IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

CATHOLIC CHARITIES OF THE DIOCESE OF SPRINGFIELD-IN-ILLINOIS, an Illinois non-profit corporation, CATHOLIC CHARITIES OF THE DIOCESE OF PEORIA, an Illinois non-profit corporation, CATHOLIC CHARITIES OF THE DIOCESE OF JOLIET, INC., an Illinois non-profit corporation, and CATHOLIC SOCIAL SERVICES OF SOUTHERN ILLINOIS, DIOCESE OF BELLEVILLE, an Illinois non-profit corporation,	)	
Plaintiffs,	)	
	)	Case No. 11-MR-254
v.	)	
	)	Hon. John Schmidt
STATE OF ILLINOIS, LISA MADIGAN, in her official capacity as the Attorney General of the State of Illinois, ERWIN McEWEN, in his official capacity as Director of the Department of Children and Family Services, State of Illinois, and the DEPARTMENT OF CHILDREN AND FAMILY SERVICES, State of Illinois, ROCCO J. CLAPPS in his official capacity as Director of the Department of Human Rights, State of Illinois, and the DEAPRTMENT OF HUMAN RIGHTS, State of Illinois,	)	Presiding Judge
Defendants, and	)	
SUSAN TONE PIERCE, as Next Friend and on behalf of a certified class of all current and future foster children in custody of DCFS in a federal case titled *B.H. v. McEwen*, No. 88 cv 5589 (N.D. Ill. 1988); SARAH RIDDLE and KATHERINE WESEMAN,	)	
Proposed Intervening Defendants.	)	

MEMORANDUM IN SUPPORT OF INTERVENORS'
MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The Intervenor Susan Tone Pierce, as the federal court-appointed Next Friend and on behalf of a certified class of all current and future foster children in custody of Illinois Department of Children and Family Services ("DCFS") in a federal case titled *B.H. v. McEwen*, No. 88 C 5589 (N.D. Ill.), pending in the United States District Court for the Northern District of Illinois ("foster children") and Intervenors Katherine Weseman and Sarah Riddle ("the foster parents") [1] respectfully submit this Memorandum in support of the foster children's Motion to Dismiss on the basis of preemption and their Joint Motion for entry of Summary Judgment against Plaintiffs[2] on all claims raised in their Second Amended Complaint.[3] In addition, Intervenors request this court to immediately vacate the injunctive order originally entered by the Court in open Court on July 12, 2011 and clarified in the Court's Order of July 18, 2011.

INTRODUCTION

Children who are wards of the State of Illinois and who are in the custody of DCFS are among the most vulnerable children in the State. They have a right to be placed in foster homes which serve their best interests. As such, when the State or its licensed foster care agencies

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[1] Ms. Pierce has served as Next Friend in the *B.H.* lawsuit, since 1990. *See* Memo. in Support of Proposed Intervenors' Mot. for Intervention, Ex. 1, Pierce Aff. ("Pierce Aff."). The *B.H.* class presently comprises approximately 15,000 children who are wards of the State. Approximately 2,000 of these children class members presently are receiving foster care through the Plaintiffs' agencies. *See* Fox. Decl. ¶ 14. Intervenors Weseman and Riddle are prospective foster parents in Illinois. For ease of reference, the foster children and foster parents are collectively referred to as the "Intervenors."

[2] For ease of reference, Plaintiffs Catholic Charities of the Diocese of Springfield- Illinois, Catholic Charities of the Diocese of Peoria, Catholic Charities of the Diocese of Joliet, Inc., and Catholic Social Services of Southern Illinois, Diocese of Belleville are referred to herein as "Catholic Charities" or "Plaintiffs."

[3] For ease of reference, the Catholic Charities Agencies' "Second Amended and Supplemental Complaint for Declaratory Judgment, Temporary Restraining Order, Preliminary and Permanent Injunctions, Writs of Prohibition and Other Relief" is referred to herein as the "Second Amended Complaint" or ("Second Am. Compl.").

make placement decisions they may not veto a placement which is in the child's best interest on the bases of factors irrelevant to their best interests like the marital status or sexual orientation of foster parents. This is not controversial. It is clearly established that the State of Illinois itself may not consider such factors if it were making the placement decision. The State may not directly, nor indirectly, discriminate in such a manner, and thus, neither may a private party to whom the State delegates (by license and contract) this state function. Any deviation from the best interests standard is harmful to both the foster children the State has a duty to protect and foster parents who offer them homes.

Similarly, prospective foster and adoptive parents, who must be licensed by the State, have a right to full and equal access to all phases of the state licensing process and to serve as foster and adoptive parents when it is in the best interest of children. These parents, who will serve as long-term and in some cases permanent parents to the State's wards, and who will be the best interests placement for individual children, cannot be restricted by the State based on their sexual orientation to particular and fewer state-licensed welfare agencies anymore than the State could restrict them to special windows at the drivers license bureau to renew their driver's license, or to special sites to take the Illinois Bar Exam. And again, if the State may not directly discriminate in the processes of licensing foster parents, neither may private entities to whom the State delegates, at the voluntary request of the delegee, this state function.

Catholic Charities voluntarily have chosen to contract with DCFS to perform the state functions of accepting and processing foster parents for state licensing and placing and supervising Illinois state wards in foster and adoption placements. In assuming these state functions, Catholic Charities stand in the shoes of the State which has no right to assert a religiously-based conscientious objection to licensing gay male and lesbian civil union couples

or placing its wards in their homes. Thus, Catholic Charities have no right to assert religious objections in voluntarily choosing to perform these same public functions. Their claims should therefore be dismissed.

ARGUMENT

Intervenors move to dismiss pursuant to section 2-619(a)(1) of the Illinois Code of Civil Procedure. DCFS is bound by the federal consent decree in *B.H. v. McEwen*, No. 88 C 5589 (N.D. Ill.) ("*B.H.* Consent Decree"), which has specific provisions regarding the placement of foster children which Plaintiffs seek to disrupt. To carry their burden here, the foster children will show that Catholic Charities' suit is preempted by *B.H.* Consent Decree and therefore should be dismissed. *See Kellerman v. MCI Telecomm. Corp.*, 112 Ill. 2d 428, 447-48 (1986) (finding comity a justification for dismissal).

In the alternative, Intervenors seek summary judgment, which is proper because "there is no genuine issue as to any material fact." 735 ILCS 5/2-1005(c); *Morgan v. Richardson*, 343 Ill. App. 3d 733, 739 (5th Dist. 2003). Because Plaintiffs have the burden of proving every element of their claims, Intervenors need merely "show" that the record reveals the absence of proof on any element of those claims. *See*, *e.g.*, *Brooks v. Brennan*, 255 Ill. App. 3d 260, 262 (5th Dist. 1994); *see also*, *e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (entry of summary judgment mandatory when nonmoving party fails to make showing sufficient to establish existence of element essential to party's case as to which party will bear burden of proof at trial); *Swisher v. Janes*, 239 Ill. App. 3d 786, 794 (4th Dist. 1992) (relying on *Celotex Corp.*, 477 U.S. at 323). The burden then shifts to Plaintiffs to prove, with specific, admissible facts, that there are genuinely disputed issues of material fact that require a trial. *See*, *e.g.*, *Brooks*, 255 Ill. App.

3d at 1189 ("[T]he plaintiff must then come forward with evidence to support each and every element of its causes of action in order to avoid summary judgment."); *see also*, *e.g.*, *Celotex*, 477 U.S. at 322-24.

Intervenors are entitled to summary judgment because Catholic Charities has constitutional obligations to foster children and foster parents in the performance of its duties to care for the minor wards of the State. *See* Sections II.C &D, *infra*. Intervenors will address and refute Plaintiffs' assertions that they are exempt from the prohibitions against discrimination under the Illinois Human Rights Act and the Illinois Religious Freedom Protection and Civil Unions Act ("Civil Union Act"), or that the Illinois Religious Freedom Reformation Act ("RFRA") entitles them to the extraordinary relief they seek in this case.

I. Catholic Charities' suit is a collateral attack on a Federal Consent Decree and must be dismissed.

The *B.H.* Consent Decree resolved due process claims of a class of current and future DCFS wards in a suit against DCFS. *See* Pierce Aff, Ex. A ("*B.H.* Consent Decree").[4] Substantive due process requires that placement decisions be based on professional judgment. *See infra* p. 13-15 (citing *K.H. through Murphy,* 914 F.2d 846, 851 (7th Cir. 1990); *B.H. v Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989); *In re Rodney H.*, 223 Ill.2d 510, 523-24 (2006)). Professional judgment requires the placement decision be based solely on the best interests of the child. *Id.* The Decree gave specific contours to the DCFS' constitutional duty to provide physical and psychological safety to children whom the State has removed from their

[4] The *B.H.* Consent Decree is an enforceable order of the federal court under which DCFS is bound. *See Frew v. Hawkins*, 540 U.S. 431, 440 (2004) (unanimous decision) ("Federal courts are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent decree may be enforced.").

homes because of neglect and/or abuse. *Id.* Specifically, the *B.H.* Consent Decree requires that that:

> all placement decisions will be made consistent with the best interests and special needs of the child, including consideration of the following:
>
> (1) the least restrictive setting appropriate for the child;
>
> (2) where the goal is family reunification, reasonable proximity to the child's family;
>
> (3) maintaining continuity of the child's education and social relationships; and
>
> (4) consistent with the requirements of federal law, due consideration to the desirability of placement of children with relatives, siblings, and foster parents who are sensitive to the child's cultural, religious, ethnic and racial heritage.

