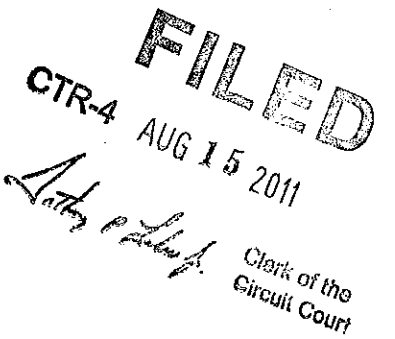
IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS



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 C 5589 (N.D. Ill.); SARAH RIDDLE and KATHERINE WESEMAN,	)	
Intervenors.	)	

INTERVENORS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Intervenors are (1) 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 the Department of Child 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 (2) Katherine Weseman and Sarah Riddle who have entered a civil union, reside in Champaign County, and intend to become licensed foster parents to a child or children who are wards of the State of Illinois ("foster parents"). Intervenors respectfully submit this Memorandum in support of their Opposition to Plaintiffs' Motion for Summary Judgment.

Introduction

Catholic Charities of Springfield, Peoria, Joliet, and Catholic Social Services of Belleville ("Catholic Charities" or "Plaintiffs") are four child welfare agencies who have held contracts with the State to provide foster parent licensing and foster children placement services. They claim that they have a right to contract with the State, even though they refuse to comply with the terms of the offered contracts. Despite the fact that the State forbids its contracting agencies from inappropriately narrowing the pool of suitable prospective foster and adoptive parents, Catholic Charities refuse, on religious grounds, to process the license applications of all lesbian and gay male couples and unmarried couples, or to place foster children with any of these couples, even if that placement is in the children's best interest. Instead, Catholic Charities demand that the State must continue to contract with them, and insist that the State or other contracting agencies process the applications Catholic Charities have rejected. This proposed referral system keeps those foster parents out of the pool of Catholic Charities' foster homes, both as initial placements and as placements for children whose initial placements have been

disrupted. Catholic Charities' insistence on only piecemeal performance of the contracts has consequences. There is direct harm to the foster children, some of whom will be denied the opportunity to be placed in the home that best meets their needs, and to the foster parents who face the stigma of discrimination. Catholic Charities' proposed piecemeal performance of their contracts is not required and is constitutionally prohibited.

I. Summary of Undisputed Facts.

The Court should deny Catholic Charities' motion for summary judgment and grant summary judgment in favor of the Defendants and Intervenors based on the following uncontested facts.

A. The Illinois Foster Care System: The Relationship Between DCFS and Private Agencies

1. Illinois juvenile courts grant custody and guardianship of children to DCFS when they have been abused and neglected by their parents. (Second Am. Compl. ¶ 49;[1] Shaver Aff. ¶ 5.)

2. While DCFS handles the cases of some children itself, it contracts with private, state-licensed child welfare agencies to handle the majority of these children's cases. (Second Am. Compl. ¶ 48; Shaver Aff. ¶ 5.)

3. DCFS has managed its foster care program in part by contracting with private social service agencies for several decades. (Second Am. Compl. ¶¶ 49-50.)

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[1] Plaintiffs' Second Amended & Supplemental Complaint has been verified on behalf of all four plaintiffs. *See* Pl. S.J. Mem. at 11 (citing *Donart v. Bd. of Governors*, 39 Ill. App. 3d 484, 486 (4th Dist. 1976)).

4. DCFS' management of the Illinois child welfare system through the use of service contracts with private agencies has included contracting with the Plaintiff Catholic Charities agencies. (*Id.*)

5. As private child welfare agencies, the Plaintiff agencies provide foster care services under such service contracts with DCFS. (*Id.*, *see also* Fox 3d Decl. ¶ 14.)

6. On June 1, 2011, The Illinois Religious Freedom Protection and Civil Union Act ("Civil Union Act") became effective. (Second Am. Compl. ¶ 35.)

7. As an Illinois state agency, DCFS is required to comply with the laws of the State of Illinois, including the Civil Union Act. (*Id.* at ¶¶ 3-5.)

8. In the spring of 2011, DCFS notified agencies with which it contracted that for fiscal year 2012 that they would be required to comply with the Civil Union Act when providing contracted services for DCFS. (Second Am. Compl. ¶ 5.)

9. Catholic Charities have a "non-negotiable" policy which prohibits them from processing the licensing application, or otherwise assisting, unmarried couples with licensure. (*See, e.g.*, Second Am. Compl. ¶ 5; Roach Decl. ¶ 4.)

10. Even though each of the four Plaintiff Catholic Charities agencies signed contracts for FY 2012 obligating the agency to obey applicable laws, the Plaintiff agencies advised DCFS that they would not comply with the Civil Union Act in fulfilling their obligations under their FY 2012 contracts with DCFS. (Second Am. Compl. ¶ 6.)

11. Accordingly, DCFS refused to enter into contracts for FY 2012 with the Plaintiff Catholic Charities agencies. (Second Am. Compl. ¶ 6.)

12. Catholic Charities have asserted that their refusal to license unmarried persons, including lesbian and gay male couples, can be accommodated by allowing them to refer

unwanted cases or applicants to DCFS or other agencies. (*Accord* Second Am. Compl. ¶¶ 37, 64.) Catholic Charities also admit, however, that in some areas, Catholic Charities is the *only* agency in the area providing foster care services. (*See* Fox Decl. at ¶ 4.)

13. Licensed child welfare agencies like Catholic Charities have the responsibility to recruit and license foster parents. Such agencies have designated licensing staff who are trained and licensed to process the licensing applications of and perform licensing functions for prospective foster families (e.g., conducting home compliance visits). (Fox. 3d Decl. ¶¶ 6-7; Shaver Aff. ¶ 8.)

14. Licensed child welfare agencies are held accountable by DCFS for their performance. DCFS evaluates private agencies' ability to maintain the stability of children's placements and success in moving children to permanent homes. DCFS and agencies with which it contracts have long-term relationships with licensed families, providing compliance monitoring and services to ensure the safety and stability of the children's placements. (Shaver Aff. ¶ 11.)

