that Act 1 "deprives children in State care of their constitutional right to due process" (*see* Pls.' Mem. of Law in Supp. of Mot. for Summ. J. 42) is foreclosed by *Kowalski*, where the U.S. Supreme Court held that attorneys lacked third-party standing to challenge a Michigan statute on behalf of hypothetical future clients. 543 U.S. at 131. The attorneys in *Kowalski* argued a "requisite closeness" to "unascertained Michigan criminal defendants" who might be future clients. *Id.* at 130. The Supreme Court concluded that, far from having a "close relationship with their alleged clients," the attorneys had "no relationship at all." *Id.* at 131 (internal quotations omitted). The same is true here. Plaintiffs have absolutely no relationship with the children whose rights they purport to be asserting. Plaintiffs are neither the adoptive or foster care parents of these children. In fact, none of the Plaintiffs have even met the children in state care whom they claim they would adopt "but for Act 1." Because these Plaintiffs have "no relationship at all" with the children in state custody, they cannot claim standing to assert their constitutional rights.

Finally, Plaintiffs argue that the Court should not dismiss Cole and W.H.'s claims because they fall within the ambit of the public interest exception. (Pls.' Opp. Mem. 18, 19.) Although Plaintiffs cite to seven decisions where the Supreme Court recognized the applicability of the public interest exception, Plaintiffs noticeably did not direct this Court to the one ruling which is most on point with the facts in this case. In *Stair v. Phillips*, 315 Ark. 429, 430, 867 S.W.2d 453, 454 (1993), a former stepfather appealed from the denial of his motion to intervene in a protective services custody petition concerning the two natural children of his former wife. The Court held that the lower court correctly found the couple was divorced and that this finding rendered moot any interest the stepfather asserted in the matter affecting the natural mother's children. The Court refused to review the matter under the public interest exception because the stepfather's attempt to intervene in custody proceedings was not a matter of public interest and because as a former stepparent he had no legal rights in the children. *Id.* at 435, 867 S.W.2d at 456.

Likewise, here, Cole's desire to adopt her granddaughter is not a matter of public interest and she has no constitutional or statutory right to adopt the child. Cole and W.H.'s very personal claims do not "raise considerations of substantial public interest" and, now that Cole has achieved her goal of obtaining custody of her granddaughter, an advisory ruling on the merits of their claims would not "prevent future litigation." *Honeycutt v. Foster*, 371 Ark. 545, 548, 268 S.W.2d 875, 878 (2007). There is no one else attempting to adopt the child or remove her from Cole's care and custody. No future litigation regarding the custody of the child is in sight. The only legal proceeding in which W.H. might participate in the near future would be the finalization of her adoption by Cole in an Oklahoma court. Plaintiffs Cole and W.H.'s claims should be dismissed as moot as they do not fall within the public interest exception.

B. None of the remaining Plaintiffs have been injured by Act 1 and their claims are not ripe for review

Plaintiffs Stephanie Huffman, Wendy Rickman, Shane Frazier, Curtis Chatham, Frank Pennisi and Matt Harrison claim, in counts 9 and 10, that the enforcement of Act 1 will violate their rights to engage in private, consensual, non-commercial acts of sexual intimacy and maintain their relationships under the federal and state constitutions' due process and equal protection clauses. These Plaintiffs, however, lack standing because their alleged injuries are not "concrete, specific, real and immediate" but only "conjectural or hypothetical." *Estes*, 269 Ark. at 894, 601 S.W.2d at 254. Because it is not known whether Rickman, Frazier, Chatham, Pennisi or Harrison would qualify under the minimum licensing standards for foster or adoptive parents, it cannot be affirmatively stated that Act 1 would be the reason they are precluded from fostering or adopting. At the motion to dismiss hearing, these myriad requirements were not before the court and have only surfaced in discovery. Each of these Plaintiffs might be denied foster or adoption certification for any number of reasons (all unrelated to cohabitation) under the applicable regulations, including inadequate compliance for the physical standards of their home, insufficient financial resources, or a social worker's unfavorable home study report.

Although Plaintiffs believe that they may simply assert that it would be "futile" for them to apply to serve as foster or adoptive parents, the Arkansas Supreme Court limited the extension of standing in *Howard* to individuals "within the class of persons affected by the regulation" — individuals whom the Court recognized were in fact "seeking to become [] foster parent[s]." *Dep't of Human Servs. and Child Welfare Agency Review Bd. v. Howard*, 367 Ark. 55, 59 n.2, 238 S.W.3d 1, 4 (2006). Plaintiffs Rickman, Frazier, Chatham, Pennisi and Harrison lack standing because none of them have ever sought to adopt or foster a child in the State of Arkansas. During the course of discovery, it was revealed that none of these Plaintiffs had ever

attempted to contact DHS even about the *possibility* of becoming foster or adoptive parents. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ I, I(C).) These Plaintiffs' fleeting desire to adopt, unaccompanied by even a single attempt to contact any child welfare agency in the state about becoming foster or adoptive parents cannot put them within the class of persons "seeking to [adopt or] become [] foster parent[s]." *Howard*, 367 Ark. at 59 n.2, 238 S.W.3d at 4. While many Americans think about adopting, there is evidence that only a small percentage of these individuals actually *seek to become* adoptive parents. The *Howard* court surely did not intend to extend standing to every person who ever thought that adoption might be something worth looking into someday.

Finally, Stephanie Huffman's hesitation in moving forward with the possibility of expanding her family also precludes her from belonging to the class of persons affected by the regulation: such vacillation cannot be recognized as concretely "seeking to adopt." (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ I, I(B).)

Plaintiffs Meredith and Benny Scroggin, Susan Duell-Mitchell, and Chris Mitchell, and their minor children also do not have standing to enjoin the enforcement of Act 1 because none of them have in fact suffered, and likely ever will suffer, any injury attributable to Act 1. At the time this Court considered the Scroggins and Mitchells' standing on the motions to dismiss, the Court assumed the truth of the allegations that Plaintiffs had designated cohabiting individuals as adoptive parents by testamentary instrument. However, these Parent-Plaintiffs revised their wills after the suit was commenced to request that the designated guardians also take steps to adopt their surviving children. The Court should reconsider the Plaintiffs' standing in light of these facts uncovered during discovery. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ I, I(D).)