Id. at ¶ 34.[5] If Catholic Charities prevails, they seek a judgment which would allow them to place DCFS children in homes on bases other than their best interests, *i.e.* based on the sexual orientation and marital status of the prospective foster parents as dictated by Catholic Charities' religious beliefs, but not professional social welfare policy. Second Am. Compl. ¶48. However, the consensus in the field as well as DCFS and state law agree that excluding these couples is not in the best interests of DCFS' wards. *See infra* 16.

Catholic Charities' requested relief "inescapably implicates the decree . . . because validation of their claim would adversely affect implementation of the decree." *See Indiana Dep't of Env. Mgmt. v. Conard*, 614 N.E.2d 916, 922 (Ind. 1993) (finding that claims by third parties regarding whether the limit in federal consent decree on PCB levels could be improved upon by state law was in conflict with the consent decree); *In re New York State Comm'r of*

[5] The Decree also requires that DCFS implement licensing standards which "reflect contemporary service models and promote the development of a broad range of resources while ensuring the safety and well-being of children in care." *See B.H.* Consent Decree ¶ 55.

Corr. v. Gulotta, 598 N.Y.S.2d 547, 549 (2d Dept. 1993) (finding that claims regarding enforcement of state regulatory scheme were in conflict with federal consent decree). It is no import that Catholic Charities has not raised the BH consent decree directly—even if they distinguish the nature of the claims, the underlying question directly impacts the BH consent decree. *See Conard*, 614 N.E.2d at 922; *Huston v. Mercedes-Benz*, 2011 WL 2446608 (W.Va.). If there is any question about whether the case presents a conflict with the decree, it should be resolved by the federal court. *B.H.* Consent Decree ¶ 70 (retaining jurisdiction over modification of decree); *see Conard*, 614 N.E.2d at 922 (noting federal court's retention of jurisdiction); *Gulotta*, 598 NYS.2d at 541 (same).

Because of the conflict between the relief requested in this case and the federal consent decree, the state "proceeding amounts to an impermissible collateral attack on the consent decree." *Gulotta*, 194 AD.2d at 542; *see Conard*, 614 N.E.2d at 922 ("A collateral attack on a judgment is an attack made in a proceeding that has an independent purpose other than to impeach or overturn the judgment, although impeaching or overturning the judgment may be necessary to the success of the action."). "Allow[ing] a collateral attack contesting the terms of" a consent decree "would raise the specter of inconsistent or contradictory proceedings, would promote continued uncertainty thus undermining the concept of a final judgment and would violate the policy of promoting settlement' of actions alleging violations of federal law." *Conard*, 614 N.E.2d at 922 (quoting *Marino v. Oritz*, 806 F.2d 1144 (2d Cir. 1986)).

Given that "Supremacy Clause considerations require a State Court to respect Federal court judgments," this case must be dismissed. *Gulotta*, 194 AD.2d at 542 (dismissing state claim in conflict with federal consent decree) (citing *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979) ("State-law prohibition against

compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution.")); *Conard*, 614 N.E.2d at 923 (same). If Plaintiffs believe they are entitled to alter the requirement in the *B.H.* consent decree that all foster children be placed according to their best interests, they must raise such a claim in the federal proceeding. *Gulotta*, 194 AD.2d at 550 (citing *Black & White Children of Pontiac Sch. Sys. v. Sch. Dist. of City of Pontiac*, 464 F.2d 1030, 1030 (6th Cir. 1972) ("The proper avenue for relief if there were unanticipated problems which had developed in the carrying out of the court's order, was an application to intervene and a motion for additional relief in the principal case."); *Conard*, 614 N.E.2d at 923; *Indiana PIRG v. City of Bloomington*, 501 N.E.2d 476 (Ind. App. Ct. 1987) (dismissing case as a collateral challenge to a federal consent decree); *Burns v. Bd. of Sch. Comm'rs of Indianapolis*, 437 F.2d 1143 (7th Cir. 1971) (upholding removal of a case which attacked federal judgment and holding that the plaintiff's remedy was to intervene in the federal case). Illinois courts have consistently given deference to the federal court's control over the *B.H.* consent decree. *In re M.K.*, 284 Ill. App. 3d 449 (1st Dist. 1996) (dismissing state court case in deference to the *B.H.* consent decree); *see also Katherine M. v. Ryder*, 254 Ill. App. 3d 479 (1st Dist. 1993) (same). This case should also be dismissed.

II. Catholic Charities may not violate the constitutional rights of the foster children and foster parents.

A. *The State may not contract with agencies which refuse to conform to the Constitution.*

The State has constitutional and statutory obligations to the foster children in its care (*see* 13-20) and the foster parents who provide them with homes (*see* 20-27). Catholic Charities' proposed policy of refusing to licensing or place children in the homes of unmarried couples, including all gay male and lesbian couples, would violate those constitutional obligations.

Because the State itself cannot engage in such a policy, it cannot contract with Catholic Charities knowing it will perform state functions in an unconstitutional and unlawful manner. "[I]t is … axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 464 (1973) (holding unconstitutional state textbook program that benefited private, segregated schools) (internal quotation omitted); *Player v. State of Ala. Dept. of Pensions and Sec*., 400 F. Supp. 249, 257-258 (D.C. Ala. 1975) (finding unconstitutional the state's contracts with "the child-care institutions … which operate on a segregated basis[.]")[6] Based on DCFS' position in this case to date, it recognizes and intends to fulfill its constitutional duties to its wards.

B. *Catholic Charities are state actors and thus bound by the U.S. and Illinois Constitutions.*

Although constitutional standards generally only apply to the government, private parties are liable for constitutional violations when they engage in state action.[7] *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982) (finding that private actors are only responsible for constitutional violations if their actions "are fairly attributable to the" state). In determining whether a private actor is engaged in state action, courts engage in a case-by-case "fact-based assessment" guided by several tests, including the "public function" and "sufficiently close nexus" tests. *See Hallinan v. Fraternal Order of Police of Chi. Lodge No.7*, 570 F.3d 811 (7th Cir. 2009) (finding that state action is "a fact-based assessment"); *Rodriguez v. Plymouth*

[6] *See also Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974) (finding unconstitutional city's plan to allow private schools that discriminated on the basis of race to exclusively use public recreational facilities); *see also Griffin v. Cnty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 232 (1964) (finding state's support of private segregated schools unconstitutional); *Coffey v. State Educ. Finance Comm'n*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969) (enjoining state grants to private schools that discriminated on the basis of race).

[7] If a party's conduct constitutes "action under color of state law and will support a suit under § 1983[,]" it also is state action under the Fourteenth Amendment. *Lugar*, 457 U.S. at 935.

Ambulance Serv., 577 F.3d 816, 824-26 (7th Cir. 2009) (finding that the tests "lack rigid simplicity" and considering the public function test).[8]

Under the public function test, courts look at many factors, including whether the service was a "traditionally exclusive public function" and whether there exists a "trilateral relationship" between the state, private actor, and injured party. *Rodriguez*, 577 F.3d at 826-28 (citing *West v. Atkins*, 487 U.S. 42, 55 (1988)). In this case, Catholic Charities engaged in a "traditionally exclusive public function" because the placement of abused and neglected children who were removed from their homes has been historically exclusively within the control of the state.[9] In *Estate of Adam Earp v. City of Philadelphia*, 1997 WL 255506, *2 (E.D. Pa. 1997), the court found that placement is an exclusive government function because only the government has the authority to remove children from neglectful and abusive homes, giving rise to "a duty to provide [them] with a safe haven." When a private foster care agency "undertook to carry out that governmental obligation," it became a "state actor." *Id.* (*citing*

[8] Illinois courts apply tests derived from federal law to determine whether a private party is a state actor for the purposes of Illinois constitutional claims. *See, e.g.*, *In re Marriage of Braundmeier*, 201 Ill. App. 3d14, 17 (5th Dist. 1990) (citing the public function test among others). *See supra* 13-27, *re* Illinois Constitutional Claims.

[9] Illinois courts have recognized that this public function is "of very ancient origin" and rooted in the "power of the court of chancery." *See Cowles v. Cowles*, 8 Ill. 435, 436-37 (1846). In 1846, the *Cowles* court described this power: "the court will not, ordinarily, interfere with parental control[,]" but in cases of "neglect" or "abuse," "the court may interfere, and take the infant under its own charge, and remove it from control of the parent, and place it in the custody of a proper person to act as guardian, who may be a stranger." *Id.* This power of removal and placement of children has passed by statute to the Juvenile Courts and, in turn to DCFS. *See People ex rel. Houghland v. Leonard*, 415 Ill. 135, 112 N.E.2d 697 (1953) ("the Juvenile Court Act is a codification of the ancient equitable jurisdiction over infants under the doctrine of parens partriae. Historically, courts of chancery, representing the government, have exercised jurisdiction over the person and property of infants to insure they were not abused, defrauded, or neglected."); 20 ILCS 505/5 (k) ("The Department shall accept for care and training any child who has been adjudicated neglected or abused, or dependent committed to it pursuant to the Juvenile Court Act or the Juvenile Court Act of 1987.").

West, 487 U.S. at 55);[10] *see also Perez v. Sugarman*, 499 F.2d 761, 765 (2d Cir. 1974) (finding the placement function "essentially and traditionally public"); *A.L. v. Florida*, 2011 WL 1150374, at *3 (M.D. Fla) (finding that the state "has traditionally been responsible for providing foster care services, which includes the placement of foster children into foster homes"); *Smith v. Beasley*, 2011 WL 882951 at *6 (M.D. Fla. 2011) (same). The facts here are the same: Catholic Charities agreed, by contract, to take on the exclusive government function of placing abused and neglected children into foster homes.