15. When contracting with an agency, DCFS always reserves the right to transfer cases – or even transfer an entire agency's caseload – if agencies do not live up to their obligations. DCFS contracts with private agencies extend only for a defined term, do not renew automatically, and in most cases can be terminated by thirty days' notice by either party. (Shaver Aff. ¶ 11.)

16. With appropriate planning, private agency caseloads can be transferred with minimal disruption. In the past, transferring children between agencies rarely resulted in placements being disrupted, and caseworker assignments can also often be preserved. For example, when Cook County Catholic Charities left the foster care business a few years ago,

nearly 1,000 cases were transferred; very few children were removed from placements, and many Catholic Charities caseworkers were hired by other agencies. (Shaver Aff. ¶¶ 19-21.)[2] In addition, counseling relationships between foster children and mental health staff currently employed by Catholic Charities could be maintained even if Catholic Charities stop providing foster care services. Private agencies that supervise children formerly supervised by Catholic Charities could hire the mental health staff or contract with Catholic Charities to continue to provide counseling services to the children. (*See* Att. A, Second Affidavit of Michael Shaver ("Shaver 2d Aff.") ¶ 3.)

17. According to Catholic Charities, the homes Catholic Charities manage are in good standing. (See Huelsmann Decl. ¶¶ 8-12.) Accordingly, if foster home cases are transferred to another agency, any newly assigned agency to these cases is likely to find that the bulk of these homes remain suitable. Transitions like these have been handled by DCFS in the past with minimal disruption. (Shaver Aff. ¶ 24.)

B. DCFS' Constitutional and Other Legal Obligations to Children in State Custody

18. Even when DCFS contracts with child welfare agencies to manage foster children's cases, DCFS retains guardianship over the foster children and has the ultimate authority to make certain decisions regarding the care of the child, including, for example, the power to consent to psychiatric treatment for the child. (Second Am. Compl. ¶ 49; Shaver Aff. ¶¶ 5-7.)

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[2] While Catholic Charities speculates that their foster families may refuse to continue serving children, and that caseworker and counseling relationships will be disrupted if their FY 2012 contracts are not renewed (*see, e.g.*, Fox 3d Decl. at ¶ 15), Intervenors have shown that if Plaintiffs no longer provide services to Illinois wards, the transition process can be managed with proper planning such that disruption is kept to a minimum. *See* Shaver Decl. at ¶¶ 19-24. Plaintiffs' statements accordingly do not controvert Intervenors' showing. *See Robidoux v. Oliphant*, 201 Ill.2d 324, 335-36 (2002).

19. DCFS must ensure that the "best interests" of individual foster children guide where children are placed and must develop resources such that allow placement of individual foster children, including lesbian, gay, bisexual, transgender and questioning (LGBTQ) children, into living arrangements best situated to address their needs. (Shaver Aff. ¶¶ 6-8, 17-18.) Catholic Charities agree that this is the standard of care that must be provided to children. (Fox 3d Decl. at ¶ 14.)

20. Part of DCFS's and contracting agencies' obligations to foster children in Illinois is the duty to recruit sufficient numbers of foster homes to provide children with safe and appropriate placements. (Shaver Aff. ¶¶ 8, 17.)

21. In provision of services for Illinois foster children (whether directly or by contract), DCFS is prohibited from discriminating against prospective foster parents in placement decisions or in providing licensing services on the basis of race, religion, marital status, and sexual orientation because, among other reasons, these factors are not relevant to determine who may be a good caregiver for a child. (Shaver Aff. ¶¶ 8, 14-18; Brodzinsky Aff. ¶ 20-24.)

22. Maximizing placement resources is an integral part of child welfare work. There are over 425,000 children in foster care in the U.S., 115,000 of whom have been freed for adoption but continue to linger in foster care because there are not enough families willing or able to adopt them. (Shaver Aff. ¶ 8; Brodzinsky Aff. ¶ 23.)

23. There is no rational basis for categorically excluding lesbian, gay male, or other couples from adopting or fostering children solely because they are living with a partner and,

consequently, doing so is contrary to the best interests of children. (Shaver Aff. ¶¶ 8, 14-18; Brodzinsky Aff. ¶ 20-24.)[3]

24. All major professional organizations whose focus is the health and well-being of children and families affirm the ability of lesbian, gay, and bisexual parents to parent, adopt and foster children, as reflected in the position statements on these topics by the 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 Child Welfare Workers, the Evan B. Donaldson Adoption Institute, and the American Bar Association. It is contrary to accepted professional judgment standards in child welfare practice to exclude lesbian and gay male couples or other unmarried couples from being foster and adoptive parents based solely on their orientation and/or cohabiting status, thereby reducing the pool of potential matches that are in the best interests of children in the child welfare system. (Brodzinsky Aff. ¶ ¶ 21-23, 25.)

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[3] Catholic Charities have submitted affidavits contending that the agencies have adhered to the best interest standard. *See* Huelsmann Decl. ¶ 3 ("In our long history of working in foster care, I know of no instance where DCFS has identified a case where the Catholic character of our agency has prevented us from servicing a child in our care in accord with the best interests of that child, nor do I believe any such case exists or will exist in the future."); Fox 3d Decl. ¶ 14 ("[W]e are able to give DCFS our professional assurance that we do not interfere in the slightest with the best interests of the child;" "we follow professional codes of ethics, we follow licensing standards"). However, the Civil Union Act only became effective as of June 1, 2011, and DCFS notified agencies in the spring of 2011 that they would be required to comply with the Civil Union Act when providing contracted services for DCFS by licensing both members of a civil union couple. *See supra* Facts 7-8. Moreover, Plaintiffs have presented no evidence to counter Intervenors' showing that their discriminatory policies are directly *contrary* to accepted child welfare standards and the best interests of children. Plaintiffs' statements accordingly do not controvert Intervenors' showing. *See Robidoux,* 201 Ill.2d at 335-36.

C. Potential Harms to Foster Children Posed by Agencies which Refuse to Recognize Unmarried Couples as Prospective Foster Parents

25. Policies that discriminate against unmarried foster parents who live with their partners are highly likely to cause significant harm to foster children. (Shaver Aff. ¶¶ 12-18; Brodzinsky Aff. ¶ 26.)

