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).)