Catholic Charities also meet the second consideration of the public function test because of the "trilateral relationship" between the State, Catholic Charities, and the State wards. Removing children from neglectful or abusive homes triggers constitutional obligations, running from the State to the children, to prevent unreasonable physical and psychological harm and to find safe, appropriate placements where the children's rights will be protected. *See infra* 13-20; *Rodriguez*, 577 F.3d at 827-28 (considering the state's duty to plaintiff); *Perez*, 499 F.2d at 765 (considering "the State's ultimate responsibility for the well-being of the children"). Further, Catholic Charities have inserted themselves in that relationship by "undertaking freely, and for consideration" the state's obligation to the children. *Rodriguez*, 577 F.3d at 827; *see* Second Am. Compl. ¶ 15. And finally, Catholic Charities have contracted to place these foster children and therefore they have a "direct, not an attenuated relationship with the [foster children]."

[10] The government's function of *placing* children in appropriate homes is regularly found to be a public function (*see* above and n.11) and should be distinguished from foster parents and institutions which directly care for children. Courts are divided on whether this type of care is a state function. *See Leshko v. Servis*, 423 F.3d 337, 343-44, 47 (3d Cir. 2005) (noting that while removing children from their homes and placing them with other caregivers are exclusively government functions in Pennsylvania, foster parents are not state actors); *Letisha A. v. Morgan*, 855 F. Supp. 943, 949 (N.D. Ill. 1994) (finding no state action once child had been placed in private institution, focusing on institution's role as care giver, akin to a foster parent or relative); *but see McAdams v. Salem Children's Home*, 701 F. Supp. 630, 634 (N.D.Ill. 1988) (finding state action in a home which cared for children).

Rodriguez, 577 F.3d at 827 (considering whether private actor has a direct duty to plaintiff). These factors all confirm that Catholic Charities are engaged in a public function and are therefore state actors. [11]

Catholic Charities also qualify as state actors under the "sufficiently close nexus" test. Under this test, the court considers the relationships between the three parties, the extent to which the private actor is regulated by the State, and the State's involvement in the private actor's decision making process. *See Lethbridge v. Lula Belle Stewart Center*, 2007 WL 2713733, *4 (E.D. Mich. 2007). All of these factors are met: Catholic Charities have a close relationship with the State and the foster children, the placement procedure is highly regulated[12] and, the state remains involved in the licensing of foster parents, and retains ultimate authority for foster children, giving rise to an ongoing relationship with Catholic Charities. *See* Shaver Decl. ¶ 13; 20 ILCS 505/5 (requiring DCFS to accept for care all children who have "been adjudicated neglected or abused"). Thus, Catholic Charities is a state actor under the "sufficiently close nexus test." *Lethbridge,* 2007 WL 2713733, *4 ("Given the state's Fourteenth

[11] Several other courts have held that private foster care agencies are state actors under the public function doctrine. *See, e.g.*, *S.B. v. City of Philadelphia*, 2007 WL 3010528, at *2 (E.D. Pa. 2007) (finding a public function where the city delegated "their traditional government functions of selecting foster parents, assigning them foster children, and generally supervising the foster-care process"); *Donlan v. Ridge*, 58 F. Supp. 2d 604, 609-610 (E.D. Pa. 1999) (finding foster care agency a state actor under public function test); *Harris ex rel Litz v. Lehigh County Office of Children and Youth Servs.*, 418 F. Supp. 2d 643, 647 (E.D. Pa. 2005) (same); *relied on by D.B. v. City of Philadelphia*, 2008 WL 4565891, at *1 (E.D. Pa. 2008) (same); *Brooks v. Richardson*, 478 F. Supp. 793, 795 (S.D.N.Y. 1979) (same).

[12] *See, e.g.*, 225 ILCS 10/5(d), 225 ILCS 10/4 (requiring that foster family home licenses are issued by DCFS itself, not the supervising child welfare agency); 225 ILCS 10/4 (requiring that DCFS must be satisfied that the foster family home "reasonably meet[s] standards prescribed for [it]" before DCFS grant it a license); 225 ILCS 10/5 (mandating that all child welfare agency workers who inspect foster family homes for licensing pass a DCFS examination); 225 ILCS 10/7.3 (DCFS must "review the child placement records of each private child welfare agency that places wards of the Department" at least every six months).

Amendment obligation, the pervasive regulation of [the foster care agency's] business, [the agency's] receipt of state funds, and its contractual obligations, the Court finds that the complaint alleges a sufficient nexus between Defendants' actions and the State of Michigan for purposes of stating a claim under § 1983.").[13]

C. Catholic Charities' policy violates the foster children's constitutional rights to physical and psychological safety.

1. *Foster children have a right to be placed on based on their best interests.*

Catholic Charities' discriminatory policy violates the liberty interests of foster children. DCFS is entrusted with the care children who have "been adjudicated neglected or abused." 20 ILCS 505/5 (j). The State is responsible for providing reasonable physical and psychological safety for these children. *K.H. through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (relying on *Youngberg v. Romeo*, 457 U.S. 307 (1982)); *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989) ("a child who is in the state's custody has a substantive due process right to be free from unreasonable and unnecessary intrusions on both its physical and emotional well-being."); *In re Rodney H.*, 223 Ill.2d 510, 523 (2006) (recognizing that these rights "implicate[] the due process clauses of the state and federal constitutions").[14]

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[13] *See also Wilder v. Bernstein*, 645 F. Supp. 1292, 1315 (S.D.N.Y. 1986) ("an agency's decisions relating to the acceptance and care of a child placed with the agency by [the city agency], where the State and City remain ultimately responsible for the child's welfare, and where the agency's decisions are directly circumscribed by state and/or city regulations, contain 'a sufficiently close nexus [with] the State . . . so that the action of the [agency] may be fairly treated as that of the State itself.'"), *aff'd* 848 F.2d 1338 (2d Cir. 1988) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. at 351).

[14] *See also Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) ("When the state places a child in state-regulated foster care, the state has entered into a special relationship with that child which imposes upon it certain affirmative duties."); *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) ("[t]he relationship between state officials charged with carrying out a foster child care program is an important one involving substantial duties and, therefore, substantial rights"); *Taylor v. Ledbetter*, 818 F.2d 791, 798 (11th Cir. 1987) (en banc) (finding substantive due process right for children in foster care); *Harris*, 418 F. Supp. 2d at 647 (citing

"The controlling standard for determining whether [foster children's] rights have been violated is whether 'professional judgment in fact was exercised.'" *B.H.*, 715 F. Supp. at 1394 (quoting *Youngberg*, 457 U.S. at 321). DCFS' policies must be consistent with "accepted professional judgment, practice, or standards." *Youngberg*, 457 U.S. at 314-15 (describing substantive due process standard for individuals who are in state custody); *see Yvonne L. ex rel. Lewis v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 893-94 (10th Cir. 1992) (holding that an action alleging injuries sustained in a foster care setting must be evaluated by whether child welfare workers "failed to exercise professional judgment" when making foster care placements); *K.H. through Murphy*, 914 F.2d at 854 (finding child welfare workers protected from liability only when exercising "a bona fide professional judgment" regarding placement of state wards). Conduct violates this standard when it is "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." *Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 646 (E.D. Pa. 1999) (quoting *Youngberg*, 457 U.S at 323).

This constitutional duty requires the non-controversial standard of basing placement decisions on the "best interest" of the child, contours of which are made explicit in the *B.H.* Consent Decree, Illinois state law, and DCFS regulation. 20 ILCS 505/7(c); 20 ILCS 505/5 (l-1); 89 Ill. Admin. Code 301.60. It is also the accepted professional standard for placement in child welfare practice. *See* Att. 2 (Brodzinsky Aff. ¶¶ 23, 25, 26.)

Youngberg) (a foster child "has a liberty interest in his personal security and well-being, an interest protected by the Fourteenth Amendment").

2. *Catholic Charities' policy violates the best interest standard.*

Catholic Charities' demand, on the basis of its religious objections, of an additional requirement for the placement decision -- that no child in their care be placed with a gay male or lesbian couple, or with any other unmarried couple – violates the best interest standard. This consideration has nothing to do with the best interests of a child and Catholic Charities do not assert (nor could they prove) that preventing children from being placed with gay male and lesbian couples or unmarried couples is in the best interest of the state wards in their care.

Professional standards guiding the best interest placements require that potential foster parents are not excluded on the basis of sexual orientation or marital status. As testified to by Dr. David Brodzinky,[15] children's physical, psychological, social, academic, moral, and spiritual adjustment do not depend on the type of family they grow up in (i.e., family structure) but rather with the quality of parenting they receive and the resources available to them. Brodzinsky Aff. ¶ 22.[16] Child welfare decision-making that categorically excludes prospective foster or adoptive parents based solely or primarily on their family structure rather than on their parenting competences, resources, and supports is inconsistent with accepted professional judgment and practices and the best interests of children. *Id.* There is no rational basis for categorically

[15] Dr. Brodzinksy is a psychologist and a former professor and Professor Emeritus of Clinical and Developmental Psychology at Rutgers University. Brodzinksy Aff. ¶ 3. Among other credentials listed in his affidavit and *curriculum vitae*, he has over 30 years of experience in the adoption and foster care fields as a researcher, scholar, teacher, clinician, trainer, and consultant. *Id.* ¶ 6. Further, he has published numerous peer-reviewed journals articles, book chapters, and six books on adoption and foster care (as well as on other topics). *Id.*

[16] The primary factors that influence the variability in children's adjustment, regardless of their parents' sexual orientation or their parents' marital status include, but are not limited to: mental health of the parents; quality of relationship between parenting figures; parental expectations, beliefs, and style; peer relationships; educational opportunities; and resources and supports available to the family. *Id.*

excluding gay male and lesbian individuals and couples from adopting or fostering children and, consequently, to do so is inconsistent with the best interests of children. *Id.* at ¶ 20.