26. For many children, the best possible placement is with the relative of the child. More than half of the children placed in foster care and supervised by Catholic Charities are in the homes of relatives. Decisions to place children with relatives are usually made by DCFS at the time a child is removed from a parent's home, before the child's case is assigned to an agency. At the time of that assignment, the relative with whom the child will be placed typically has gone through only an expedited background check and will not have completed the full licensing process. (Shaver Aff. ¶ 13; Brodzinsky Aff. ¶¶ 25-26.)

27. When the agency is assigned, it may be unaware of the cohabitation of the unmarried couple. For an agency whose policies prohibit placement of children with, or licensing of, unmarried couples, the agency has several alternatives, all of which harm children:

- First, the agency can return the case to DCFS when it becomes aware that the foster parent has a partner. Returning the case is likely to delay and disrupt the casework and oversight provided to the child.
- Second, the agency can remove the child from the home, a course of action that is not only contrary to the child's best interests, but also likely to cause serious psychological harm to the child.
- Third, to the extent the agency continues to provide foster care services but refuses to allow foster parent licensing, the agency's actions are likely to deprive the caregiver and the child of the enhanced resources and supports

that being licensed would provide. Thus, this outcome is also not in the best interests of the child.

(Shaver Aff. ¶ 14.)

28. Similarly, an agency whose policies prohibit the placement of children with, or licensing of, unmarried couples is faced with a difficult series of choices when a formerly single foster parent enters into an unmarried, cohabiting arrangement, each of which again harms children. The agency could:

- First, transfer the case to a different agency, resulting in the same concerns as above, and also sending a cruel message to a child that the person caring for the child had not been "adequate" in the eyes of the foster agency.
- Second, even if the agency permits the child to stay in such a home while remaining under the agency's supervision, the agency's policy to refuse licensing services to unmarried couples would prevent the foster parent's civil union partner from joining as a licensed foster parent of the child, which substantially increases the instability of the placement, and guarantees uncertainty for the child in the event of the death or disability of the original foster parent.

(Shaver Aff. ¶ 16.)

29. Additionally, a growing number of lesbian, gay, bisexual, transgender, and questioning youth are in the foster care system. An agency must have a welcoming culture, not a culture of condemnation and rejection, to provide the necessary support for these children—to say these children are worthy, that they "count," and to advocate for them rigorously when they

face challenges in schools, within residential settings and elsewhere. (Shaver Aff. ¶¶ 16, 18; Brodzinsky Aff. ¶¶ 27-28.)

30. Referring lesbian and gay male prospective foster parents to another agency that will serve them without discriminating is not an acceptable solution from either a child welfare prospective or a mental health perspective, for a number of reasons:

- It delays placement decisions for those children for whom the agency is already responsible, which may increase the adjustment time for these children.
- It reinforces the stigma for lesbian and gay male prospective parents, increasing their risk for internalized homophobia and potentially undermining their motivation to foster or adopt children. This could potentially reduce the pool of prospective foster parents.
- In some areas, there may be no other agency to which the potential foster parents can be referred. Referral to an agency located at a distance could result in a barrier to entry to the foster parents in terms of increased costs of licensure.
- Finally, agencies that exclude lesbian and gay male individuals as foster parents could very well have children in their custody who have begun to question their sexuality, gender identity, or gender expression, and the agency's policy would send a strong message to these children that could undermine their self-esteem and emotional well-being. Further, any agency that excluded lesbian and gay male individuals as foster parents would be

unable to place a child who requested gay or lesbian foster parents without transferring the child to another agency.

(Brodzinsky Aff. ¶ 27.)[4]

31. Although DCFS often makes the decision about a child's initial foster placement, if that first placement is disrupted, private agencies like Catholic Charities almost always decide where to place a child under their supervision. Unfortunately, placement disruptions are a very common occurrence in the foster care system. In the DCFS Southern Illinois Region, for example, published reports indicate that in Fiscal Year 2010 nearly 25% of foster children experienced more than two placements in their first year, including more than half of children over 15 years old. Private agencies therefore play an important and ongoing role in deciding where foster children under their supervision will live. (Shaver 2d Aff. ¶ 2.)

Based on this set of undisputed facts, and when the law is correctly applied as discussed below, summary judgment must be granted in Defendants' and Intervenors' favor, and denied for Plaintiffs.

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[4] Again, while Catholic Charities aver that a referral system allegedly is "harmless," the statement does not address or refute the facts and opinions of Intervenors' experts. For example, Ms. Fox claims that a computerized system identifies the best placement from all social service agencies. (Fox 3d Decl. ¶ 12.) However, this does not address the needs of hard to place children, children with disrupted placements (including LGBT youth whose placement has been disrupted because families reject them because of their sexual orientation or gender identity) who have been assigned to Catholic Charities and need a new home, or the fact that the best possible foster parent placement may have been deterred from becoming foster parents because of Catholic Charities' discrimination and are not in the system. *See* Facts 25-31. Likewise, Ms. Fox's blanket assurance that "once any child enters the social welfare system, every step we take related to that child is based on his or her best interest" simply does not address the concerns raised by Intervenors' experts regarding the damage that inevitably flows from the discrimination in providing licensing assistance and in placement decisions for the children whose cases Catholic Charities supervises. (*See* Shaver Aff. ¶¶ 14-16.) *See Robidoux*, 201 Ill.2d at 335-36.

II. Plaintiffs' Claims are Preempted by the Federal B.H. Consent Decree

First, Plaintiffs' claims are preempted by the federal consent decree in *B.H. v. McEwen*, No. 88 C 5589 (N.D. Ill.). *See* Interv. S.J. Mem. at 5-8. DCFS is bound by specific provisions of the *B.H.* Decree requiring the placement of foster children based on their best interests.[5] In contravention of the *B.H.* Decree, Catholic Charities seek a judgment that would allow them to make decisions about child placement based on reasons unrelated to the children's best interests, *i.e.*, based on the sexual orientation and marital status of the prospective foster parents as dictated by Catholic Charities' religious beliefs. Second Am. Compl. ¶¶ 2-3. Plaintiffs' complaint should be dismissed on these grounds.

