STATEMENT OF THE CASE

This matter began when Appellees attempted to become foster parents and found the Child Welfare Agency Review Board ("CWARB") had passed a regulation stating that people who had engaged in same-sex conduct within the previous six months were not eligible to become foster parents. They filed their original Complaint in the Pulaski County Circuit Court on April 6, 1999. (R. 1, Add. 1) Various pre-trial hearings were held on December 5, 2000; February 21, 2001; November 8, 2002; and January 21, 2003. (SR. 5)

A bench trial was held beginning on March 23, 2004 , which concluded December 20, 2004. (R. 1831, 2619) The Court rendered its decision on December 29, 2004, finding that while the proposed regulation did not violate Plaintiffs' right to privacy or the Equal Protection clause of the Arkansas or United States Constitution, the Child Welfare Agency Review Board exceeded its legislative authority as set out in Ark. Code. Ann § 9-28-405. (R. 1788, Add. 863) As such, the regulation was deem unconstitutional.

Appellants timely filed their Notice of Appeal on January 3, 2005. (R. 1822, Add. 897) and Appellees cross appealed on January 18, 2005. (R. 1824, Add. 899) This appeal follows.

ARGUMENT

Standard of Review

The regulation at issue purports to inhibit homosexual conduct. As such, the trial court correctly concluded that the level of scrutiny is a rational basis. Likewise, this Court uses a "rational basis" standard of review when determining whether legislation is special or local and prohibited. *McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997); *Fayetteville Sch. Dist. No. 1 v. Arkansas State Bd. of Educ.*, 313 Ark. 1, 852 S.W.2d 122 (1993). All the constitutional arguments presented require the same analysis from this Court, a rational basis review.

When read on its face, it is clear that choosing to engage in the proscribed conduct does not put anyone into a protected class. When determining whether a classification is rationally related to a legitimate state purpose, this Court must answer: 1) whether the challenged legislation does have a legitimate purpose; and 2) whether it was reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose. 16B Am. Jur. 2d, *Constitutional Law* §§ 811 (1998).

THE TRIAL COURT ERRED WHEN IT MISAPPLIED THE RATIONAL BASIS STANDARD OF REVIEW AND HELD THAT THE REGULATION PASSED BY THE CWARB VIOLATED THE SEPARATION OF POWERS DOCTRINE.

The judgment entered by the trial court on December 29, 2004 stated that the Arkansas General Assembly delegated the CWARB the authority to promulgate rules and regulations that promoted the health, safety, and welfare of children. The Court then declared that the regulation contained in Section 200.3.2 of the Minimum Licensing Standards did not promote one of those three things and as such violated the Separation of Powers Doctrine. (R. 1788, Add. 863)

Respectfully, the trial court erred. Indeed, the Child Welfare Agency Review Board ("CWARB") is charged with promulgating rules regarding licensing and operation of child welfare agencies. Ark. Code Ann. § 9-28-405 (a). And as the trial court stated, those rules and regulations must promote the health, safety, and welfare of the children in the care of a child welfare agency. The rules and regulations must also ensure adequate supervision and promote safe and healthy facilities, among other things. Ark. Code Ann. § 9-28-405 (c). In carrying out those duties, the CWARB enacted section 200.3 (2) of the Minimum Licensing Standards for Child Welfare Agencies ("MLSCWA") which reads:

> No person may serve as a foster parent if any adult member of that person's household is a homosexual. Homosexual, for purposes of this rule, shall mean any person who voluntarily and knowingly engages in or submits to any sexual contact involving the genitals of one person and the mouth of anus of another person of the same gender, who has engaged in such activity after the foster home is approved or at that point in time that is reasonably close in time to the filing of the application to be a foster parent.

MLSCWA 200.3(2) Likewise, to qualify as a foster parent, the stability of the foster family must be evaluated and determined to be appropriate. MLSCWA 200.3(3).

This question requires statutory interpretation. The basic rule of statutory construction is to give effect to the intent of the legislature. *Rose v. Arkansas State Plant Bd.*, ___ Ark. ___, ___ S.W.3d ___ (Sept. 22, 2005). Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. *Id.* In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Id.* We construe the statute so that no word is left void, superfluous, or insignificant, and we give meaning and effect to every word in the statute, if possible. *Id.* Also, when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion to resort to rules of statutory

interpretation. *Burnette v. State,* 354 Ark. 584, 127 S.W.3d 479 (2003). Here, the legislation codified at Ark. Code Ann. § 9-28-405 does not contain any ambiguous words or terms of art. As to the regulation, the definition of 'homosexual' is clear. With regards to this regulation, it is not having a certain sexual orientation that is prohibited. Rather, it is the behavior of same sex conduct within a certain time frame that disqualifies certain applicants. (R. 2271, AB. 249) The distinction is between homosexual orientation versus homosexual activity.