Further, for some children, the best interest placement may be with an excluded couple, for example with a relative with whom the child has an established relationship. Another best placement may be with couple who lives in the child's community; placement in a different community would disrupt the child's education and social relationships, the services and resources currently being received, and visitation and reunification efforts with the birth family. Brodzinsky Aff. ¶¶ 25-26. Additionally, many gay male and lesbian couples offer unique resources and strengths which may make them a best interest placement for a particular child such as: their willingness to parent children of color and those with special needs (categories of children who often linger the longest in foster care); their ability to offer an LGBT-affirmative environment for older children who are LGBTQ;[17] their tendency to promote a high level of egalitarianism and tolerance of diversity in their children; and their interest in and support for contact with birth families. Brodzinsky Aff. ¶¶ 23-25.

Dr. Brodzinsky's opinion is consistent with all major professional organizations whose focus is the health and well-being of children and families. *See id.* ¶ 20 (citing American Medical Association, American Academy of Pediatrics, American Psychiatric Association, American Academy of Child and Adolescent Psychiatry, American Psychoanalytic Association, American Psychological Association, Child Welfare League of America, National Association of Social Workers, Evan B. Donaldson Adoption Institute, and the American Bar Association). Applying Catholic Charities' policies to the placement decision of DCFS' children is a

[17] Indeed, DCFS mandates that its agencies "[m]ake every effort to ensure that LGBTQ youth are placed in gay-affirming environments that respect the youth's right to self-determination." DCFS PROCEDURES 302, APPENDIX K(H)(4)).

"substantive departure from accepted professional judgment, practice or standards" and breaches the constitutional requirement that the administration of the foster care system be consistent with such professional judgment. *See Jordan*, 66 F. Supp. 2d at 646 (quoting *Youngberg*, 457 U.S at 323).

3. *This breach of duty harms the foster children.*

Catholic Charities claim that no "serious harm would flow" from their refusal to "process[] foster care or adoption applications" of gay male and lesbian couples in civil unions and referring these couples to other agencies. Second Am. Compl. ¶¶ 46. To the contrary, Catholic Charities' departure from professional child welfare standards causes harm to children. Thus, Catholic Charities cannot simply assert their lack of harm claim as a matter of uncontested fact in these summary judgment proceedings.

As noted above, some of the excluded foster parents may be a best-interest placement for a particular child. The children in Catholic Charities' care will have a smaller and less diverse pool of potential foster placements, making it difficult to find a placement that fits the best interests of the child in need. *See* Shaver Aff. ¶ 6; Brodzinsky Aff. ¶¶ 22-23. Having fewer appropriate placements undermines efforts to find timely residential, psychological, and legal permanence for these boys and girls, which increases their risk for long-term psychological problems. Brodzinsky Aff. ¶ 23.

Children will also face less stable placements which will not receive the full range of services. Children placed with a relative in a relationship and unmarried or gay male or lesbian, will face harmful scenarios. The agency would return the case to DCFS when it becomes aware of the foster parents' living arrangements, a result that will delay and disrupt the casework and oversight provided to the child at a critical stage. Brodzinsky Aff. ¶ 26; Shaver Aff. ¶¶ 16, 17.

Second, it can remove the child from that home, a course of action that not only is contrary to the child's best interests, but will cause serious psychological harm to the child, who already is likely to have been traumatized by the circumstances surrounding removal from his parents' custody. Shaver Aff. ¶ 14. Third, there will be a denial of services. If the agency continues to provide services to the child and caregiver, the agency will be unwilling to permit the relative to become a licensed foster parent. This will deprive the caregiver and the child of the enhanced resources and support that being licensed would provide. *Id.*

Similar harm will occur if a previously single foster parent entered a relationship, and his or her partner moved into the home. Research suggests that many unpartnered lesbians and gay men do not reveal their sexual orientation when they begin working with a child welfare agency—if these individuals later partner, the couples cannot marry under Illinois law and would not conform to Catholic Charities' policy. Brodzinsky Aff. ¶ 26. The foster child would be harmed if the agency disrupts the placement, denies services to that foster home, or denies a license to the partner, if the couple enter a civil union. Brodzinsky Aff. ¶ 26; Shaver Aff. ¶ 16.

Referring gay male and lesbian clients and unmarried cohabiting clients to another agency is not an acceptable solution, both from a child welfare perspective and a mental health prospective. Brodzinsky Aff. ¶ 27; Shaver Aff. ¶ 16. Referral reduces the timeliness of placement for those children for whom the agency is already responsible, which, in turn, increases the adjustment risk for these youngsters. Brodzinsky Aff. ¶ 27. Referral also reinforces stigma for lesbian and gay male prospective parents, increasing their risk for internalized homophobia and potentially undermining their motivation to foster or adopt children. If they are discouraged from fostering or adopting, referral will reduce the pool of available families for those needy children waiting for safe and stable homes. *Id.*

Further, in some geographical regions there might not be other agencies to which the clients could be referred. If this is the case, a referral could be to an agency that is quite a distance from the prospective foster parents, resulting in considerable travel on the part of the family and the professionals in order to meet the requirements of application, homestudy assessment, child preparation and visitation, placement, and monitoring. This barrier could undermine the motivation of prospective clients, increase their costs, as well as the cost of the placing/supervising agency, and compromise the services provided by the agency. *Id*.

Finally, if an agency is unwilling to work with lesbian and gay male families, but has older children in its caseload who have begun questioning their sexual orientation, gender identity or gender expression, the agency's policy sends a strong negative message to these boys and girls, potentially undermining their self-esteem and emotional well-being. This would be especially true if the child expressly requested a placement with a lesbian or gay family, but was told that this was not possible, except through another agency. Moreover, referring the youngster to another agency in order to support his or her desire would require disruption to the casework services already being received. *Id*.

Similarly, foster children who are lesbian, gay, bisexual, transgender or questioning (LGBTQ) require services from agencies prepared to understand and respond to their needs in a sensitive, respectful, and LGBTQ-affirmative manner.[18] "Coming out" is a process and LGBTQ youth do not always self-identify when they enter care. It is not in the best interests of these children to simply refer them to another agency when their sexual orientation or gender identity becomes known, especially when they have been under the care of the first agency for some

[18] Indeed, DCFS mandates that its agencies "[m]ake every effort to ensure that LGBTQ youth are placed in gay-affirming environments that respect the youth's right to self-determination." DCFS PROCEDURES 302, APPENDIX K(H)(4)).

time. To do so could delay the timeliness of finding them a safe and nurturing environment, disrupt community ties and the services already being provided to them, and reinforce their own internalized homophobia. LGBTQ youth, especially those in foster care, are a population at significant risk for adjustment difficulties if they are not provided with a safe, supportive, and affirmative environment in which to explore issues related to their sexual orientation, gender identity, and gender expression. Consequently, agencies working with foster and adopted children must have the knowledge and motivation to create such an environment. *Id*. at ¶ 28.

D. Catholic Charities' policy violates the foster parents' constitutional rights to be free from discrimination and to familial privacy.

Plaintiffs' refusal to process licenses for civil union couples to be foster or adoptive parents or to place children with these foster parents is intentionally discriminatory on the basis of sexual orientation. Refusing to process the application for foster or adoptive licensure or place foster children with couples joined in a civil union excludes *all* lesbian and gay male couples, since they cannot marry in Illinois, 750 ILCS 5/212(a)(5), and their marriages legally entered elsewhere are recognized in Illinois as only a civil union. 750 ILCS 75/60. Lesbian and gay couples who are prospective foster or adoptive parents seeking licensure by the State and to welcome foster children into their homes, however, have constitutionally protected interests against discrimination on the basis of sexual orientation. Additionally, all unmarried couples, including those in civil unions have fundamental rights and liberty interests to enter into committed intimate relationships that are burdened by Plaintiffs' refusal to license them to serve as foster or adoptive parents. Brodzinsky Aff. ¶ 28; Shaver Aff. ¶ 18.

1. *Plaintiffs' Policy discriminates on the basis of sexual orientation.*

Discrimination on the basis of sexual orientation violates the equal protection clause of the Illinois Constitution. Ill. Const. art. I, § 2. And state policies that deny unmarried couples

access to government benefits or services have repeatedly have been held to discriminate on the basis of sexual orientation. *See, e.g.*, *Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. July 23, 2010) (recognizing that exclusions of unmarried couples from government benefits discriminates against lesbian and gay male couples); *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 789 (2005) ("[B]ecause of the legal definition of 'marriage,' the partner of a homosexual employee can never be legally considered as that employee's 'spouse' and, hence, can never become eligible for benefits. We therefore conclude that the benefits programs are facially discriminatory."); *Bedford v. N.H. Cmty. Tech. Coll. Sys.*, 2006 WL 1217283, *6 (N.H. Super. 2006) ("Thus, same-sex partners have no ability to ever qualify for the same employment benefits unmarried heterosexual couples may avail themselves of by deciding to legally commit to each other through marriage. For this reason, unmarried, heterosexual employees are not similarly situated to unmarried, gay and lesbian employees for purposes of receiving employee benefits."). Rejecting the state's argument that the benefit scheme was "a neutral policy that treats all unmarried employees equally," the *Collins* court explained:

> [The benefit statute], when read together with Arizona Constitution Article 30 § 1, treats unmarried heterosexual State employees differently than unmarried homosexual employees. Heterosexual domestic partners may become eligible for family coverage under the State plan by marrying. Because employees involved in same-sex partnerships do not have the same right to marry as their heterosexual counterparts, [the benefit statute] has the effect of completely barring lesbians and gays from receiving family benefits.