III. Catholic Charities' Religious Claims Fail.

Further, this Court should deny Catholic Charities' motion for summary judgment and grant summary judgment to Defendants even if the Court were to find that preemption does not apply.

a. The State is prohibited from contracting with private agencies that violate the law.

It is an uncontested fact that Catholic Charities are not willing to process the licenses of lesbian and gay male couples and unmarried couples, including couples who have entered into a civil union, or place children in their care. *See supra* Facts 9-12. The State cannot discriminate in the application and licensing process of foster and adoptive parents. Rather, the State is required by the Constitution, Illinois law, its own regulations, and the *B.H.* Consent Decree to place children in foster homes on the basis of their best interests and not based on other factors such as sexual orientation or marital status, or the religious beliefs of a private agency. *See supra*

[5] The *B.H.* Consent Decree requires that "all placement decisions will be made consistent with the best interests and special needs of the child[.]" *B.H.* Restated Consent Decree ¶ 34.

Facts 7, 17-24; Interv. S.J. Mem. at 13-24. Because DCFS may not make placement decisions on the prohibited bases Catholic Charities insist on applying, the State is barred from contracting with agencies for placement services that discriminate against foster parents and place children on bases other than their best interests. *See Norwood v. Harrison*, 413 U.S. 455, 464 (1973); Interv. S.J. Mem. at 8-13. Summary judgment should be granted to Defendants and Intervenors and Plaintiffs' motion for summary judgment should be denied.

b. As State Actors, Catholic Charities may not engage in discriminatory practices.

By virtue of their relationships and obligations to DCFS, the foster children and the foster parents, Catholic Charities are state actors and as such are prevented by the United States and Illinois constitutions from engaging in their discriminatory policy. *See* Interv. S.J. Mem. at 8-13; *supra* Facts 1-5, 13-14, 18-29.

Catholic Charities are state actors under the "public function" test, *see* Interv. S.J. Mem. at 10-12, based on the following uncontested facts: DCFS is entrusted with the care of children who have been "adjudicated neglected or abused." 20 ILCS 505/5(k); *supra* Fact 1. The State has constitutional and statutory obligations to the foster children in its care. *See* Interv. S.J. Mem. at 13-20; *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). While DCFS is charged with the ultimate responsibility of caring for the abused and neglected children in its custody, it does not make every placement itself. Rather, it contracts with licensed private child welfare agencies to provide foster care services to DCFS wards, including the historically exclusive state function of placing a child in a foster home. *See* Interv. S.J. Mem. at 9-13 and n.9; *see also supra* Facts 1-5. When these agencies assume the governmental functions of deciding where the State's wards will live and providing licensing services to screen applicants

for State-issued foster home licenses, they stand in the State's shoes and assume responsibility to fulfill the State's constitutional obligations to these children as state actors. *See* Interv. S.J. Mem. at 8-13; *Perez v. Sugarman*, 499 F.2d 761 (2d Cir. 1974) (finding that foster care agencies are state actors because they perform a "public function"); *Harris v. Lehigh County Office of Children and Youth Servs.*, 418 F. Supp. 2d 643, 651 (E.D. Pa. 2005) (foster care agencies perform a function that is "traditionally the exclusive prerogative of the State"); *Estate of Adam Earp v. Doud*, No Civ. A. 96-7141, 1997 WL 255506, *2 (E.D. Pa. 1997) (same).

Catholic Charities are also state actors under the "sufficiently close nexus" test, *see* Interv. S.J. Mem. at 12-13, by virtue of the following uncontested facts: (1) they have entered a close relationship with the State and the foster children by contracting to carry out the State's responsibility for finding appropriate placements and screening applicants for foster home licenses; (2) the placement procedure is highly regulated and the State remains involved in the licensing of foster parents; and (3) the State retains ultimate authority for foster children, giving rise to an ongoing relationship with Catholic Charities. *See* Interv. S.J. Mem. at 12-13, n.12; *supra* Facts 1-6, 10, 13-15, 18-29; *Lethbridge v. Lula Belle Stewart Ctr.*, No. 06-14335, 2007 WL 2713733, *4 (E.D. Mich. 2007); *see also Wilder v. Bernstein*, 645 F. Supp. 1292, 1315-16 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

As state actors, Catholic Charities are bound by constitutional norms and prevented from engaging in their policy because it violates the rights of foster children to be placed in foster homes on the basis of their best interests, *see* Interv. S.J. Mem. at 13-20, and violates the foster parents' rights to be free from discrimination by the State. *Id.* at 20-27. There are no uncontested

facts as to these issues. Accordingly, the Court should grant Defendants and Intervenors summary judgment and deny Plaintiffs' motion for summary judgment.

c. As State Actors, Catholic Charities may not raise religious defenses.

As a matter of law, state actors may not rely on a religious defense. All of Catholic Charities' statutory defenses require them to make religious objections:

(1) The Illinois Human Rights Act includes "non-sectarian adoption agency" as a "public accommodation" (775 ILCS 5/5-101), and Catholic Charities claim that as "secular adoption agency" they are exempt from the Act;

(2) The Civil Union Act only exempts a "religious body" engaged in a "religious practice" (750 ILCS 75/15); and

(3) IRFRA requires that Plaintiffs establish that the State has placed a "substantial burden" on Plaintiffs' "exercise of religion" (775 ILCS 35/15).

The State could not raise such objections based on religious exemptions. As state actors, Catholic Charities are similarly constrained. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 302 (2001) (private institution entwined with State "charged with public character and judged by constitutional standards"); *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (government cannot act to advance religion); Interv. S.J. Mem. at 27-44. There are no issues of material fact regarding whether Catholic Charities are state actors; the Court should deny Catholic Charities' motion for summary judgment and grant summary judgment to Defendants and Intervenors.

IV. Catholic Charities' Statutory Defenses Fail.

While the Court may resolve the case for the above reasons, without reaching Catholic Charities' statutory defenses, the claimed defenses do not apply and the Court should deny

Catholic Charities' motion for summary judgment and grant summary judgment to Defendants and Intervenors.

a. The Human Rights Act applies to Catholic Charities.