A litigant must have suffered an injury as a member of a class affected to have standing to challenge the validity of a law. *Arkansas Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 363, 166 S.W.3d 550, 554 (2004). Plaintiffs' reliance on *Jegley v. Picado*, 349 Ark. 600, 80 S.W. 3d 332 (2002), is misplaced because none of the Parent-Plaintiffs' can demonstrate that they *currently* belong to a class affected by Act 1 since their claims are premised on the speculative occurrence of an improbable sequence of events. The fact that the Parent-Plaintiffs' (and their children) might "some day in the future" belong to a class affected by Act 1, based on the unlikely event that a multitude of unfortunate circumstances might simultaneously occur in their lives and the lives of their children,[2] is not sufficient to grant them standing in the present case: their claims are impeded by the threshold justiciability requirement of "ripeness." Ripeness poses the question of whether a claim was brought too early. A future-looking, hypothetical threat is not enough. A real "controversy" must be definite and concrete, admitting of specific relief and not an advisory opinion issued for hypothetical facts. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-1 (1937). In other words, a case is ripe only if the issues are *not* speculative or hypothetical. *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996); *see also Quapaw*

[2] As explained in Intervenors' Memorandum of Law in Support of Intervenors' Motion for Summary Judgment and Motion to Dismiss at 17, each of these Child- and Parent-Plaintiffs' claims are contingent on the simultaneous occurrence of *all* of the following events: 1) both of a Child-Plaintiff's natural parents would have to die or become incapacitated at the same time, while the Child-Plaintiff is still a minor; 2) the designated adoptive parent would still have to be willing and able to adopt the minor Child-Plaintiff at the time of her parents' death or incapacity; 3) the designated adoptive parent would still have to be cohabiting at the time of the parents' death or incapacity; 4) the designated adoptive parent would have to qualify for and obtain certification by meeting every other requirement set forth by a licensed placement agency to adopt a child in the State of Arkansas, and 5) a court would have to determine that it is in the best interest of the child to be adopted by the designated adoptive parent, rather than remaining in their custodial care in a guardianship relationship. In addition, in order for the Scroggins and their children to belong to a class affected by Act 1, Jared Butler would either have to be no longer able or no longer willing to perform his role as named guardian of the Scroggin children, given the fact that Matt Harrison is only named as an alternate to Mr. Butler.

Care & Rehabilitation v. Arkansas Health Servss Permit Comm'n, 2009 Ark. 356, --- S.W.3d ---- (2009). Because the Parent- and Child-Plaintiffs have not suffered, and may never suffer any injury attributable to Act 1, none of their claims are ripe for adjudication, and any ruling on the matters they raise would be merely advisory.

C. Act 1 does not constitute an illegal exaction

Plaintiffs' claim that Act 1 constitutes an illegal expenditure of public funds must be dismissed because the Act does not authorize the taxing or expenditure of any funds. Plaintiffs have never identified how, where or when funds, if any, have been misapplied. Plaintiffs' allegation that Act 1 will reduce the pool of applicants and cause unnecessary expenditures due to children remaining in state custody is a mere conclusion unsupported by specific factual allegations. It is in fact disproven by the Plaintiffs' own acknowledgment that DHS has maintained an internal written policy barring placement of foster children with cohabiting individuals since 2005 which was never rescinded prior to Act 1's enactment. (*See* Pls.' Opp. Mem. App. A at 6, ¶¶ 13 and 15.) Act 1 cannot in fact cause additional expenditure by codifying a previously established policy and practice because it does nothing new to increase expenditures.

Plaintiffs assert Intervenors have invented an incorrect standard for the requirements of an illegal exaction claim. But as Plaintiffs' own citations set forth, plaintiffs in public funds cases "*must show* that the State misapplied or illegally spent money that was lawfully collected." (*See* Pls.' Opp. Mem. 20 (emphasis added).) Plaintiffs have made no such showing, neither have they presented facts anywhere nearing the specificity of the allegations contained in *McGhee v. Arkansas State Board of Collection Agencies,* 360 Ark. 363, 372, 201 S.W.3d 375, 380 (2005) to which they compare their unsupported allegations. Plaintiffs' broad reading of *McGhee* would warrant illegal exaction claims in every complaint filed against a government entity since all

government action is in some degree supported by taxpayer funds. Moreover, in *McGhee*, the court was reviewing an improperly granted motion to dismiss when it found that appellants' complaint contained specific factual allegations that the Board was aware that the check-cashers were charging unconstitutionally usurious fees while continuing to provide them licenses. Here, undisputed evidence exists that Act 1 does not increase expenditures for keeping children in state care by restricting foster placements with cohabiting individuals since this practice and policy pre-dates Act 1. (*See* Intervenors' Resp. to Pls.' Mot. for Summ. J. § II; and FCAC Resp. MSJ Ex. 5, Crawford Dep. at 214:19-215:12.) Ultimately, Plaintiffs' illegal exaction claim is merely derivative of illegal conduct by the State and contingent on Plaintiffs' improbable ability to prevail on any of their claims that Act 1 is unconstitutional. Intervenors respectfully submit that this Court should dismiss Plaintiffs' illegal exaction claims because Plaintiffs do not state and cannot otherwise maintain a cause of action.

II. THE CONSTITUTIONALITY OF INITIATED ACTS MUST BE JUDGED BY STANDARDS APPLICABLE TO THE ACT OF THE LEGISLATURE

By mischaracterizing the individual rights they claim are implicated by the Act, Plaintiffs have sought to impose on Act 1 a heightened standard of review, one which goes well beyond the well-established rational basis review standard applicable to state legislation whenever fundamental rights and suspect classes are not implicated. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983). The Arkansas Supreme Court has long held that state statutes are presumed constitutional and that the burden is on the challenging party to prove a statute's unconstitutionality. *Hamilton v. Hamilton*, 317 Ark. 572, 575, 879 S.W.2d 416, 418 (1994); *Rose v. Arkansas State Plant Bd.*, 363 Ark. 281, 293, 213 S.W.3d 607, 618 (2005). Plaintiffs simply cannot come to terms with the fact that their due process claims do not implicate any fundamental rights, or that cohabiting individuals have never been afforded

"suspect class" status. Because Intervenors have already presented detailed arguments that Act 1 does not infringe on any fundamental right or liberty protected by the Due Process clauses, and that Act 1 does not violate the Equal Protection clauses (*see* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ II, III), Intervenors now address only the Plaintiffs' mischaracterization of the rights they claim are implicated by Act 1 and their subsequent misapplication of heightened levels of scrutiny.

A. Children in protective State custody have no fundamental right to be placed in any particular foster home or to be adopted

Plaintiffs argue that Act 1 violates the State's duty of care to children in their custody by limiting the pool of foster and adoptive parent applicants. In asserting that Act 1 violates the substantive due process rights of children in state custody Plaintiffs rely strictly on cases involving challenges to abusive conduct by government officials, not challenges to state legislation.[3] None of these cases are analogous to the due process challenge Plaintiffs present in this case. Consequently, Plaintiffs incorrectly impose a "professional judgment standard" on Act 1. 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). Here, the challenged government action is legislation dealing

[3] 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.

with child welfare, it is not abusive conduct by a government official or, as Plaintiffs would have the Court believe, by extension, some sort of a departure from an accepted professional judgment standard.

Where the challenged government action is legislative action, 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."). Because the state of Arkansas acts in the protective and provisional role of *in loco parentis* for children who due to various circumstances have become wards of the state or lost their natural parents, the State certainly has a legitimate interest in determining what adoptive home environments will best serve all aspects of children's growth and development. *Lofton v. Secretary of Dep't of Children and Family Servs.*, 358 F.3d 804, 809-10 (11th Cir. 2004).

Any professional associational statements and any DHS witness's individual opinion expressing disagreement with the policy adopted by Arkansas voters is entirely irrelevant to the constitutionality of the Act. (Pls.' Opp. Mem. 24.) Legislation is not subject to veto by dissenting experts and professional organizations who disagree with either its means or its 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). 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). (*See also* Intervenors' Resp. to Pls.' Mot. for Summ. J. § I(A).)