Collins, 727 F. Supp. 2d at 803 (internal quotation marks and footnote omitted).[19]

[19] Plaintiffs' first complaint made clear their intent to discriminate against lesbian and gay male couples, where they listed as a religious conviction justifying their discriminatory policy their objection to "homosexual conduct." Complaint ¶ 36. *See Snowden v. Hughes*, 321 U.S. 1, 8 (1944) ("[Intentional discrimination] may appear on the face of the action taken with respect to a particular class or person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself.") (citations omitted).

While engaged in a state function, Plaintiffs, are therefore prohibited from following a policy of refusing to process the license applications of unmarried couples, including those in civil unions or to place foster children with their families, since that policy involves disparate treatment of lesbian and gay male couples. Such a policy is subject to review under heightened scrutiny. When "conducting an equal protection analysis, [Illinois courts] apply the same standards under both the United States Constitution and the Illinois Constitution." *Wauconda Fire Prot. Dist. v. Stonewall Orchards, LLP*, 214 Ill. 2d 417, 434 (2005). Numerous courts have relied on legal standards and precedent from federal law to conclude that discrimination on the basis of sexual orientation should be analyzed under heightened scrutiny. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (applying strict scrutiny to sexual orientation discrimination under the U.S. Constitution); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426-62 (Conn. 2008) (analyzing federal precedent to conclude that state constitution sexual orientation discrimination claim must be analyzed under heightened scrutiny); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009) (same); *In re Marriage Cases*, 183 P.3d 384, 442-44 (Cal. 2008) (same). However, Plaintiffs' discriminatory policy fails to pass muster under any standard of constitutional review, as shown below.

2. *Plaintiffs' policy violates foster parents' fundamental rights and liberty interests in their relationship with their civil union partner.*

In addition to protection from discrimination, foster parents have fundamental rights and liberty interests in family integrity and intimate association that are protected by the privacy and due process clauses of the Illinois Constitution. Ill. Const. art. I, §§ 2, 6, 12. *See, e.g.*, *People v. Beard*, 366 Ill. App. 3d 197, 204 (1st Dist. 2006) ("The United States Constitution provides a right of privacy that applies to personal decisions involving marriage, procreation, contraception,

family relationships and child rearing. … The right of privacy protected by article I, section 6, of the Illinois Constitution extends beyond the federal right of privacy by 'expressly recognizing a zone of personal privacy,' and this provision is broad and without restrictions."); *Best v. Taylor Machine Works*, 179 Ill.2d 367, 458 (1997) ("[art. I, §] 12 provides a constitutional source for the protection of [certain]privacy interest[s]"); *People v. R.G.*, 131 Ill.2d 328, 343 (1989) (recognizing that "an individuals' freedom of choice concerning procreation, marriage and family life is a fundamental right" protected by the due process clause); *see also Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (U. S. Constitution guarantees fundamental right and liberty interest to form an enduring and intimate "personal bond" with another person).

The State cannot condition the rights to make private decisions about intimacy and family life on the foster parent plaintiffs' ability to become licensed. The Arkansas Supreme Court recently found unconstitutional a state law that imposed virtually the same condition on foster parents' liberty interests in forming committed familial relationships – a law that prohibited an individual from adopting or serving as a foster parent if he or she is "cohabiting with a sexual partner outside of marriage that is valid under [Arkansas law]." *Ark. Dep't of Human Servs. v. Cole*, --- S.W.3d ----, 2011 Ark. 145, 2011 WL 1319217 (Ark. 2011) (inner quotation and citation omitted). The court held that the categorical exclusion violated substantive due process because "the exercise of one's fundamental right to engage in private, consensual sexual activity is conditioned on foregoing the privilege of adopting or fostering children." *Id.* at [--], citing *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969) (invalidating a law that conditioned receipt of welfare benefits on a residence requirement as an unconstitutional burden on right to interstate travel.'").

Plaintiffs' policy, like the state law in *Cole*, places an unconstitutional burden because couples must choose to form a committed family relationship by entered into a civil union with a partner "without the opportunity to adopt or foster children or forego [a committed partnership] and, thereby, attain eligibility to adopt or foster." *Id.* at [--]. Because Plaintiffs' policy burdens foster parents' fundamental rights, the policy must be subjected to heightened scrutiny. *See Cook v. Gates*, 528 F.3d 42, 52-56 (1st Cir. 2008) (holding that substantive due process requires heightened scrutiny of burdens on same-sex couples' intimate association); *Witt v. Dep't of Air Force*, 527 F.3d 806, 813-19 (9th Cir. 2008) (same). However, Plaintiffs' policy fails even under rational basis review.

3. *Plaintiffs' discriminatory policy fails rational basis review.*

The state defendants have not asserted any governmental interest to support Plaintiffs' claim that they should be able to engage in their harmful and discriminatory licensing practices but DCFS has, on the contrary, sought to terminate its contacts with Plaintiffs. The only interests that Plaintiffs have asserted to justify their policy are religious interests, which cannot serve as legitimate governmental interests. *See* Section III.A, *infra*. The U.S. Supreme Court has warned that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). The facts supporting this motion show the irrationality of Plaintiffs' exclusionary policy that fails even the most deferential level of review.

4. *Plaintiffs' discriminatory policy harms foster parents.*

Plaintiffs claim that no "serious harm would flow" from their refusal to "process[] foster care or adoption applications" of gay male and lesbian couples in civil unions and referring these couples to other agencies. Am. Compl. ¶¶ 43, 44. Intervenors factually contest this bold and

unsupported assertion and place it at issue. Foster parents are subjected to harm by Plaintiffs' policy in numerous ways.

a. Referrals are discriminatory.

Plaintiffs' offer to make a referral does not change the fact that Catholic Charities have refused service to the couple because of their sexual orientation and unmarried status. *See Estate of G.S. and Karim Baksh*, 1996 WL 379336, at *12 (Ill. Human Rights Comm'n.) (finding that a referral made with discriminatory intent violates the Human Rights Act), *rev'd on other grounds by Baksh v. Human Rights Comm'n*, 304 Ill. App. 3d 995, 1000 (1999); *see also United States v. Morvant*, 898 F. Supp. 1157, 1165 (E.D.La.1995) (assumes without analysis that a referral to another dentist was a refusal of service which violated the ADA); *D.B. v. Bloom*, 896 F. Supp. 166, 170 (D.N.J. 1995) (finding that referral to a different facility constituted the denial of services); *Howe v. Hull*, 873 F. Supp. 72, 79 (N.D. Ohio 1994) (finding that a doctor's refusal to treat and referral to another facility was a discriminatory denial of full access to a public service).[20]

b. Referrals inflict actual injury upon foster parents.

Referring lesbian and gay male and unmarried couples who wish to serve as foster parents, to another agency harms them for the following reasons. Brodzinsky Aff. ¶ 27. First, it reinforces stigma for lesbian and gay prospective parents, increasing their likelihood for

[20] The Human Rights Act makes clear that referrals with a discriminatory intent violate the Act. Section 5-102.1 of the Act allows certain service providers such as health care professionals to "refer … an individual in a protected class for any non-discriminatory reason if, in the normal course of his or her operations or business, the professional would for the same reason refer … an individual who is not in the protected class …." 775 ILCS 5/5-102.1. Given that referrals for "any *non*-discriminatory reason" are excluded as a violation of the act, clearly referring for a *discriminatory* reason violates the Illinois Human Rights Act.

internalized homophobia and undermining their motivation to foster or adopt children. *Id.*; *see also Bruff v. N. Miss. Health Servs.*, 244 F.3d 495, 500 (5th Cir. 2001) (noting harm to the agency where a client refused to continue treatment after her counselor refused to treat the client on the basis of her sexual orientation and referred her to another counselor). Second, Catholic Charities is the only agency in some communities. *See* Fox Decl. ¶ 4. A referral to another agency would require considerable travel on the part of the family and the professionals to meet the requirements of application, home study assessment, child preparation and visitation, placement, and monitoring. The travel could increase the costs and other burdens, undermining the couple's motivation to foster children.[21]

Further, the Seventh Circuit has recognized that the State is harmed by discrimination in the provision of services because such discrimination erodes the public confidence in the state's neutrality. The court has rejected claims by public employees who, on the basis of a religious objection, sought to be excluded from protecting certain segments of the public; the court found that such exceptions would undermine public confidence. *See Endres v. Ind. State Police*, 349 F.3d 922, 927 (7th Cir. 2003) (finding officer could not refuse assignment to protect casino on religious grounds, citing "the need to hold police officers to their promise to enforce the law without favoritism-as judges take an oath to enforce *all* laws, without regard to their (or the litigants') social, political, or religious beliefs"); *Rodriguez v. City of Chicago*, 156 F.3d 771, 779 (7th Cir.1998) (finding no requirement that City exclude officer from guarding an abortion clinic, rather than putting him on a different beat) (Posner, C.J., concurring: "The objection is to

[21] The Supreme Court has recognized the harmful psychological effects of maintaining "separate but equal" facilities, which in reality are "inherently unequal." *See Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 494 (1954) ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect."). Similarly here, foster parents could lose faith in the fairness of the State's system if one of the state's contractors is permitted to discriminate openly while performing state duties.[22]

III. Catholic Charities are not exempted from the Human Rights Act and Civil Union Act on the basis of religion.

Catholic Charities have asserted that they are not required to follow the Civil Union Act and Human Rights Act because of statutory religious exemptions for those acts and because of their right to religious liberty under IRFRA. These claims fail because (1) Catholic Charities cannot assert religious-based defenses as state actors (*infra* Part A); (2) even if they could assert the statutory defenses under the Civil Union Act and Human Rights act, they do not apply to a social service agency engaged in foster care (*infra* Part B); and (3) their IRFRA claim fails (*infra* Part (C)).