Catholic Charities should be denied summary judgment because they are wrong, as a matter of law, that the Human Rights Act does not apply to their work under State contracts as foster care agencies. Catholic Charities' policy violates two sections of the Act. First, Catholic Charities violates the "aiding and abetting" section of the Act, an issue unaddressed in their opening brief. The Human Rights Act clearly prohibits DCFS from discriminating in the provision of its services. 775 ILCS 5/5-1-1, 5/5-102(c); Interv. S.J. Mem. 35-39. No party disputes that Catholic Charities have contracted with DCFS to provide foster care services in the past, seek to continue contracting with DCFS, and seek to discriminate on the basis of marital status and sexual orientation in performing these contracts. *See supra* Facts 2-10. If allowed to continue their discriminatory policy, Catholic Charities would also be liable because, by virtue of these undisputed facts, they would "aid, abet, compel or coerce [DCFS] to commit any violation of [the Human Rights] act." 775 ILCS 5/6-101(B); Interv. S.J. Mem. at 35-36. Therefore, this Court should, as a matter of law, deny Catholic Charities summary judgment as to Count I of their complaint and grant summary judgment to the Defendants.

Even putting aside the fact that Catholic Charities are prevented from discriminating under the aiding and abetting section of the Human Rights Act, Catholic Charities are also covered as "public accommodations" within the meaning of the Act. Catholic Charities' claim that they fall within the Act's exclusion for "sectarian adoption agencies" fails for two reasons.

First, as explained above, as state actors, Catholic Charities cannot invoke any statutory exemptions for religious activity. Catholic Charities argue that as "sectarian" adoption agencies,

they are outside of the Human Rights Act's covered "public accommodations." However, as state actors, they may not rely on religious liberty defenses. Thus, to the extent that Catholic Charities are operating as "adoption agencies" – as Catholic Charities has claimed – rather than as foster care agencies – as addressed below – they are nonetheless covered by the Human Rights Act. *See* 775 ILCS 5/5-101(A)(12).

Second, Catholic Charities are covered under the 2007 amendments to the Human Rights Act because foster care agencies fall within the group of social service agencies that qualify as "public accommodations."[6] The Human Rights Act defines a "place of public accommodation" through a non-exhaustive list of examples that include restaurants, theaters, dry-cleaners, grocery stores, parks, senior citizen centers, non-sectarian adoption agencies and "other social service center establishment[s]." *Id.* at 5/5-101(A). The 2007 amendment's addition of the phrase "or other social service center establishment" includes foster care agencies like Catholic Charities because they are similar to those enumerated in the statute. *See 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."). Intervenors have already addressed and fully refuted arguments Catholic Charities presented in their Second Amended Complaint and in their summary judgment memorandum. *See* Second Am. Compl. at

[6] In support of this position, Plaintiffs cite and analyze the previous version of the Human Rights Act and cases interpreting it. *See* Pl. S.J. Mem. at 20-24, citing *Gilbert v. Dep't of Human Rights*, 343 Ill. App. 3d 904 (1st Dist. 2003) (interpreting prior version of the Human Rights Act); *Cut 'N Dried Salon v. Dep't of Human Rights*, 306 Ill. App. 3d 142 (1st Dist. 1999) (same); *Baksh v. Human Rights Comm'n*, 304 Ill. App. 3d 995 (1st Dist. 1999) (same). These cases and the earlier version of the Act simply are not relevant to the analysis of the more expansive definition of public accommodation which took effect in 2008.

¶¶ 29-34, Pl. S.J. Mem. at 21-24. Intervenors rely on their opening brief, which refutes each of Catholic Charities' arguments on this point. *See* Interv. S.J. Mem. at 37-39.

As foster care agencies contracting with the State, Catholic Charities fall within the Human Rights Act's coverage. Therefore, this Court should deny Catholic Charities' motion for summary judgment for Count II and grant summary judgment for Defendants.

b. The Civil Union Act applies to Catholic Charities

Catholic Charities have only raised one argument that Intervenors have not already addressed and fully refuted regarding why Catholic Charities allegedly are not required to follow the Illinois Religious Freedom Protection and Civil Union Act ("Civil Union Act"). *See* Interv. S.J. Mem. at 9-13, 29-44. Catholic Charities argue that, as "private entit[ies]," they are not required to acknowledge civil union couples. Pl. S.J. Mem. at 25. But, as previously explained, in providing foster care services, Catholic Charities are state actors and therefore cannot avoid responsibility for complying with the Civil Union Act by arguing that they are "private entit[ies]." *See* Interv. S.J. Mem. at 9-13. Moreover, even if they were not state actors, Catholic Charities have voluntarily agreed to perform state contracts as foster care agencies. *Id.* at 29-44. Plaintiffs argue that "[n]othing in Illinois law requires plaintiffs to provide their social services to *anyone*." Pl. S.J. Mem. at 25. Although Illinois law certainly did not compel Plaintiffs to become foster care agencies, once they entered state contracts for placement services, Catholic Charities became subject to the Human Rights Act's prohibition against discrimination on the basis of marital status, which, with the passage of the Civil Union Act, includes Civil Union couples. *Supra* at 17-19. Therefore, neither DCFS nor Catholic Charities may discriminate against Civil Union couples in the placement of foster children.

In addition to arguing they are not liable as private entities, Catholic Charities allege in their Complaint and argue here (*see* Second Am. Compl. at ¶¶ 35-38; Pl. S.J. Mem. at 24-28) that they are exempted under Section 15 of the Civil Union 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. As explained in Intervenors' opening summary judgment brief, this exemption does not apply to Catholic Charities because (1) as state actors, Catholic Charities may not assert a religious defense; (2) these sentences should be read together to provide an exemption only to objecting religious bodies who wish to abstain from conducting solemnization ceremonies; (3) Catholic Charities, operating as foster care agencies, are not "religious bodies" engaged in a "religious practice" as these terms are commonly understood under Illinois law and (4) the court should analyze the plain language of the Act rather than looking to the ambiguous and incomplete legislative history cited by Plaintiffs. *See* Interv. S.J. Mem. at 29-35. Intervenors rely on this section of their opening brief to refute Catholic Charities' arguments. *Id.*

Catholic Charities are not exempted from the Civil Union Act as a matter of law; therefore, the Court should deny them summary judgment on Count II of their complaint and grant Defendants and Intervenors summary judgment.

c. Illinois Religious Freedom Restoration Act Claim.