However, the trial court found that the CWARB has exceeded its authority by passing a regulation having to do with morality as opposed to health, safety, or welfare. (R. 1788, Add. 863) As the trial court correctly noted, it is well within the discretion of Arkansas General Assembly to pass laws legislating morality and the trial court was correct when it acknowledged that there is a legitimate public interest in legislating morality. (R. 1796, Add. 871) The error occurred when the trial court incorrectly decided that subjecting children to additional and unnecessary stress by placing them with sexually active homosexuals is not parallel to a rule regarding health or welfare. The CWARB's position has always been that prohibiting practicing homosexuals from being foster parents is in the best interest of the health and welfare of the children in the State's foster care system. The common definition of welfare is health, happiness, and good fortune; well being. THE AMERICAN HERITAGE COLLEGE DICTIONARY, 3rd Ed. p. 1531. As such, when the CWARB implemented the regulation, they were promoting the health and welfare of the children in foster care.

It is interesting to note that the Eleventh Circuit *en banc*, stated:

> Moreover, post-legislation conduct, including the passage of regulation, by the executive agency that must find placements for parentless children, which may be at times inconsistent with the spirit, if not the letter of a legislative enactment, should not weigh heavily in the calculus of rational basis review.

Lofton v. Sec. of Dep't of Children, 337 F.3d 1275 (11th. Cir. *en banc* 2004). Additionally, this Court has consistently held that it is not in the business of second guessing the legislature. *Berry v. Gordon*, 237 Ark. 547, 376 S.W.2d 279 (1964). As part of a custody ruling, the Arkansas Court of Appeals affirmed a trial court which based its initial decision partially on the rationale that homosexually is generally unacceptable, that children could be exposed to ridicule and teasing by other children and that it was contrary to the trial court's sense of morality to expose children to a homosexual lifestyle, and that it was no more appropriate for a custodial parent to cohabit with a lover of the same sex than with a lover of the opposite sex. *Thigpen v. Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987). Currently, the State does not permit non-related cohabitating couple to be foster parents. Should the regulation at issue fall, any 'couple,' regardless of level of commitment, will be able to become foster parents provided all other screenings are passed.

Here, the applicants seeking to become foster parents invite the State to come into their home and assess the functionality, stability and safety of the home. When a child is brought into foster care, the State of Arkansas stands *in loco parentis*. Thus, the State's overriding interest must be doing what is in the best interest of the children in its care, not serving the interest of the foster parent applicant. The entire foster care system exists to protect children. The State has a duty of the highest order to protect the interest of minor children. *Palmore v. Sidot*, 466 U.S. 429 (1984). As stated in *Lofton v. Sec., Dep't of Child & Family*, 358 F.3d 804 (11th Cir. 2004):

> It is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its citizens to become productive participants in society—particularly when those future citizens are displaced children for whom the state is standing *in loco parentis*.

Lofton, at 819. While *Lofton* concerned adoption of children, it is certainly appropriate in foster care situations. Appellants submit that it is more appropriate in foster care situations, due to the fact that foster care is meant to be temporary.

When determining what is in a child's best interest, the State must consider the child's development and needs. It makes no sense to take a child who is already in a stressful situation, by way of neglect or abuse, being brought into foster care and put him into a home that is not in tune with society's moral compass, not stable due to the lack of a lawfully recognized union, and hinders socialization. It is in the best interest of Arkansas children who are in foster care to be placed with a foster family that will demonstrate appropriate role-modeling, have stability and is considered 'normal.' This protects not only the health of their spirit and minds, but also their welfare.

At the trial, the State reiterated various legitimate reasons for the regulation. Robin Woodruff, the former CWARB member who introduced the regulation testified that the reason she introduced the regulation was because she saw an absence of anything that would create stability. (R. 2232, Ab. 231) She knew that Arkansas had a small window of opportunity to impact the lives of children in foster care, who had likely come from abusive or neglectful homes, and Arkansas needed to give these children its best. (R. 2231-32, AB. 231) She testified that the CWARB had discussions as to what was defined by the term 'homosexual' and that they key element was they did not want to exclude people who were not practicing homosexuals at that particular point in time. (R. 2233, AB. 232)

Another reason Mrs. Woodruff proposed the regulation was because she was focused on the interests of the foster child, not of the person who might apply. (R. 2445, AB. 239) Though Plaintiffs may argue that Mrs. Woodruff and the rest of the CWARB was biased in

implementing the regulation, it is clear that the concern is for the children in the custody of the State of Arkansas. Mrs. Woodruff testified that there was scientific evidence on both sides of the issue regarding homosexual parenting but that she still believed in the regulation. (R. 2256, AB. 243)

James Balcom, a member of the CWARB testified that he agreed with Mrs. Woodruff regarding how the regulation was brought to life and passed. (R. 2266, AB. 248) He testified that there five meetings held across the State to allow people to comment of the proposed regulation. (R. 2267, AB. 248) There were minutes taken of all the meetings so that the board members could consider everything before casting their vote in favor of or against the proposed regulation. (R. 2267, AB. 248) In weighing the credibility of the studies presented to the CWARB for consideration, Mr. Balcom found them all invalid either due to sample size, the way the samples were selected and whether or not the study was longitudinal. (R. 2274, AB. 251) Mr. Balcom further testified that it was his deference to the community views presented to the CWARB that carried the most weight in casting his vote. (R. 2278, AB. 253) He also relied on his moral compass. (R. 2278, AB. 253)