A. Catholic Charities cannot assert defenses based on religion as state actors.

As argued above, Catholic Charities are engaged in a public function in their work caring for the state's foster children. Once it is established that a private actor is engaged in state action, the "ostensibly private organization ought to be charged with a public character and judged by constitutional standards . . . . " *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 302 (2001). Once so judged, private organizations do not have all of the freedoms they would if they were not engaged in state action. *See Cooper v. U.S. Postal Serv.*,

[22] Catholic Charities' reliance on Federal Executive Order No. 13559 is unavailing. *See* Am. Compl. ¶ 45, Ex. C. That order requires that beneficiaries of service programs be allowed to *request* a referral if they would prefer not to receive government contracted services from a religious provider. *Id.* Nothing in the Order suggests that the contracting agency has a right to deny service to the class of people for whom it has contracted to serve.

577 F.3d 479, 495 (2d Cir. 2009) (finding that a religious group engaged in state action could not display religious materials because "they fail spectacularly under the first inquiry of *Lemon*"); *c.f. Dodge v. Salvation Army*, 1989 WL 53857 (S.D. Miss. 1989) (holding that the Salvation Army could not rely on an exemption from laws preventing religious discrimination in employment for a position paid for by the state).

Here, Catholic Charities' purpose is plain: they seek to use the state's power and exercise control over placement of state wards, while at the same time engaging in "Catholic Charities' grounded practice of declining to entertain or process applications for foster care or adoption on the part of unmarried same sex or heterosexual cohabitating couples[.]" Second Am. Compl. ¶ 37. Thus, they wish to discriminate against foster parents because of their religious beliefs, a justification the government cannot rely upon without unconstitutionally advancing religion. *See McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."); *see also Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religio;, finally, the statute must not foster an excessive government entanglement with religion.") (internal citations and quotations omitted); *c.f. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (holding that the government could not vest churches with veto power over liquor licenses).

Catholic Charities, as state actors, cannot rely on this justification for discrimination either. *See Brentwood Acad.*, 531 U.S. at 302; *Cooper*, 577 F.3d at 495; *see also Edwards v.*

Aguillard, 482 U.S. 578, 596-597 (1987) ("The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose."); *Varnum v. Brien*, 763 N.W.2d 862, 905 (Iowa 2009) (finding that religious views could not "be used to justify a ban on same-sex marriage"). Thus, they are constitutionally prevented from raising religious-based exemptions under the Civil Union Act and Human Rights Act and relying on the protections for religious liberty under the IRFRA and state constitution.

B. **Catholic Charities are not exempted from the Civil Union Act.**

The Civil Union Act requires that the State provide "the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law." 750 ILCS 75/20. Under DCFS regulations, prior to the passage of the Civil Union Act, only married couples could be jointly licensed as foster parents. *See* 89 Ill. Admin. Code 402.12 (a). DCFS has rightly interpreted its regulation to now include couples who have entered civil unions. *See* Second Am. Compl., Ex. A. Allowing Catholic Charities, in performing a state function, to discriminate against prospective foster parents joined by a civil union would thwart the Act's purpose of elevating the rights of couples in civil unions to the level of the rights enjoyed by married spouses.

1. *Section 15 only applies to solemnizations of civil unions.*

Plaintiffs claim they are exempted from recognizing civil unions by Section 15 of the Act, which states:

> Nothing in this Act shall interfere with or regulate the religious practice of any religious body. Any religious body, Indian Nation or Tribe or Native Group is free to choose whether or not to solemnize or officiate a civil union.

750 ILCS 75/15.

Even if Catholic Charities could raise this religious-based argument as a state actor, a straightforward reading of the exemption's two sentences together confirms that Plaintiffs' foster care work does not fit within the exception, which is limited to solemnizations of civil unions. The first sentence offers a general statement delineating the Act's scope: "Nothing in this Act shall interfere with or regulate the religious practice of any religious body." 750 ILCS 75/15. The second sentence, in turn, specifies its predecessor's scope by clarifying to whom it applies and to what actions: "Any religious body, Indian Nation or Tribe or Native Group is free to choose whether or not to solemnize or officiate a civil union." *Id*. Under a plain reading of the statute, the exemption targets civil union ceremonies, allowing objecting religious bodies to abstain from conducting them. *See Johnston v. Weil*, 241 Ill.2d 169, 175-76 (Ill. 2011) (holding that legislative intent is best found by examining the plain language of the statute, giving the terms their ordinary meaning). This reading dovetails with the Act's purpose; while allowing objectors to avoid performing civil unions, it retains for couples joined in civil unions the panoply of other rights and protections enjoyed by married couples.

2. *Catholic Charities is not a "religious body" engaged in a "religious practice."*

Even if the first sentence were treated as a separate exemption, recognizing civil unions in the context of Plaintiffs' work as a child welfare agency would not "interfere with or regulate the religious practice of any religious body." *See* Amended Complaint ¶ 35.

First, "religious body" in the context of this statute is limited to religious denominations. Since this is the first time this statutory language has been interpreted, "[i]t is appropriate statutory construction to consider similar enactments . . . . " *Board of Educ. of Chi. v. A, C, & S, Inc*., 131 Ill.2d 428, 468 (1989) (citing *Anderson v. City of Park Ridge*, 396 Ill. 235, 244, 72

N.E.2d 210 (1947) ("It is proper not only to compare statutes relating to the same subject matter but to consider statutes upon related subjects though not strictly *in pari materia.*")). Other state statutes use "religious body" to refer to a religious congregation rather than a social services organization that maintains a religious affiliation. *See, e.g.*, 5 ILCS 315/6 ("Agreements containing a fair share agreement must safeguard the right of nonassociation of employees based upon bona fide religious tenets or teachings of a church or religious body"); 735 ILCS 5/8-803 ("A clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs . . . ."). Defining a "religious body" as a religious congregation rather than social service agency also comports with the second sentence of the Civil Union Act, which references a "religious body['s]" ability to "officiate a civil union." Religious denominations, not social services agencies, have the authority to solemnize marriages and civil unions under Illinois law. *See* 750 ILCS 5/209 (a). Catholic Charities, as social services organizations associated with the Catholic Church, do not constitute a religious congregation and, thus, do not fall within the category of a "religious body."

Moreover, Plaintiffs' foster care placement services are not a "religious practice." A plain reading of "practice" limits it to religious customs or belief rather than including every effort in which a religiously motivated person is engaged. In other statutes, "religious practice" references religiously mandated observances or beliefs. For example, the University Religious Observances Act requires public universities to allow students to schedule school requirements and tests around conflicts with their "religious practices." 110 ILCS 110/1.[23] The statute defines

[23] Other Illinois statutes which use the term "religious practice" accommodate personal beliefs and observances mandated by religious custom and belief. They include personal medical choices mandated by religious beliefs about medicine. *See, e.g.*, 55 ILCS 5/5-1069 (providing that a county board may provide employees with insurance and that "[t]he insurance may include provision for employees who rely on treatment by prayer or spiritual means alone for healing in

"religious practice" as "includ[ing] all aspects of religious observance and practice, as well as belief." *Id.* In this context, it is clear that students are allowed to rearrange classes for observances and customs required by their religious beliefs, rather than any good deed a person is motivated to perform by their religion.

A similar term, "religious purpose," has been construed narrowly to apply only to activities pertaining to worship and religious instruction. In *Provena Covenant Medical Center v. Dep't of Revenue*, the Illinois Supreme Court held that the term "religious purpose" in the Illinois Tax Code should not be interpreted to cover every action a person performed under the name of religion:

> In a sense, everything a deeply devout person does has a religious purpose, . . . but if that formulation determined the exemption from property taxes, religious identity would effectively be the sole criterion. A church could open a restaurant, for instance, and because waiters attempted to evangelize customers while taking their orders, the restaurant would be exempt. But the operation of a restaurant is not necessary for evangelism and religious instruction, although, like any other social activity, it can provide the occasion for those religious purposes.

236 Ill.2d 368, 409-10 (2010) (internal quotation omitted). Thus, the Court determined that simply acting in a manner consistent with one's religious beliefs could not constitute a "religious purpose" under the Illinois Tax Code. *Id.* at 409 The Court concluded that a medical center affiliated with the Catholic Church did not have a primarily religious purpose because, although the medical center "provided an opportunity for various individuals . . . to express and to share

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accordance with the tenets and practice of a well recognized religious denomination"); 55 ILCS 5/3-3021 (providing that treatment by prayer or other spiritual means by decedent does not automatically give rise to an autopsy or investigation); 410 ILCS 213/25 (providing that a parent can object to hearing screenings being performed on their infants if the screenings conflict with the parent's religious beliefs and practices). Another statute accommodates religious symbols in the home. *See* 765 ILCS 605/18.4(h) (condominium managers cannot "prohibit any reasonable accommodation for religious practices, including the attachment of religiously mandated objects to the front-door area of a condominium unit").

their Catholic principles and beliefs," medical care "is not intrinsically, necessarily, or even normally religious in nature." *Id.* at 410; *see also Faith Builders Church, Inc. v. Dep't of Rev.,* 378 Ill.App.3d 1037, 1046 (4th Dist. 2008) (despite Christian mission statement, day care center's primary purpose was business); *Fairview Haven v. Dept. of Rev.,* 506 N.E.2d 341, 153 Ill.App.3d 763 (Ill. App. Ct. 1987) (nursing home with religious mission did not have primarily religious purpose; religious belief in the value of charity and service work did not have to be accomplished through a nursing home). Similarly here, while engaging in social work is consistent with Catholic beliefs, acting with such consistency does not give rise to a "religious practice."