Plaintiffs cannot succeed in their extraordinary claim that they can require the State of Illinois to enter contracts even though Plaintiffs have announced that they plan to change material terms of the contracts – changes that will breach the State's obligations to third parties, in this case to the vulnerable children in the state foster care system and the foster parents who

are offering them homes. Such a drastic alteration in the manner in which government provides legally mandated human services to children is simply not required under IRFRA.

i. Catholic Charities cannot establish that the State has "substantially burdened" their "exercise of religion."

Catholic Charities should be denied summary judgment on their IRFRA claim because they do not make the required threshold showing that the State has "substantially burden[ed]" their "exercise of religion." 775 ILCS 35/15. The only decision from an Illinois appellate court, and thus controlling authority here, held: "To constitute a showing of a substantial burden on religious practice, a plaintiff must demonstrate that the governmental action prevents him from engaging in conduct or having a religious experience that his faith mandates." *Diggs v. Snyder*, 333 Ill. App. 3d 189, 195 (5th Dist. 2002) (analyzing prisoner's IRFRA claim) (quotations omitted); *see also Marcavage v. City of Chicago*, 467 F. Supp. 2d 823, 833 (N.D. Ill. 2006) (quoting *Diggs* for substantial burden standard).[7]

[7] Plaintiffs (at 29-33) cite a variety of federal court tests interpreting a "substantial burden" on "exercise of religion" under the federal statutes RLUIPA and RFRA. *See* Pl. S.J. Mem. at 29-33. Catholic Charities urge the Court to reject *Diggs*'s selection among these federal tests, instead suggesting a standard that separately analyzes whether their action is "exercise of religion" and whether the state imposes a "substantial burden" on that exercise. *See* Pl. S.J. Mem. at 29, citing, *e.g. Westchester Day Sch. v. Village of Mamaroneck*, 280 F. Supp. 2d 230, 240 (S.D.N.Y. 2003), *vacated on other grounds* 386 F.3d 183 (2d Cir. 2004) ("for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution . . . is insufficient"); *see also Guru Nanak Sikh Soc. of India v. County of Sutter*, 326 F. Supp. 2d 1140, 1152 (E.D. Cal. 2003) (quoting same), *aff'd*, 456 F.3d 978 (9th Cir. 2006); *Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp. 2d 1186, 1194 (D. Wyo. 2002) (quoting same), *aff'd* 451 F.3d 643 (10th Cir. 2006). Plaintiffs ignore the federal cases cited in their brief which instruct the court to consider "the importance of a religious practice when assessing whether a substantial burden exists." *See Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001) (rejecting federal RFRA claim); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (finding no RLUIPA violation for permit denial where churches had to relocate and holding: "Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise . . . would render meaningless the word 'substantial.'"). The

Proposed *amicus*, Evangelical Child and Family Agency, cites *Sherbert v. Verner*, 374 U.S. 398, 403-6 (1963), *Thomas v. Review Bd. of Ind. Em't Sec. Div.*, 450 U.S. 707, 716-18 (1981), and *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 139-41 (1987), for the proposition that the denial of a "monetary governmental benefit inflicts a substantial burden on religious exercise." Evangelical Child and Family Agency *Amicus* Brief ("ECFA Br."), at 9. However, Catholic Charities is not seeking a government benefit generally available to the public. Rather, they have sought and been denied a government contract because of their own insistence on changing the contractual terms. That difference makes the *Sherbert* line of cases inapplicable here. *See e.g. Teen Ranch v. Udow*, 479 F.3d 403, 410 (6th Cir. 2007) (rejecting a sectarian agency's argument that withdrawing the contract because of the agency's inclusion of religious curriculum into the youth program infringed the agency's free exercise rights, explicitly differentiating the *Sherbert* line of cases).[8] "Unlike unemployment benefits or the ability to hold office, a state contract for youth residential services is not a public benefit." *Id.* at 409 (quoting district court opinion) (internal citations omitted) (citing *Locke v. Davey*, 540 U.S. 712 (2004) (holding that a state scholarship program that excluded students pursuing degrees in theology did not violate the Free Exercise Clause)); *see also Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 838 (W.D. Mich. 2005) (rejecting the claim that "the State can be required under the Free

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Illinois appellate court in *Diggs* already chose this standard among federal standards cited by Plaintiffs, and the *Diggs* standard should apply in this case.

[8] Although *Teen Ranch* was decided on the bases of claims made under the Free Exercise clause of the U.S. Constitution rather than on RFRA grounds, the court differentiated the *Sherbert* line of cases on the basis of the difference between generally available government benefits and state contracts, rather than because of the change in constitutional standard in *Employment Division v. Smith*, 494 U.S. 872 (1990). Therefore, *Teen Ranch* still offers guidance even though IRFRA re-established the pre-*Smith* standard. *See* 775 ILCS 35/10.

Exercise Clause to contract with a religious organization"), *aff'd*, 479 F.3d 403, 410 (6th Cir. 2007).

Catholic Charities are asking to underperform on their contracts, and to require other agencies and DCFS offices to finish the required work. If this were allowed, all religious agencies could make similar demands, leaving the state with multiple demands based on varying religious objections. *Cf. Christian Legal Soc. v. Martinez*, 130 S. Ct. 2971, 2978 (2010) ("CLS, it bears emphasis, seeks not parity with other organizations, but a preferential exemption from Hastings' policy."). For example, a religious agency could enter a contract requiring them to be on call during the weekends, but then insist on the right not to work on Sundays on religious grounds, demanding that the State or other contractors complete the contract. Another foster care agency could refuse to place children with previously divorced foster parents, also on religious grounds. Nothing in Free Exercise or IRFRA jurisprudence requires the State to accept this kind of piecemeal performance of state contracts and for the State to rearrange its own processes to make up the difference. "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 (4th Dist. 2002) (upholding statute requiring plaintiff to disclose his Social Security number despite plaintiff's religious objection).[9]

[9] 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

Catholic Charities' loss of their state contract because of their insistence on changing the contract terms is not a substantial burden.[10] In short, a private agency that seeks to contract with the State to provide essential services to children in the State's care is not substantially burdened in its religious exercise when the State denies that contract because the agency will not fulfill an important contractual requirement. To hold otherwise would grant religious organizations like Catholic Charities veto power over the way the State performs its duties. This is not required by IRFRA.