Intervenors established in their opening brief that Act 1 amply satisfies the rational basis test. Act 1 seeks to minimize the harm to children by keeping them from being placed in home environments which, on average, are more unstable and volatile than other foster care settings. The Act implicates no fundamental right of children in State custody,[4] 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 §§ II(A) and IV.) Plaintiffs argue that the custody cases, presenting the State's longstanding policy that the interests of children are best served by living with a biological parent who is not cohabiting, bear no relevance to how adoption and foster placements should be made. However, this line of cases at the very least demonstrates that the courts recognize that cohabitation *may* be harmful to children and as such are sufficient to show that Act 1 is rationally related to a legitimate government interest. Under the properly applicable due process standard of review, Plaintiffs' due process claims fail and Intervenors are entitled to summary judgment.

B. Children whose parents become incapacitated or are deceased, and for whom a guardian has been designated by testamentary instrument, have no right to be adopted by the designated guardian

The Child-Plaintiffs—whose parents have designated guardians for them by will, and whom the parents have designated to adopt their children upon their death or incapacity—insist that they merely "seek access to the same procedures available to all children." (Pls. Opp. Mem. 43.) Contrary to the Child-Plaintiffs' assertion, Act 1 does not treat them any differently than

[4] Plaintiffs acknowledge that children in State custody have no fundamental right to be fostered or adopted. (*See e.g.* Pls.' Opp. Mem. 2 and 46.) Neither have (or could) Plaintiffs asserted that children in State custody have a fundamental right to the individualized assessment of every individual interested in fostering or adopting children. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § II(D).)

any other children in the State of Arkansas. Since parents and children have no statutory right, cognizable liberty or property interest in directing who, if anyone, will adopt the children upon the parents' death or incapacity, or any such right in having the court consider a designated individual to adopt the surviving children, all children and parents are equally reliant on the court's consideration of their testamentary designations of legal guardians. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ II(A)(1)-(2).)

Try as they might, Plaintiffs cannot acquire the right to bypass statutory adoption requirements by challenging Act 1. It is the State's role to assure that children are placed with individuals who will serve their best interests. Therefore, all adoptions are subject to the State's oversight and scrutiny. No parent in Arkansas can insist that his child be adopted by an individual whom the State has legislatively prohibited from adopting children. Simple examples illustrate this point: a natural mother's designation of a convicted child molester to adopt her child upon her death would under no circumstances be approved by the courts, even if the molester was the mother's brother, and both mother and child wanted the adoption to proceed. Ark. Code Ann. §§ 9-28-409(f)(1)–(h)(2). Neither would a child be able to insist that a 17 year-old cousin be appointed as his adoptive parent when his father dies, simply because the father had named the cousin to adopt the child upon his death. Ark. Code Ann. §§ 9-9-202(3)-(4), 9-9-204(2). The fact that the Child-Plaintiffs claim they have "no control over the marital status of the designated caregivers chosen for them by their parents," does not, as they claim, subject Act 1 to heightened scrutiny. (Pls.' Opp. Mem. 43.) That children do not have any control over the criminal activity or age of their designated caregivers does not equate to a violation of equal protection. (*See* Intervenors' Resp. to Pls.' Mot. for Summ. J. § II.)

C. The right to "family integrity" does not include a fundamental right for children in protective state custody to be fostered or adopted by their relatives

Cole and W.H. maintain that Act 1 violates their right to family integrity because Cole couldn't adopt W.H. while that she is also cohabiting in a sexual relationship with another adult. These Plaintiffs rely on *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), which held that the right to family integrity includes the right of grandparents to reside with their children and grandchildren. *Id.* at 504. But, Act 1 is not a criminal ordinance that excludes grandparents from living with grandchildren. It is legislation aimed at providing the best homes for vulnerable children. Unlike the zoning ordinance in *Moore*, Act 1 steers children into homes that are more likely to provide stability and continuity for their development. The right of family integrity does not require the state to make any placement, whether that be with a grandmother or any other relative, which may expose the child to the risks associated with cohabiting environments. Thus, Plaintiffs continue to mischaracterize the rights implicated by the application of Act 1.[5] While they admit grandparents have no constitutional right to adopt their grandchildren, Plaintiffs would have this Court believe that the right to family integrity includes the right for a child in protective custody to be fostered or adopted by her relatives even if the relative's home is not recognized by the State as a suitable placement for the child. (Pls.' Opp. Mem. 33-35.) Again, the right to family integrity cannot be equated to a right to adopt one's relatives in the unfortunate event that their parents can no longer care for them. And the right to family integrity

[5] Notably, in *Moore*, the "overriding factor" which cuts against the right to family integrity was that the zoning ordinance excluded family members related by "blood, adoption, or marriage." 431 U.S. at 498. The Court stated that zoning ordinances excluding certain household members had been otherwise upheld under the rational basis standard because they did not infringe on the right to family integrity. *Id.* at 498-99 (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).) In most cases, Act 1 regulates foster and adoptive placements where all members of the household are unrelated to the child. In Cole's case, her cohabiting partner is not related to W.H. and the right to family integrity is not implicated.

certainly cannot override the State's interest in protecting the children entrusted to its care such that relatives could bypass the statutory adoption requirements. *See supra* II(B).

Plaintiffs are undisputedly wrong in their characterization of Act 1 as having "created a significant risk that W.H. would be removed from her grandmother's care." (Pls.' Opp. Mem. 36.) Plaintiffs provide no evidence, nor could they, that because of Act 1 the State of Arkansas was intending to separate W.H. from her grandmother and placing her in an adoptive home. The guardianship placement of W.H. with Cole demonstrates the opposite; and more, that Act 1 strikes the proper balance between the right to family integrity and the state's interest in the child's welfare. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ II, II(B).)

D. The parental right to make decisions concerning the care, custody and control of their own children does not grant parents the right to bypass statutory adoption requirements

A parent's liberty interest in making decisions concerning the care, custody, and control of her children has never been interpreted as allowing a parent to bypass statutory adoption proceedings through testamentary designations. The two cases cited by Plaintiffs, *Linder v. Linder*, 348 Ark. 322, 342-43, 72 S.W.3d 841, 851-52 (2002), and *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), do not recognize that a deceased parent has a fundamental right to have a court consider their testamentary wishes regarding who might adopt their child. Adoption, which is wholly a creature of the state, and governed entirely by statute, does not implicate the rights of parents to "establish a home and bring up children," "control the education of their own," and "direct the upbringing and education of children under their control." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925).