3. *The legislative history is ambiguous, but indicates that Catholic Charities should look to the Human Rights Act for any exemptions.*

Ignoring the plain language and purpose of the statute, Catholic Charities place undue weight interpreting the Act on an indeterminate portion of its legislative history. Highlighting a short exchange between the bill's sponsor and a questioner on the Senate floor, Plaintiffs argue that this limited back-and-forth, excised from lengthy remarks on the bill, "absolutely confirms" their interpretation. Second Am. Compl. ¶ 35. The singular intent of one legislator out of many does not represent the collective intent of the entire body in passing the bill. *See Johnston*, 241 Ill.2d at 175. The collective legislative intent, not the intent of separate individuals, is most relevant to the statute's interpretation. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."). Plaintiffs' excerption from two senators' remarks belie the ambiguity apparent from a fuller reading of the transcript. Senator Koehler, hesitating as he answers whether the exemption's second sentence should be read to modify the first answers, "If I understand your question correctly, yes." S., TRANSCRIPTS OF DEBATE, 96 Gen. Assembly, 81 (Ill. Dec. 1, 2010)

(statements of Sen. Koehler, Sen. Haine, and Sen. Clayborne). In another exchange upon which Plaintiffs rely, Senator Koehler's remarks appear to be a non-sequitur; it is unclear whether his affirmation is to Senator Haine or to the presiding officer, or whether his remarks should not be read as a response at all.

> SENATOR HAINE: And therefore—and this is a part of this intent; this has been the worries of these institutions of faith of all denominations, Christian and Jewish—go to their various agencies providing social services, retreats, religious camps, homeless shelters, senior care centers, adoption agencies, hospitals, a wide gamut of things. So that's covered under the first sentence.
>
> PRESIDING OFFICER (SENATOR CLAYBOURNE): Senator Koehler.
>
> SENATOR KOEHLER: Yes. The—certainly the intent of Representative Harris and I is not to at all, you know, impede the rights that religious organizations have to carry out their—what their duties and—religious activities are.

Id. This colloquy is ambiguous and cannot offer guidance in interpreting the act.

Reading the entire legislative history, rather than a few ambiguous remarks in seclusion, shows that the legislature did not intend to cover Plaintiffs' foster care services within the Act's limited exemption. More to the point is the colloquy between Senator Koehler and another senator that shows that the Civil Union Act exemption does not expand or replace an exemption for religious employers under the Illinois Human Rights Act ("IHRA"). *Id.* at 59-60 (statements of Sen. McCarter and Sen. Koehler). When Senator McCarter asked whether the Civil Union Act would "affect hiring within a nonprofit 501(3)(c) [*sic*] church organization[,]" Senator Koehler directed him to the Human Rights Act rather than Section 15 of the Civil Union Act. *Id.* He stated: "Religious organizations are specifically exempt in the Human Rights Act as employers, and this [the Civil Union Act] does not pertain to religious organizations in any way." *Id.* He reaffirmed this position later in the testimony when asked whether a religious organization would be required to cover the health plan of an employee's partner if they entered

a civil union. *Id.* at 72-73. Senator Koehler stated: "Again, the Human Rights Act of Illinois exempts religious organizations from being included in the category of employer." *Id.* at 73. Thus, the Human Rights Act, and not the Civil Union Act, is the source of any exemption for religious organizations. *See* 775 ILCS 5/2-101(B)(2) (providing an exemption for certain religious organizations from the Human Rights Act's prohibition on employment discrimination). Section 15 of the Civil Union Act does not provide an independent exemption to civil rights laws. This dialogue between Senator McCarter and Senator Koehler, directly answering whether organizations like Catholic Charities are exempt under the Act, sheds more relative interpretive guidance than the remarks on which Plaintiffs rely.

C. **The Human Rights Act applies to Catholic Charities**

Catholic Charities' policies violate the Human Rights Act by discriminating on the bases of sexual orientation and marital status. The Act applies to Plaintiffs because of their relationship with the state, and because they operate a public accommodation.

1. *"Aiding and abetting" is prohibited by the Human Rights Act*

Under the Human Rights Act it is a "civil rights violation" for any DCFS officers or employees to "[d]eny or refuse to another . . . the full and equal enjoyment of the accommodations, advantages, facilities or privileges of the official's office or services or of any property under the official's care because of unlawful discrimination." 775 ILCS 5/5-101, 5/5-102(c). Thus, when DCFS makes licensing or placement decisions, it cannot discriminate against the child and it cannot discriminate against prospective or current foster parents. Discrimination on the basis of sexual orientation, sex and marital status by DCFS is explicitly barred by the Illinois Human Rights Act. 775 ILCS 5/1-103(Q).

If DCFS were to allow Catholic Charities to implement their discriminatory policy, Catholic Charities would also be liable because they would "aid, abet, compel or coerce a person to commit any violation of this Act." 775 ILCS 5/6-101(B). This aiding and abetting clause has been used in employment law contexts to bring suit against non-employer parties that have contractual relationships with the employer in question, provided that the abetting party also had knowledge of a discriminatory practice, and a clear causal effect on the complainant's employment situation. *See*, *e.g.*, *Robert Cook*, 1993 WL 817038 (Ill. Human. Rights. Comm'n.); *Mary L. Rademacher*, 1997 WL 377563 (Ill. Hum. Rts. Com.). Although this is not an employment law case, the relationship between DCFS and Catholic Charities is analogous to the subcontractor relationships traditionally covered by Section 5/6-101(B). DCFS has contracted with Catholic Charities to provide a service, and Catholic Charities has knowingly perpetuated a violation of the Illinois Human Rights Act in that capacity. Consequently, Catholic Charities can be held liable for aiding and abetting DCFS in violation of the Human Rights Act.

The aiding and abetting clause applies when: (1) there was a significant contractual relationship between the parties; (2) the abettor's actions caused the discrimination; and (3) the abettor acted with knowledge. *See Cook*, 1993 WL 817038; *Rademacher*, 1997 WL 377563, at *3. Plaintiffs meet these standards by contracting with DCFS, operating a discriminatory policy while carrying out duties of the contract on behalf of the state, and having knowledge that they are engaged in the discriminatory behavior. *See Davy Cady*, 2005 WL 1981118 (Ill. Human Rights Comm'n) (finding "knowledge" where the abettor posted for " public view the job intake form with the wording 'needs to be minority'" even where the abettor had no knowledge of the requirements of the statute).

2. *Foster Care Agencies are public accommodations.*

Under the Human Rights Act, a "[p]lace of public accommodation includes, but is not limited to. . . a senior citizen center, homeless shelter, food bank, non-sectarian adoption agency, or other social service center establishment . . . ." 775 ILCS 5/5-101. The definition of public accommodations is non-exhaustive and therefore, the statute must be interpreted to include other similar establishments. *Board of Trs. of S. Ill. Univ. v. Dep't of Human Rights*, 159 Ill.2d 206, 211 (1994) ("[W]hen a statute lists several classes of persons or things but provides that the list is not exhaustive, the class of unarticulated person or things will be interpreted as those 'others such like' the named persons or things."); *Baksh v. Human Rights Comm'n*, 304 Ill. App. 3d 995, 1003 (1st Dist 1999) (noting the "broad statutory definition" of public accommodation). Further, the 2007 amendment of the act added the broad phrase "or other social services center establishment" making clear that other services should be included.

Catholic Charities' work as foster care agencies is "like" all of the establishments listed in this section of the act. 775 ILCS 5/5-101. Catholic Charities provide social services to foster children and foster parents, in the form of placement of children in foster homes, training and licensing of foster parents, and continued monitoring of those placements. This is similar to the work conducted by non-sectarian adoption agencies, or homeless shelters, both of which are covered. *Id.* Indeed, Catholic Charities refer to themselves as a "social service agencies" throughout the complaint. *See, e.g.*, Second Am. Compl. ¶ 1. Foster care agencies qualify as a "social services center establishment" under a plain reading of the term, making Catholic Charities a "public accommodation" under the Act. 775 ILCS 5/1-101.

Catholic Charities argue that because "non-sectarian adoption agency" is included in the Human Rights Act, that "a sectarian (*i.e.*, religiously-based) adoption agency is *not* a "place of

public accommodation," and, therefore, does *not* fall within the scope of the Illinois Human Rights Act." Second Am. Compl. ¶ 31. Even if this is true, Catholic Charities may not rely on a religious-based exemption while performing a public function. *See supra* 27-30. Further, the work of adoption agencies and foster care agencies, while similar, are distinct; if the Human Rights Act excluded foster care agencies, the exemption would be explicit in the statute.

Foster care agencies are entrusted as long-term guardians of children who are the legal responsibility of the state. *See* 89 Ill. Admin. Code 301.40. The agencies must become licensed and enter contracts with the state in order to provide services to foster children. 20 ILCS 505/4a. Foster agencies have long and extensive relationships with both foster children and foster parents, including initial licensing and home study of foster parents (89 Ill. Admin. Code 402.4), comprehensive admissions studies for each child (*Id.* at 401.420), and continued monthly monitoring of the home by an assigned caseworker (*Id.*). These longstanding relationships make the need for anti-discrimination provisions particularly acute.

In contrast, adoption agencies do not have the extensive regulated relationship with adoptive parents that foster care agencies have with foster parents. Many adoption agencies arrange private adoptions between two private parties for a child who is not the legal responsibility of the state. Adoptive parents usually only require an initial investigation of the home by a licensed child welfare agency and a criminal background check. 750 ILCS 50/6. They are not subject to ongoing monitoring by the state or its agents. Excluding a subset of these agencies from discrimination provisions simply does not have the same impact as leaving foster children and foster parents unprotected from discrimination.