Mr. Balcom also testified regarding alternative compliance. There is a provision in the regulations whereby the board may, at its discretion, have alternative compliance to its rules. (R. 2276, AB. 252) The CWARB has used and granted alternative compliance in the past, though no request has ever come for a homosexual foster parent. (R. 2290, AB. 258)

Finally, Dr. Rekers testified as an expert for the CWARB in developmental and clinical psychology for both children and adults with an emphasis on family studies. (R. 2341, 2343, AB. 264, 265) He acknowledged that the regulation at issue referred to homosexual behavior and not to sexual orientation. (R. 2345, AB. 265) He stated that children in foster care have

higher rates of emotional and other psychological disorders compared to children in the general population. (R. 2350, AB. 267) Examples included but were not limited to: 1) A review in 2000 concluded that the prevalence of psychological disorders in children entering foster care was from 29 to 96% from study to study (R. 2351, AB. 267); a 1986 study by McIntyre and Keesler reported that 50% of children in foster care had behavior problems (R. 2352, AB. 268); in 1987, Hochstadt reported that 59.6% of foster children in Chicago required treatment for emotional and/or behavioral problems in one month (R. 2352, AB. 268); Halfon reported that children on Med-Cal, in California in 1992, accounted for 41% of mental health services even though they represented less than 4% of Med-Cal eligible children (R. 2352, AB. 268); and a 1998 study by Clausen in San Diego where 61% of the sample foster children had mental health problems. (R. 2352, AB. 268)

Dr. Rekers went on to testify that children have embarrassment about being associated with homosexual parents and that children do not want to be different from other children. (R. 2357, AB. 268-69) He also stated that foster children living with homosexuals experience more stress. (R. 2358, 2361, AB. 270, 271)

Dr. Rekers also testified that placing children in homosexual foster homes could adversely affect reunification into the biological home because children who are experiencing more stress in foster care are more vulnerable to developing psychological disorders if they don't have them, or make it more difficult to recover and that would cause a higher risk of failure for reunification. (R. 2361, AB. 271) He also discussed studies regarding the cooperation between the biological and foster parent during visitation and said that it's possible the foster parents homosexuality may become a area of conflict between the biological and foster parent and be an obstacle to reunification. (R. 2362, 271. 272) He went on to say that the foster child already has

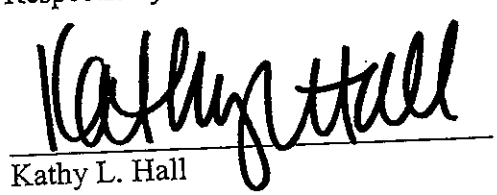
the stress of moving from their house, family, neighborhood, friends to a different neighborhood, family, friends, possibly different school, different parents and that then if their parent were to be a homosexual, then they would on top of that have the additional stress of the apparently these children have additional stress of lack of peer support, feeling apprehensive, fearful of reactions or put-downs from other children. (R. 2367, AB. 274) Dr. Rekers went on to say that it's unavoidable that the child is under the stress of being pulled from their home and put in a new setting, but what the State should be concerned about is adding avoidable stresses to the child for their own adjustment, emotional and psychological adjustment. (R. 2394, AB. 289)

It is easy to see that children in foster care are already undergoing tough changes and have extreme circumstances with which to deal. To exacerbate those not only does a disservice to the children, but to the population as a whole. In applying a rational basis, the trial court, respectfully, got hung up in semantics. Rather than acknowledging that the regulation does serve its legislative purpose, the trial court incorrectly relied on the absence of the word "moral" in Ark. Code. Ann. § 9-28-405. The testimony of the State's witnesses is absent of bias and demonstrates a legitimate purpose. Likewise, it was reasonable for the legislature and the CWARB to believe that use of the regulation promotes that purpose.

Conclusion

Because the State is charged with serving the best interest of the children in its care, and because it is in the best interest for children's health and welfare to be in a home where homosexual conduct is absent, the regulation should be upheld.

Respectfully submitted,



Kathy L. Hall

CERTIFICATE OF SERVICE

I, Kathy L. Hall, certify that a true and correct copy of the above Motion was mailed to the following this 17th day of November 2005 via USPS with adequate postage to ensure delivery:

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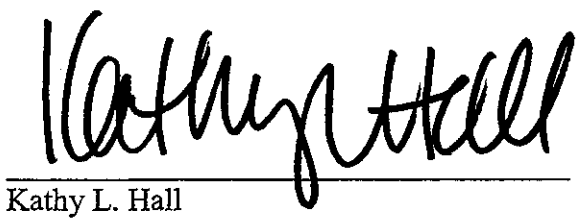

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