The holdings in *Linder* and *Troxel* are both premised on the fact that only *living* fit custodial parents can evaluate whether visitation by a relative is appropriate at the time a decision regarding visitation is made. *Linder*, 348 Ark. at 351, 72 S.W.3d at 857; *Troxel*, 530 U.S at 68-69. In neither of these cases were the courts considering the wishes of the deceased parent who could no longer make contemporaneous judgments regarding permanent legal custody of his child. In fact, neither the *Linder* Court or the *Troxel* Court gave any consideration whatsoever to the deceased parent's wishes regarding visitation by the grandparents, even though it was the parents of the deceased who were seeking visitation rights. If anything, these cases corroborate the parental role taken over *by the state* upon the death of a natural parent. Upon the death of both of a child's natural parents, the State "acts in the protective and provisional role of *in loco parentis* for those children who, because of various circumstances, have become wards of the state." *Lofton*, 358 F.3d at 809. Acting *parens patriae*, the state is vested with authority to make in the moment decisions for a child whose deceased parents can no longer evaluate potential changed circumstances or newly disclosed facts relevant to the welfare of the child. *Id.*

When a child is deprived of the supervision and care of his parents due to their untimely death or incapacity, any adult may file a petition for guardianship of the minor child. Ark. Code Ann. §§ 28-65-104, 28-65-205. The court will make a determination of the petitioner's suitability for appointment as legal guardian based on a determination of the best interests of the child, in conjunction with state policy. Ark. Code Ann. §§ 28-65-105, 28-65-201, and 28-65-203. Naturally, the courts may look to a parent's testamentary designation of a guardian for their children because a fit parent is given a presumption that he or she is acting in a child's best interests. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("[N]atural bonds of affection lead parents to act in the best interests of their children."). However, even if the testamentary designation

includes a desire that the appointed guardian also adopt the child, that designated guardian, like any person desiring to *adopt* a child in the State of Arkansas, must submit to the statutory adoption scheme by which all adoptions are governed. *Swaffar v. Swaffar*, 309 Ark. 73, 78, 827 S.W.2d 140, 143 (1992). The court's authority in matters relating to adoption is limited to the authority set forth by statute. The court will not grant a petition for the adoption of a minor, even by a person designated by natural parents, without the petitioner having first submitted himself to a child welfare agency's review of suitability as an adoptive parent for the child, through the completion of a home study and successful fulfillment of all other licensing requirements. Ark. Code Ann. § 9-9-212.

Plaintiffs admit they have no reason to believe that the individuals they have named as guardians in their respective wills would not in fact be appointed as guardians of their children. Since Act 1 does not affect the guardianship of minors, Plaintiffs have no basis for their contention that Act 1 interferes with their ability to plan for their children's future or to designate people of their choosing to care for their children. Insofar as the physical care and legal custody of their children by specific individuals is concerned, Act 1 in no way precludes Plaintiffs from making the testamentary guardianship designations of their choosing. Act 1 plainly does not prevent the testamentary designation of an individual cohabiting with a sexual partner outside of a marriage which is valid under the constitution and laws of the state of Arkansas as the legal guardian of a minor child. Ark. Code Ann. § 9-8-305.

Plaintiffs argue that Act 1's exclusion of guardianships entirely discredits any child welfare justification offered by the defense in this case. (Pls.' Opp. Mem. 53-55.) Contrary to Plaintiffs' assertion, there is a rational basis for the exclusion of guardianships from the Act. While guardianship placement decisions might initially be made more quickly than adoptive

placement decisions, guardianships entail much more long-term judicial oversight than Plaintiffs imply. With guardianship the state retains a swift and immediate remedy for the removal of a child whose welfare becomes compromised by the placement. In contrast to adoption, the state retains the ability to remove a child from a guardianship placement without facing the imposing hurdle of terminating parental rights. (*See* FCAC Resp. MSJ Ex. 2, Choate Dep. at 97:13-98:3.) Furthermore, in addition to the statutory safeguard of annual accountability, the courts may craft individual guardianships to require additional reporting in appreciation of the heightened risks associated with placing a child in a cohabiting environment. Guardianships allow for the placement of children with individuals with whom they already developed a bond without going so far as to create a formal parent-child relationship. In contrast, foster-parent placements often become adoptive placements, and are intended to at the very least model and often serve as a substitute for the parent-child relationship. The state is not required to promote the modeling or creation of parent-child relationships in environments which are less likely to promote responsible parenting. By allowing guardianship exceptions to cohabiting placements, the state strikes a balance between satisfying parental designations of caregivers and the state's interest in the well-being of the child. (*See* Intervenors' Resp. to Pls.' Mot. for Summ. J. § IV.)

Once again, no fundamental right is implicated and Act 1 is subject only to rational basis review. Insofar as the Parent-Plaintiffs have the right to "have their wishes about the future well-being of their children given the proper weight and consideration" by an Arkansas court upon their death or incapacity, Act 1 does not prevent the appointment of an individual cohabiting in a sexual relationship outside of marriage as guardian of a minor child. (Pls.' Opp. Mem. 40.) Act 1 does not, as Plaintiffs' assert, "require[] Arkansas courts to ignore their parental judgment." (*Id.*)

E. The right to "form and maintain intimate relationships" is not infringed by Act 1, and has never been interpreted as a fundamental right to cohabit with a sexual partner

Act 1 does not burden Plaintiffs' rights to engage in private, consensual, non-commercial acts of sexual intimacy. Unlike the statutes in *Jegley* and *Lawrence*, Act 1 does not proscribe any sexual conduct, much less make anyone's private sexual conduct a crime. Plaintiffs maintain that *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), invalidating criminal sodomy statutes, should be extended to require the placement of children in cohabiting environments. Because *Lawrence* and *Jegley* only invalidated statutes criminalizing acts of private, sexual intimacy between consenting adults, it cannot be employed to invalidate a statute which is neither criminal, nor proscribes private sexual intimacy between two adults. The right recognized in *Jegley* and *Lawrence* is narrow and cannot be read so broadly as to prevent Arkansas from making child placement decisions based on the legal commitment between the adults living in a prospective adoptive home. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § IV(B).)

The state is not obligated to place children in environments where adults are cohabiting in a sexual relationship unanchored by the accountability marriage provides, because any fundamental right the Plaintiffs might claim in their freedom to form and maintain intimate relationship is secondary to, or must at least be balanced against, a child's interest in being placed in the safest and most stable home available. While Plaintiffs have cataloged a number of "benefits and privileges" which they argue cannot be conditioned by law on the cessation of activity in which an individual may claim a "fundamental right," the competing human interests of a child cannot be compared to tax exemptions, medical benefits, or eligibility for government employment. (*See* Pls.' Opp. Mem. 46.) Adopting a child cannot be compared to receiving unemployment benefits: children are not commodities. *See Coyote Pub., Inc. v. Miller*, --- F.3d -

--, 2010 WL 816936, at *6 (9th Cir. Mar. 11, 2010) (citations omitted) ("The Thirteenth Amendment to the U.S. Constitution enshrines the principle that people may not be bought and sold as commodities. Payment for consent to adoption of a child is widely prohibited.") With adoption, a court must consider whether the best interests of the child will be served, while in granting property interests a court will not consider whether "medical benefits" own any competing interests or rights. Therefore, even if a state may not condition property tax exemptions on the taking of an oath because it would violate the fundamental right to free speech, the state may condition the *adoption of a child* on meeting legislatively enacted eligibility requirements because every adoption decision must be made with one standard in mind: the best interest of a child. *Smith v. Thomas,* 373 Ark. 427, 433, 284 S.W.3d 476, 480 (2008) ("[I]n both custody and guardianship situations, the child's best interest is of paramount consideration, and the statutory natural-parent preference is one factor. However, that preference is ultimately subservient to what is in the best interest of the child."); *Blunt v. Cartwright,* 342 Ark. 662, 669, 30 S.W.3d 737, 741 (2000) ("Indeed, any inclination to appoint a parent or relative must be subservient to the principle that the child's interest is of paramount consideration."). Plaintiffs cannot prevail in arguing that the best interest of the child must be subservient to their fundamental right to engage in private, consensual, non-commercial acts of sexual intimacy.