Catholic Charities also fail to establish a substantial burden because contracting with the State to provide foster care and adoption services is not a "religious experience that [Catholic Charities'] faith mandates." *Diggs*, 333 Ill. App. 3d at 195 (citations omitted). Catholic Charities' lack of a state contract for specific services does not "prevent" them from providing many social services to adults and children. (*See* Fox Decl. ¶ 5.) Indeed, under the exclusion for sectarian adoption agencies in the Human Rights Act, they may continue to engage in private

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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).

[10] Plaintiffs' own cases indicate that increased costs in doing business due to the loss of the contract are not a substantial burden. In *Civil Liberties for Urban Believers*, cited by Plaintiffs, the Seventh Circuit held that imposing increased costs on a plaintiff's religious exercise is not a substantial burden. *See Civil Liberties for Urban Believers*, 342 F.3d at 761-62 ("That [plaintiffs] expended considerable time and money [because of the state's action] does not entitle them to relief under RLUIPA's substantial burden provision.") *citing Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (plurality) (law requiring Sunday business closure did not violate Orthodox Jewish plaintiffs' Free Exercise rights despite imposing higher costs on them).

adoptions; they are only prevented from engaging in the state functions of providing licensing services to foster parents and placing state wards in their homes.[11]

[11] Catholic Charities' own cases acknowledge that there is no substantial burden where there are alternate options for engaging in the exercise of religion. *See* Pl. S.J. Mem. at 32, citing *Henderson v. Kennedy*, 265 F.3d 1072, 1073 (D.C. Cir. 2001) (rejecting federal RFRA claim where state regulation "is at most a restriction on one of a multitude of means" by which plaintiffs could exercise their religion by evangelizing); *Midrash Sephardi, Inc., v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (rejecting federal RLUIPA claim and reciting federal RFRA standard: substantial burden met "if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion"); *see also Smith v. Fair Emp't Hous. Comm'n*, 913 P.2d 909, 925 (Cal. 1996) (no substantial burden where landlord who violated anti-discrimination law on basis of religious beliefs could "sell[] her units and redeploy[] the capital"). Catholic Charities' remaining cases outline general tests for the standard but the cases can be distinguished on their facts because they address whether there are substantial burdens in prison and zoning contexts and none of them address the State's interest in protecting children or in preventing discrimination and therefore offer little insight on this case—the loss of a contract with the State after a demand to change its terms for religious reasons. *See Nelson v. Miller*, 570 F.3d 868, 879 (7th Cir. 2009) (prisoner's religious exercise "substantially burdened when the prison forces him to choose between his religious practice and adequate nutrition"); *Barr v. City of Stinton*, 295 S.W.3d 287, 302 (Tex. 2009) (finding substantial burden under Texas RFRA where city's zoning ordinance "ended [plaintiff's] ministry, as the City Council surely knew it would"); *Outreach Conference Center v. City of Chicago*, 591 F.3d 531, 537 (7th Cir. 2009) (finding substantial burden under RLUIPA where city "malicious[ly]" denied "small religious organization" permit after organization angered local politician); *Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008) (denial of prisoner's request for religious diet substantial burden where prisoner provided religious authority's letter and prison had available alternate diets); *Perez v. Frank*, 433 F. Supp. 2d 955, 958-59 (W.D. Wis. 2006) (finding substantial burden in RLUIPA claim by Muslim prisoner who was denied access to traditional foods and prayer oil, but denying burden regarding a denial of 24-hour access to prayer room because access was not "effectively impracticable"); *Warner v. City of Boca Raton*, 887 So. 2d. 1023, 1035 (Fla. 2004) (finding no substantial burden under Florida RFRA based on ordinance which required horizontal, rather than vertical cemetery markers); *Kikumura v. Hurley*, 242 F.3d 950, 961 (10th Cir. 2001) (remanding to allow prisoner to produce evidence that denial of visits from a particular pastor was a substantial burden); *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 302 Ill. App. 3d 564, 571 (Ill App. Ct. 1998) (noting in dicta that if the church had made an IRFRA claim in its challenge to denial of zoning permit it would not

Because Catholic Charities has failed to establish a substantial burden on a religious exercise, the Court should deny Plaintiffs summary judgment on Count III and grant summary judgment to Defendants.

ii. Compelling interests

If the Court reaches the question of whether the State has compelling interests, the Court, as a matter of law, should deny Catholic Charities' motion and grant summary judgment to Defendants and Intervenors. The State has several compelling interests served by requiring all agencies contracting with it to provide services to children in state care to comply with the nondiscrimination policies at issue here.

1. Children's Welfare

Both Catholic Charities and proposed *amicus*, Evangelical Child and Family Agency, fail to acknowledge the State's compelling interest in children's welfare. While this issue has not been addressed in Illinois decisions, sister states have held, as a matter of law, that an interest in children's welfare is compelling under their state RFRA and under free exercise claims. *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

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succeed based on the city's compelling interests) *aff'd in part, rev'd in part* 196 Ill. 2d 1, 26-27 (Ill. 2001) (deciding case on other grounds).

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, 2-3 (Mich. 1990) (denying church's exemption from child care licensing and corporal punishment regulations based on state's interest in children's well-being).

In this case, the interest is heightened because the children at issue are the legal wards of the State, and, further, the legislation passed to protect the children – requiring that they be placed on the basis of their best interests – is also constitutionally required. *See* Interv. S.J. Mem. at 13-15. Catholic Charities cannot demand a contract in violation of the State's own laws and constitutional obligations. *See Norwood*, 413 U.S. at 465 (holding that the state is prohibited from entering contracts with a private party "to accomplish what it is constitutionally forbidden to accomplish") (citations omitted); Interv. S.J. Mem. at 8-9; Defs. S.J. Mem. at 30.