Further, the purported sectarian exemption specifically applies only to adoption agencies, and not to any other services in the category. The inclusion of certain exceptions in a statute

should be construed as the exclusion of all others. *State v. Mikusch*, 138 Ill.2d 242, 250 (1990). The public accommodation definition identifies other specific exemptions, such as private clubs, but does not exclude sectarian foster care agencies. *See* 775 ILCS 5/5-103. The exceptions to the act should be read narrowly to achieve its broad purpose. *See Board of Trs. of Cmty. Coll. Dist. No. 508 v. Human Rights Comm'n*, 88 Ill.2d 22, 26 (1981) ("As remedial legislation the [Illinois Human Rights] Act should be construed liberally to effect its purpose."). Absent a specific exception for sectarian foster care agencies, they are clearly included within the act as "social service centers."

D. Catholic Charities is not exempted by the Illinois Religious Freedom Act.

Even if Plaintiffs could rely on RFRA while engaged as state actors, they cannot establish a violation under IRFRA because (1) no "substantial burden" has been placed on their exercise of religion; (2) the state has compelling interests in the welfare of foster children and in preventing discrimination; and (3) Catholic Charities' proposed referral system is not a less restrictive means.

1. *Catholic Charities fail IRFRA's first prong because they cannot show a substantial burden on its religious exercise.*

Before requiring the state to justify its action, Plaintiffs must first show that the state has "substantially burden[ed]" their "exercise of religion." 775 ILCS 35/15;[24] *Diggs v. Snyder*, 333 Ill. App. 3d 189, 195 (5th Dist. 2002) ("[I]t is the duty of a plaintiff to make a threshold showing that the complained-of action does, in fact, impose a substantial burden . . ."). To show a substantial burden, "a plaintiff must demonstrate that the government action prevents him from engaging in conduct or having a religious experience that his faith mandates.'" *Id*. (no

[24] To the extent that Plaintiffs rely on the free exercise provision of the state constitution rather than IRFRA, they still fail to show a substantial burden and the state has compelling interests which cannot be met through more narrowly tailored means.

substantial burden where impeded activity was not "required by the basic tenets of [plaintiff's] religion") (internal quotations and citations omitted). [25]

Catholic Charities fail to meet IRFRA's threshold step because the state action at issue—potential withdrawal of a contract to provide foster care services—does not constitute a "substantial burden." They do not claim that contracting with the state to provide foster care services is "required by the basic tenets of [their] religion." *See Diggs*, 333 Ill. App. at 195 (no substantial burden where state forbade Muslim prisoner from possessing religious pamphlet not required for religious practice); *see also Stefanow v. McFadden*, 103 F.3d 1466, 1471 (9th Cir. 1996) (*superseded in other part by statute*, *see Navajo Nations v. U.S. Forest Serv.*, 479 F.3d 1024 (9th Cir. 2007) (no substantial burden where officials confiscated contraband religious book neither "central to [prisoner's] religious practices" nor required religious reading)). Without a state contract to provide foster care placements, Plaintiffs remain free to continue offering their abundant additional social services for needy and marginalized individuals. *See* Second Am. Compl. ¶ 39; *see also* Fox Decl. ¶ 3 ("infant and international adoption; child welfare; senior in-home counseling; crisis intervention; youth, family and community outreach; child day care; a food pantry; Latino and immigrant outreach; residential care; and behavioral health"). Catholic Charities may end its contract for foster care and carry out its mission through other means. *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 925 (1996) (anti-discrimination law did not impose substantial burden on landlord who could, "if she does not wish to comply with an antidiscrimination law that conflicts with her religious beliefs, avoid the

[25] Given the "paucity of cases involving [IRFRA]," the Illinois Appellate Court has relied on federal cases interpreting the federal RFRA statute, 42 U.S.C. § 20000bb *et seq*. for guidance in defining the "substantial burden" under IRFRA. *Diggs*, 333 Ill. App. 3d at 194 (acknowledging that *City of Boerne v. Flores*, 521 U.S. 507 (1997) limited federal statute's application to federal government).

conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments") (called into question for other reasons by *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

2. *The State has compelling interests.*

Even if Catholic Charities demonstrate that their religious free exercise has been substantially burdened, the state has compelling interests in: (1) placing its wards on the basis of a best interest standard; and (2) in preventing discrimination.

a. The State has a compelling interest in the largest pool of potential foster parents possible.

The State and DCFS are obligated by the Constitution, the *B.H.* Consent Decree, and state law to implement the foster care program consistent with professional standards and by making placements based on the foster children's best interests. *See supra* 13-20. Independent from these constitutional and statutory obligations, under its *parens patriae* powers, the State bears the ultimate responsibility for children adjudicated its wards. *See* 20 ILCS 505/5(k). This responsibility gives rise to compelling interest in the foster children's safety and well being and thus, even if Catholic Charities showed that compliance with DCFS' regulations imposed a substantial burden, the State's interest in foster care placement based on each child's best interest would prevail. Although this issue has not been raised in foster care in Illinois, sister states have held that an interest in children's welfare is compelling, outweighing religious objections. *See, e.g.*, *State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692, 696 (Tex. 1984) (holding "that, as a matter of law, the State has a compelling interest of the highest order in protecting the children in child-care facilities from physical and mental harm"); *see also State ex rel. O'Sullivan v. Hearth Ministries, Inc.*, 607 P.2d 1102, 1109 (Kan. 1980) (denying Free Exercise claim by religious agency operating unlicensed boarding home for girls based on state's

"legitimate, vital interest" in children); *North Valley Baptist Church v. McMahon*, 696 F.Supp. 518, 526-27 (E.D. Cal. 1988) (rejecting plaintiff's Free Exercise claim because "the state's interest in protecting the health and safety of children is particularly acute"); *Michigan Dep't of Soc. Servs. v. Emmanuel Baptist Preschool*, 455 N.W.2d 1, 387-88 (Mich. 1990) (denying church's exemption from child care licensing and corporal punishment regulations based on state's interest in children's well-being).

Nor is there a less restrictive means of protecting the children's interests. In support of these interests, the State created a regulatory scheme, including a requirement of placement of these children on the basis of the child's best interests, and for licensing of foster care agencies, a requirement of following all state and DCFS regulations. 20 ILCS 505/5; 89 Ill. Admin. Code 301.60. Catholic Charities cannot demand a change in its contract terms and an exclusion from these regulations. "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986) (upholding state statute's reliance on Social Security numbers over plaintiffs' claim that use of number violated their religious beliefs); *see also Mefford v. White*, 331 Ill. App. 3d 167, 178 (2002) (upholding statute requiring plaintiff to disclose his Social Security number despite plaintiff's religious objection).[26] There is no less restrictive way to apply regulations passed for children's safety than to apply them to all agencies engaged in their care. *Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d at

[26] Although *Bowen* and *Mefford* were not decided under the compelling interest standard, similar cases in sister jurisdictions reach the same outcomes applying strict scrutiny. *See Penner v. King*, 695 S.W.2d 887, 890 (Mo. 1985) (en banc) (applying strict scrutiny and upholding statute requiring applicants to disclose Social Security numbers for licenses despite plaintiffs' contrary religious beliefs); *Miller v. Comm'r of Internal Revenue*, 114 T.C. 511, 516 (2000) (applying strict scrutiny and upholding IRS requirement that plaintiffs provide Social Security numbers of children to claim dependency deductions).

696; *O'Sullivan*, 607 P.2d at 1109; *North Valley Baptist Church*, 696 F. Supp. at 526-27 *Michigan Dept. of Social Services*, 455 N.W.2d at 387-88.

b. The State has a compelling interest in preventing discrimination.

The State also has a compelling interest in preventing discrimination. The United States Supreme Court has held that a state interest in preventing discrimination on the basis of race is sufficiently compelling interest to outweigh a burden on free exercise rights. *Bob Jones Univ. v. United States*, 461 U.S. 574, (1983); *c.f. Roberts v. U.S. Jaycees*, 468 U.S. 609, 624-625 (1984) ("[Discrimination] . . . deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life."). Other states have successfully demonstrated that an interest in preventing discrimination on the basis of some immutable characteristic is compelling enough to overcome a substantial burden on religious exercise. *See*, *e.g.*, *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. App. Ct. 1987) (sexual orientation); *N. Coast Women's Care Med. Grp. Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 968 (Cal. 2008) (full and equal access to health care regardless of gender or sexual orientation); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93 (Cal. 2004) (gender); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (marital status).

Here, the state's interest is even more acute than in cases addressing private discrimination because Catholic Charities is engaging in state functions. Allowing a contracting agency to engage in discrimination would erode public confidence in the state's neutrality. *See supra* 26 (citing *Endres*, 349 F.3d at 927; *Rodriguez*, 156 F.3d at 779). The state also has an interest in not being the cause of the harms that flow from stigmatizing both foster children and the foster parents who offer them homes. *See supra* 17-20, 24-26.

There are no less restrictive means of preventing discrimination short of forbidding the discrimination altogether. *See Swanner*, 874 P.2d at 280 n.9 ("The most effective tool the state has for combat[]ing discrimination is to prohibit discrimination . . . [c]onsequently, the means are narrowly tailored and there is no less restrictive alternative."); *Bob Jones,* 461 U.S. at 604; *Gay Rights Coal. of Georgetown Univ. Law Ctr.*, 536 A.2d at 39; *N. Coast Women's Care Med. Grp. Inc.,*189 P.3d at 968; *Catholic Charities of Sacramento*, 85 P.3d at 93. Further, as argued above, referrals made for a discriminatory reason *are* discrimination and violate the Human Rights Act. *See supra* 26. Only an outright ban on discrimination can prevent the harms of discrimination.

IV. **CONCLUSION**

For the reasons set forth in detail above, Catholic Charities' Complaint should be dismissed, or in the alternative summary judgment should be granted to the Intervenors.

Respectfully submitted,

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