Ultimately, Plaintiffs misinterpret the right of two adults to engage in consensual acts of sexual intimacy as involving the right of those individuals to foster or adopt a child without any thought being given, or weight afforded, to the consequences associated with their choice of intimate relationships, or the effect that choice might have on the child entrusted to their care. Neither *Jegley* nor *Lawrence* extends any such right. The Plaintiffs are free to maintain their

intimate relationships, but cannot demand that the state not take into account the heightened risks associated with those relationships when making placement decisions for children in state care. Agency placement decisions involving the welfare of children cannot be equated to agency decisions concerning social security benefits.

Finally, Plaintiffs' argument that Act 1 places a special burden on homosexuals because persons cohabiting in a same-sex relationship cannot marry under Arkansas law must fail because Act 1 applies equally to individuals cohabiting with a person of the opposite or same sex. Plaintiffs cannot prevail because it is the Arkansas marriage laws, not Act 1, which prevent persons of the same sex from marrying. *See* Ark. Code Ann. § 9-11-107(b) (codifying Act 144 of 1997, § 2); Ark. Code Ann. § 9-11-109 (codifying Act 144 of 1997, § 1); Ark. Const. amend. 83, §§ 1-2. Plaintiffs, however, have failed to challenge the constitutionality of the Arkansas marriage laws, and therefore have failed to state a claim upon which relief can be granted. Furthermore, the allegation that "where a state limits marriage to heterosexual couples *and then conditions a privilege on being married*, it cannot be said that this is not discrimination on the basis of sexual orientation" does not advance Plaintiffs' case. (Pls.' Opp. Mem. 50.) If Plaintiffs wish to dispute the constitutionality of statutes granting benefits to individuals based on their marital status, they should at least chose one which does so. Even if the State was conditioning a benefit on marital status, it would not be the first time a state had done so. The courts have long recognized the states' legitimate interest in promoting marriage: "Marriage is an important institution that is fundamental to our very existence and survival." *Hatcher v. Hatcher*, 265 Ark. 681, 697, 580 S.W.2d 475, 483 (1979) (Fogleman, J., concurring in part and dissenting in part) (citing *Loving v. Virginia*, 388 U.S. 1 (1967); and *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)). "It is difficult to imagine a State purpose more important and

legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children." *Goodridge v. Dep't of Public Health*, 440 Mass. 309, 385, 798 N.E.2d 941, 997 (2003).

Plaintiffs are free to choose whether or not to comply with the wide range of requirements essential to becoming an adoptive parent. Act 1 does not prevent any individuals from maintaining their current living arrangements, nor their sexual relationships. But those same individuals cannot claim an imaginary fundamental right prevents the State from putting in place safeguards rationally related to securing the best available homes for children in need of foster care and adoption, because the fundamental right to maintain intimate relationships simply does not spawn a fundamental right to cohabit.

III. ACT 1 IS RATIONALLY RELATED TO LEGITIMATE GOVERNMENT INTERESTS

The voters of Arkansas have a constitutional right to enact legislation which serves the best interests of children in need of adoption or foster care. *Roberts v. Priest*, 334 Ark. 503, 510, 975 S.W.2d 850, 852 (1998). "[A]n Initiated Act, as regards constitutionality, is to be determined just as though it were an Act of the Legislature, because in adopting an Initiated Act the People become the Legislature, and must legislate within constitutional limits." *Jeffery v. Trevathan*, 215 Ark. 311, 319, 220 S.W.2d 412, 416 (1949). Since no fundamental right or suspect class is implicated by Act 1, rational basis review applies. *Regan*, 461 U.S. at 547; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 311-12 (1976).

It is not the role of the Court to discover the actual basis for the legislation but "merely to consider 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 purpose and void of any hint of deliberate and lawful purpose."

Hamilton v. Hamilton, 317 Ark. 572, 576, 879 S.W.2d 416, 418 (1994) (citations omitted). Plaintiffs alone carry the burden of proving that Act 1 is not rationally related to achieving *any* legitimate objective of state government under any reasonably conceivable state of facts. *Id.* Legislative classifications are not subject to a trial just because the opponents disagree over the policy or whether there are better means to effectuate the policy.

Act 1 passes rational basis review without resort to empirical data because Arkansas voters could consult their own experiences, observations, and knowledge to reasonably conclude that cohabiting households are less stable and less safe for children. Nonetheless, Act 1 is also firmly justified by a large body of scientific literature and research. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss §§ IV(B), (C) and (D).) Despite the filing of Plaintiffs' lengthy 73-page brief in opposition, along with 2 appendices and over 1000 pages of exhibits, it remains undisputed that married and single parent homes are on average safer than cohabiting homes. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § IV(B)(1).) It is undisputed that marriage, when compared to cohabitation, is associated with better relationship quality, higher levels of commitment, lower dissolution rates, and more social and economic support, all of which are predictive of relationship stability. It is undisputed that relationship stability is associated with positive child development and well-being. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § IV(B)(2)(a).) It also remains undisputed that cohabitation is correlated with higher levels of depression, higher levels of substance abuse, higher rates of domestic violence, and higher rates of sexual infidelity. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § IV(B)(2)(b).)

Plaintiffs do not dispute that average child outcomes are higher among married parent families than some other family structures, including cohabiting parent families. (See Pls.' Opp. Mem. App. A at 14 ¶ 31.) Plaintiffs also do not dispute that married people are more committed to their relationship than people in cohabiting relationship, whether heterosexual or homosexual. (See Pls.' Opp. Mem. App. A at 9 ¶ 20.) Plaintiffs recognize that married families on average have more economic resources than cohabiting families. (See *id.* at 9 ¶ 21.) Plaintiffs also do not dispute that married couples have lower rates of depressive distress than cohabiting couples. (See *id.* at 11 ¶ 26.) Furthermore, Plaintiffs agree that the rate of partner domestic violence is higher for cohabiting couples than for married couples. (*See id.* at 11-12 ¶ 27.) These five undisputed facts alone are sufficient to further undergird the rational basis for precluding the placement of children in cohabiting environments, especially where such children have already been exposed to abuse and neglect or, at the very least, great loss.

While Plaintiffs do not refute that, on average, children have better outcomes in married homes than they do in cohabiting environments, Plaintiffs argue there can be no child welfare purpose in prohibiting the placement of children in foster and adoptive cohabiting environments, while allowing such guardianship placements. (Pls.' Opp. Mem. 52.) Plaintiffs ignore the logic and overall effect of Act 1, that even with guardian placements, Act 1 still certainly minimizes the risk associated with placing children in cohabiting environments.

It does so without shutting out all cohabiting placements by the courts in unique situations, for example, where a special relationship exists between the child and caregiver. This is almost universally not the case where a child is placed in foster or adoptive care through agencies because the parties are strangers. For parental preferences, pre-established relationships, and relative placements, an allowance for court-appointed guardianship is made

because the risk is deemed lower where the relationship is extended family, historical, pursuant to a fit biological parent's recommendation. As Plaintiffs themselves have insisted, guardianship differs from foster care or adoption in important ways, and therefore can serve a unique role in providing care for children whose parents are unable or unwilling to care for them. Far from being inferior, DHS employees testified that guardianship was considered a permanency placement and the best placements for certain children. (FCAC MSJ Ex. 13, Blucker Dep. at 83:8-18, 84:8-14, 93:14-24, 95:15-19; FCAC MSJ Ex. 15, Davis Dep. at 120:18-121:16, 143:20-146:11, 355:15-21.)

And the guardianship exclusion allows the state to address unique situations, without creating and promoting parent-child relationships in cohabiting environments. Guardianships do not create formal parent-child relationships where foster and adoptive placements do. Thus, the guardianship exception to cohabiting placements does not undermine the State's interest in creating and promoting parent-child relationships within marriage where the child is more likely to experience and learn responsible parenting. As a regulator and a teacher, Act 1 promotes parenting within marriage to maximize responsible parenting, while accommodating special relationships and exigencies through guardianships.

Finally, as explained in Intervenors' opening brief, by allowing guardianship exceptions to cohabiting placements, Act 1 strikes a balance between satisfying parental designations of caregivers and the state's interest in the well-being of the child. (Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § II(B).) Guardianship is unique in that it remains under the oversight of the courts and can be terminated much more quickly than parental rights could be in the case of adoption, should the State have reason to step in for the welfare of a child placed in a cohabiting environment. In any event, that Act 1 allows an exception for

guardianships does not invalidate it as irrational because the act as a whole minimizes the risk to children while also allowing some leeway in unique circumstances.

Relying on their appendix entitled "Plaintiffs' Response to Intervenors' Statement of Materials Facts," Plaintiffs try to create the appearance of a disputed fact by repeating the unsubstantiated claim that the research provided by each of the experts in this case (including their own) is not applicable to homosexual couples and that, therefore, Act 1 is irrational with respect to same-sex cohabitors wishing to foster or adopt. (*See e.g.* Pls.' Opp. Mem. App. A at 6-8 ¶¶ 17-19, and 11-15 ¶¶ 26-34.) Plaintiffs do not have the burden to prove that the research on cohabitants include same-sex couples or any other articulated subgroup of cohabitants because it is not material. Plaintiffs cannot demand that legislatures undertake the impractical burden of identifying all conceivable subgroups of and the subtle differences that might distinguish them from the broader regulated class. Classes are necessarily under and over inclusive in all legislation because mathematical precision in regulation is not only exceedingly impractical, it is impossible.

Even if the question of whether the social science research somehow *excludes* homosexual couples were a material issue of fact (it is not), the Plaintiffs would have the burden to demonstrate that all homosexual couples "rise above," or at least overcome, the negative relationship indicators associated with cohabitation among other cohabitants and the negative outcomes associated with children raised in other cohabiting environments, and that they are equivalent to married persons with respect to the state's interests. Simply stating again and again that cohabitants are a "heterogeneous group" does not provide the court with the invisible data on which to rely for the extreme and unsubstantiated proposition that same-sex cohabitants are, on average, equivalent to married families when it comes to raising children. The Plaintiffs have

not presented any evidence that same-sex cohabiting couples who are interested in adopting children are on average, equivalent. In fact, the opposite is undisputable.

Even if comparing an excluded subgroup to the included group were relevant to constitutional review (which it is not), the studies relied on by Plaintiffs' experts are undisputedly legislative facts demonstrating that homosexual individuals have elevated rates of psychological disorders,[6] substance abuse,[7] and infidelity,[8] and that homosexual couples have

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[6] (FCAC Reply MSJ Ex. 1, Cochran Expert Report, Ex. B; S.D. Cochran, V.M. Mays, M. Alegria, A. Ortega, D. Takeuchi, *Mental Health and Substance Use Disorders Among Latino and Asian American Lesbian, Gay, and Bisexual Adults*, 75 Journal of Consulting and Clinical Psychology 785-794 (2007).)

> "Thus our findings suggest two broad conclusions. First, like previous surveys of the general population have demonstrated, minority sexual orientation appears to be a risk indicator for some small elevation in mental health and substance use morbidity, especially among women, within Latinos and Asian Americans. Recent histories of suicide attempts also appear elevated." (*Id.* at 790.)

(FCAC Reply MSJ Ex. 2, Cochran Expert Report, Ex. B; S.D. Cochran, J.G. Sullivan, V.M. Mays, *Prevalence of Psychiatric Disorders, Psychological Distress, and Treatment Use Among Lesbian, Gay and Bisexual Individuals in a Sample of the U.S. Population,* 71 Journal of Consulting and Clinical Psychology 53-61 (2003).)

> "In the present work, sexual orientation was measured explicitly, and our findings demonstrate that minority status sexual orientation is associated with somewhat higher rates of mental health morbidity, including comorbidity, and use of mental health services. Although approximately 58% (*SE* = 6.6%) of lesbian, gay, and bisexual individuals studied did not evidence any of the five disorders assessed in the MIDUS, in the group as a whole, we did observe higher prevalences on all of the mood, anxiety, and substance use disorders measured when they were compared with heterosexuals of the same gender. Among men, these differences were most extreme for major depression and panic disorder, whereas among women the difference was more extreme for generalized anxiety disorder. Among men also, we observed higher rates of current psychological distress in those who were gay or bisexual compared with heterosexual men." (*Id.* at 58.)

[7] (FCAC Reply MSJ Ex. 3, Cochran Expert Report, Ex. B; S.B. Burgard, S.D. Cochran, V.M. Mays, *Alcohol and Tobacco Use Patterns Among Heterosexually and Homosexually Experienced California Women*, 77 Drug and Alcohol Dependence 61-70 (2005).)

> Abstract: "Results: Overall, homosexually experienced women are more likely than exclusively heterosexually experienced women to currently smoke and to evidence higher levels of alcohol consumption, both in frequency and quantity." (*Id.* at 61.)

higher dissolution rates.[9] (*See* Intervenors' Resp. to Pls.' Mot. for Summ. J. § I(D).) For example, Dr. Cochran's most recent study entitled *Burden of Psychiatric Morbidity Among Lesbian, Gay, and Bisexual Individuals in the California Quality of Life Survey*, states that: "Our findings, using measures of both identity and adult sexual behavior, confirm that minority sexual orientation, broadly defined, is associated with an elevated risk for common affective, anxiety, and substance use disorders for some members of this subpopulation. . . . In conclusion, after measuring sexual orientation with greater precision than the majority of previous studies and with more statistical power, we find confirming evidence that minority sexual orientation is, in fact, a risk indicator for psychiatric morbidity of similar import as other major demographic status characteristics." (FCAC Reply MSJ Ex. 5, Cochran Expert Report, Ex. A; S.D. Cochran & V.M. Mays, *Burden of Psychiatric Morbidity Among Lesbian, Gay, and Bisexual Individuals in the California Quality of Life Survey*, 118 Journal of Abnormal Psychology 647, 654-655 (2009).)

Dr. Peplau reports that married heterosexual couples "perceive more barriers" to ending the relationship than do gay, lesbian or cohabiting heterosexual couples. (FCAC Reply MSJ Ex. 6, L.A. Peplau & A.W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 Annual Review of Psychology 405, 412 (2007).) She also notes that little is known about the longevity of same-sex relationships because there exist no comparable "divorce" statistics to those which are available for heterosexual married couples. "Longitudinal studies provide further clues about

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[8] (FCAC Reply MSJ Ex. 4, Peplau Expert Report, Ex. A; L.A. Peplau, S.D. Cochran & V.M. Mays, *A National Survey of the Intimate Relationships of African-American Lesbians and Gay Men: A Look at Commitment, Satisfaction, Sexual Behavior and HIV Disease*, Ethnic and Cultural Diversity Among Lesbians and Gay Men 11, 29 (B. Greene ed., Newbury Park: Sage Publications) (1997).)

[9] (*See* 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).)

relationship stability. In a five-year prospective study, Kurdek (1998) reported a breakup rate of 7% for married heterosexual couples, 14% for cohabiting gay male couples, and 16% for cohabiting lesbian couples. Controlling for demographic variables, cohabiting gay and lesbian couples were significantly more likely than were married heterosexuals to break up (see also Kurdek 2004)." (*Id.*, Peplau & Fingerhut, *The Close Relationships Of Lesbians And Gay Men*, at 412.)

In addition, 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." (FCAC MSJ Ex. 20, Lamb Dep. 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).). The Defendants do not have the burden to prove that this or any other subgroup of cohabitants may present higher risks to children when it has met its burden on the broad class of cohabitants. But the Plaintiffs' experts have undisputedly provided the above legislative facts that would justify such an exclusion had the act done so specifically.

Ultimately, because they cannot dispute the material facts regarding the "disparities in average outcomes" of cohabiting couples versus married couples, Plaintiffs attempt to minimize the difference by calling what are admittedly "statistically significant" differences "extremely small." (*See* Pls.' Opp. Mem. App. A at 9 ¶¶ 20, 30.) Plaintiffs argue that these statistical

differences cannot justify the "blanket exclusion of all cohabiting couples." But Arkansas need not minimize statistical differences in the area of child welfare when the State is entrusted with the crucial role of placing vulnerable children in temporary (foster) or permanent (adoptive) homes. Furthermore, it is undeniable that legislatures may rely on just such statistical data in passing numerous other state and federal laws. Examples abound just in the area of convicted felons and the restrictions society places on them following their release from confinement: whether it be the restrictions on firearm ownership for felons convicted of armed robbery, or the restrictions placed on sex offenders from residing within a given parameter from public schools, all such restrictions may be based on statistical probabilities. The state does not have to prove that each and every sex offender will offend again: it is sufficient that the statistics prove that, on average, there is a heightened risk of recidivism.[10]

Plaintiffs incorrectly assert that because the available social science looks at children in intact biological parent families, and not foster or adoptive families, it cannot serve as a rational basis because foster and adoptive children will not be placed with intact biological parents. (Pls.' Opp. Mem. 60.) Plaintiffs err by requiring an exact comparison to the basis for Act 1, which is plainly not necessary when passing legislation. Plaintiffs' argument fails because as the party with the burden of proof, they offer no evidence that children specifically placed for foster or adoption with unrelated cohabitants will fare as well as if placed with unrelated married parents. Plaintiffs further compound their error by stating the question in this case is whether children are better off being placed in a cohabiting environment or remaining in and aging out of

[10] Plaintiffs' argument that it is irrational to categorically ban all cohabitors based on statistical averages about negative behavior and characteristics "when DHS and CWARB routinely assess the suitability of all applicants, even those who have committed crimes," (Pls.' Opp. Mem. 64) misrepresents the facts. The state legislature has disallowed certification of adoptive and foster homes where the applicant has committed certain unappealable crimes. *See* Ark. Code Ann. §§ 9-28-409 (e)-(h).

the State's system. This is plainly wrong because on constitutional review, the statutory classifications -- placements in married versus unmarried cohabiting environments -- must be compared. Plaintiffs' additional argument that Act 1 is unconstitutional because an individualized assessment process could identify more stable cohabiting environments again ignores the burden of proof when challenging legislation. (Pls.' Opp. Mem. 62.) Aside from the State's rational decision to invest its efforts in placements in marital home environments that are on average more stable, Plaintiffs have not and could not present evidence to meet their burden of proof that an individualized screening process would be foolproof in identifying cohabiting environments that are on par with married families to eliminate that risk which the State need not undertake.[11]

Plaintiffs also seek to cast aside the significance of the instability and negative outcomes associated with cohabitation by arguing that correlation cannot be equated with causation. (Pls.' Opp. Mem. 63, and App. A at 14 ¶ 31.) Again, policy decisions are frequently based on statistical correlations. Legislative rationality is not lost because a classification is based upon averages or generalities. Under rational-basis review, "[e]ven if the classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn . . . imperfect, it is nevertheless the rule that . . . perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (citations omitted). Legislatures are permitted to use generalizations so long as "the question is at least debatable." *Heller v. Doe by Doe*, 509 U.S. 312, 326 (1993). The State

[11] Plaintiffs also introduce a host of classifications that are not regulated by Act 1 which purportedly could have a negative impact on child welfare. (Pls.' Opp. Mem. 61.) But Arkansas didn't vote to regulate any of the groups they mentioned such as males having a higher propensity to drug abuse, certain ethnic and racial drug abuse rates, and persons with lower levels of education. Even if Plaintiffs' assertions are true, because Arkansas has addressed one source of risk for children, does not mean it must, or can in case of sex and racial classifications, address all others in the same legislation, or even at all. It isn't irrational to target one problem just because all problems are not addressed.

does not bear the burden of proving that *all* cohabiting homes are unstable and unsafe for children for Act 1 to survive rational basis review. The burden remains on Plaintiffs to prove that Act 1 is not rationally related to achieving *any* legitimate objective of state government under any reasonably conceivable state of facts. *Hamilton*, 317 Ark. at 576, 879 S.W.2d at 418. Act 1 is not irrational even if some married persons would do poorly raising children, while some cohabitants might do well. The finding that the increased instability of cohabiting homes versus other family structures is not a favorable environment for raising children is supported by both the common wisdom of Arkansans who rigorously debated the issue during the initiative campaign and the scientific literature. This finding is certainly more than debatable and should not be now subject to veto by trial.

Finally, Plaintiffs' attack on the promotion of marriage as an adequate rational basis in support of the constitutionality of Act 1 again misconstrues Intervenors' opening brief. Defendants are not, as Plaintiffs suggest, using Act 1 to promote marriage in a manner that has no child welfare purpose. (Pls.' Opp. Mem. 64 n.37.) Instead, Intervenors have explained that marriage not only legally commits parents to each other, but legally commits parents to children. Because of the legal bond of marriage, children are more likely to receive the benefits of a stable home environment where they are nurtured by both a mother and a father.

A living model of a father and a mother caring for their children is an important state interest by its own right: "Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." *Hernandez v. Robles,* 7 N.Y.3d 338, 359, 855 N.E.2d 1, 4, 821 N.Y.S.2d 770, 776 (2006). As models, a married man and woman demonstrate a full commitment to each other and their children and thus encourage responsible parenting in children who will likely one day become

parents themselves. "It is hard to conceive of an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society -- particularly when those future citizens are displaced children for whom the state is standing *in loco parentis*." *Lofton v. Sec'y Dep't of Children and Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004).

Because responsible parenting is most likely to be modeled in the context of marriage, Act 1's preclusion of state-created families who are not legally bound to one another is rationally related to a legitimate government interest. Simply stated, Act 1 is rationally related the State's interest in providing children with a set of parents who are most likely to provide them with a stable environment and to encourage them to commit to the people with whom they will one day form lifelong family ties, especially their own offspring and the person with whom they conceive their offspring.

IV. ACT 1 IS NOT UNCONSTITUTIONALLY VAGUE

Despite the fact that Plaintiffs employ the term cohabiting or its derivative dozens of times in their initial and amended complaints, several times in reference to their chosen lifestyle, Plaintiffs continue to insist that the word does not give "a person of ordinary intelligence" notice of who is categorically barred from fostering or adopting. (*See e.g.* FCAC MSJ Ex. 52, Third Am. Compl. ¶¶ 91, 107.) Amending their complaint over a year after it was initially filed to assert a vagueness claim against the language of the act they are challenging simply reveals the desperate state in which Plaintiffs find themselves.

Plaintiffs' argument that Act 1 is unconstitutionally vague fails because the Act does *not* "leave judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis." (*See* Pls.' Opp. Mem. at 68; incorrectly substituting the word "judges" with "officials" in citing *Ratliff v. Ark. Dep't of Human Servs.*, 104 Ark. App. 355, 362,

292 S.W.3d 870, 876-77 (2009).) The guidelines which Plaintiffs claim are erroneously omitted from the Act already exist in the law: in cases from the highest court of this state, as well as in the pervasive and continuous use of the term in state statutes. "Flexibility and reasonable breadth in a statute, rather than meticulous specificity or great exactitude, are permissible so long as the statute's reach is clearly delineated in words of common understanding. Impossible standards of specificity are not required, and a statute meets constitutional muster if the language used conveys sufficient warning when measured by common understanding and practice. It is not necessary that all kinds of conduct falling within the reach of the statute be particularized. Statutes are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute." *Ratliff*, 104 Ark App. at 363, 292 S.W.3d at 877.

The Intervenors have already explained that because Arkansas common law and statutes provide a clear definition of "cohabitating," Act 1 is not void for vagueness. (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § V(A)(1).) *See e.g. Turney v. State*, 60 Ark. 259, 29 S.W. 893 (1895); *Sullivan v. State*, 32 Ark. 187 (1877); *Lyerly v. State*, 36 Ark. 39 (1880); *Taylor v. State*, 36 Ark. 84 (1880); *Bush v. State*, 37 Ark. 215 (1881); *McNeely v. State*, 84 Ark. 484, 106 S.W. 674 (1907); *Wilson v. State*, 178 Ark. 1200, 13 S.W.2d 24, 25 (1929); *Poland v. State*, 232 Ark. 669, 670, 339 S.W.2d 421, 422 (1960); *see also* Ark. Code Ann. § 16-43-901; Ark. Code Ann. § 9-12-306; Ark. Code Ann. § 9-12-301; Ark. Code Ann. § 9-11-810; Ark. Code Ann. § 9-4-102. The Intervenors also have submitted that other jurisdictions have rejected vagueness challenges to the term "cohabiting." (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § V(A)(2).) *See e.g. People v. Ballard*, 203 Cal. App. 3d 311, 249 Cal. Rptr. 806 (1988); *In re Marriage of Tower*, 55 Wash. App. 697, 703, 780 P.2d 863, 867 (1989); *State v. Green*, 99 P.3d 820, 831-32 (Utah 2004).

In addition, the term "sexual partner" is not constitutionally vague because "it has a plain and ordinary meaning that [can] be readily understood by reference to a dictionary." *Rolling Pines Ltd. P'ship v. City of Little Rock*, 73 Ark. App. 97, 106, 40 S.W.3d 828, 835 (2001). (*See* Mem. of Law in Supp. of Intervenors' Mot. for Summ. J. & Mot. to Dismiss § V(B).) For example, in *Turner v. State*, 355 Ark. 541, 543-44, 141 S.W.3d 352, 354 (2004), the Arkansas Supreme Court explained that the victim "told police that she had lied about Turner being her first sexual partner, and she explained that she previously had sex with a boyfriend from Little Rock before she met Turner." *See also Weaver v. State*, 56 Ark. App. 104, 108, 939 S.W.2d 316, 318 (1997) ("[t]he number of sexual partners of the victim would only be relevant if appellant could show that one or more had HIV and that the victim was exposed to it through them or that the victim knew they had HIV and disregarded the dangers associated with having sexual intercourse with them"); *Smith v. State*, 354 Ark. 226, 237, 118 S.W.3d 542, 548 (2003) (holding that "[t]he legislature could have rationally concluded that persons such as appellant should not use their positions as school and school-district employees to find and cultivate their underage sexual partners"); and *Holmes v. Holmes*, 98 Ark. App. 341, 349, 255 S.W.3d 482, 488 (2007) ("[T]he instant record shows that appellant had six different sexual partners in a four-and-a-half year period.").

Both the term "cohabiting" and "sexual partner" have reasonably ascertainable meanings that are routinely employed by Arkansas courts and statutes. Plaintiffs' assertion that Act 1 will be arbitrarily applied because DHS has yet to promulgate regulations "to delineate what these terms mean" does not support the proposition that the terms are themselves void for vagueness. (Pls.' Opp. Mem. 67.) The fact that a government entity is charged with implementing policies enacted by the legislature, and that doing so might or might not involve promulgating definitions

of terms to adequately fulfill the purpose of the legislation, and further that the agency might drag its feet in accomplishing that task, does not mean that the legislation itself is unconstitutionally vague. Act 1's use of the terms "cohabiting" and "sexual partner" is sufficiently definite to defeat the Plaintiffs' claims of void for vagueness.

CONCLUSION

While Plaintiffs have a political disagreement with Act 1, they cannot dispute the material facts supporting the people of Arkansas' legitimate exercise of their legislative power to protect the welfare of children in need of adoption or foster care. Because no fundamental right or suspect class is implicated by the Act, rational basis review applies. The categorical exclusion of cohabiting individuals is rationally related to the state's interest in promoting marriage, which provides the optimal environment for modeling responsible parenting and commitment to family, and affirms the longstanding State policy that the interests of children are best served by preferring placement of children with parents who are not cohabiting. Most importantly, Act 1 is rationally related to the state's interest in protecting adoptive and foster children from further harm by placing them in the safest, most stable households.

For the foregoing reasons, Intervenors respectfully request that their motion be granted, that the Court rule, as a matter of law, that Act 1 does not violate the Due Process or Equal Protection provisions of the Arkansas or United States Constitutions, and that the Plaintiffs' claims be dismissed and their motion denied.

Respectfully submitted this the 15th day of March, 2010.

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