There is no less restrictive means of protecting the children's interests than to apply regulations passed for children's safety to all agencies engaged in their care. *See Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d at 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. By demanding that DCFS implement a referral system for prospective foster parents—the claimed "least restrictive alternative"— Catholic Charities seeks to operate in a way that violates the children's best interests.

2. Interest in preventing discrimination in foster care services

Catholic Charities, citing no case law, have argued that the State does not have a compelling interest in preventing discrimination on the basis of sexual orientation or marital status. They concede that the Civil Union Act provides protection against discrimination for couples who have entered civil unions, but claim that the State has no interest in this legislation

because Catholic Charities are exempt from these provisions. Pl. S.J. Mem. at 35; *see also* ECFA Br. at 9 and 17 (claiming that Catholic Charities are exempted). As argued above and in Intervenors' opening brief, Catholic Charities are required, under the Human Rights Act and the Civil Union Act, to recognize the legality of civil unions when operating as a foster care agency caring for children in state custody. *See supra* 17-20; Interv. S.J. Mem. at 37-39.

Even absent the protection of the Civil Union Act, the State, as a matter of law, has an independent interest in preventing discrimination in the provision of foster care services. The United States Supreme Court has held that a state interest in preventing discrimination is a sufficiently compelling interest to outweigh a burden on free exercise rights. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) ("[Discrimination] . . . deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.").[12]

Illinois' legal history demonstrates the long-standing state policy against discrimination on the basis of sexual orientation. Illinois was the first state to repeal its sodomy laws. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). Illinois is only one of 14 states to pass a marriage or civil union bill granting full marital rights to lesbian and gay male couples. 750 ILCS 75/20.

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[12] Proposed *amicus*, Evangelical Child and Family Agency, cites *Bob Jones* for the proposition that a "firm national policy" on discrimination on the basis of sexual orientation and marital status is required in order for the state to have a sufficient interest. ECFA Br. at 14 (citing *Bob Jones*, 461 U.S. at 593). But *Bob Jones* is a federal case analyzing claims under the First Amendment Free Exercise Clause and therefore may understandably have looked for a national policy to determine whether the *federal* government had a compelling interest in ending race discrimination. Here, Plaintiffs chose not to bring a First Amendment claim (to avoid a rational basis test under *Smith*) and instead, to bring a claim under IRFRA, an Illinois statute. Under IRFRA, a national policy is irrelevant. The weightiness of Illinois' interest in protecting against sexual orientation discrimination has been made abundantly clear by the passage of Illinois' civil union law. 750 ILCS 75/20. Thus, as discussed below, even if a "firm state policy" were required, that standard is easily satisfied.

Illinois has specifically included sexual orientation and marital status as forms of unlawful discrimination in the Illinois Human Rights Act. 775 Ill. Comp. Stat. 5/1-102(A). Many other Illinois laws bar or penalize sexual orientation discrimination. See, *e.g.*, 10 ILCS 5/29B-10 (fair campaign practices); 225 ILCS 20/11(c) (clinical social work licensing); 225 ILCS 37/27(h) (environmental health practitioner licensing); 225 ILCS 55/30(c) and 68 Ill. Adm. Code § 1283.100 (marriage and family therapy licensing); 225 ILCS 106/65(e) (respiratory care practice); 225 ILCS 107/50(e) (professional counselor licensing); 720 ILCS 5/12-7.1 (hate crimes); 725 ILCS 5/110-5(a) (bail); 730 ILCS 5/5-5-3.2(a)(10) (sentencing factors in aggravation).

Other states have successfully demonstrated, as a matter of law, that preventing discrimination on the bases of sexual orientation or marital status advances a compelling governmental interest. *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).[13] The interest here is even

[13] The proposed *amicus*, Evangelical Child and Family Agency, claims three cases show there is no state interest in preventing discrimination on the basis of marital status. None of these cases are persuasive. *Amicus* fail to note that *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 714-17 (9th Cir. 1999), was overturned by *en banc* panel of the Ninth Circuit of the U.S. Court of Appeals, which held that the plaintiffs asserting a religious interest lacked standing and there was not an "adequately developed factual record" to determine whether the religious interests were violated. 220 F.3d 1134, 1142 (9th Cir. 2000). In *Swanner v. Anchorage Equal Rights Comm.*, 513 U.S. 979, 981 (1994), Justice Thomas, dissenting from a denial of certification, was "skeptical" that an interest in preventing discrimination on the basis of marital status was compelling. However, the full Court refused to consider the underlying decision of

greater than those cases because Catholic Charities are engaging in state functions, designed to serve the paramount state interest of protecting vulnerable children. Allowing a contracting agency to engage in discrimination would erode public confidence in the state's neutrality. *See* Interv. S.J. Mem. at 26 (*See Endres v. Indiana 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, concurring: "The objection is to 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.")). Further, the proposed discrimination would violate the foster parents' constitutional rights to be free from discrimination and to familial privacy. *See* Interv. S.J. Mem. at 20-26; *see also Norwood*, 413 U.S. at 464 (holding that the state is prohibited from entering contracts with a private party "to accomplish what it is constitutionally forbidden to accomplish."); Interv. S.J. Mem. at 8-9; Defs. S.J. Mem. at 30.

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the Alaska Supreme Court, which held that "[a]llowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination...[t]his interest will clearly suffer if an exemption is granted to accommodate the religious practice at issue." *Swanner v. Anchorage Equal Rights Com'n*, 874 P.2d 274, 283 (Alaska 1994) (internal citations omitted). Finally, in *Attorney General v. Desilets*, 636 N.E.2d 233, 238 (Mass. 1994), the court did not rule on the question of whether there was a compelling interest, but instead denied summary judgment to all parties and allowed the government to prove its interest.

Proposed *amicus*, Evangelical Child and Family Agency, claims without citation (at 14), that "heightened constitutional scrutiny" is required for a compelling government interest. Although such scrutiny is "by no means a prerequisite to [a] conclusion of a compelling governmental interest," *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 36 (D.C. 1987), several recent decisions have carefully examined the heightened-scrutiny test and concluded that sexual orientation must be recognized as a suspect or quasi-suspect classification.[14]

Proposed *amicus*' reliance on *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000), also does not support its claim that Illinois does not have a compelling interest in preventing

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[14] *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 426-62 (Conn. 2008) (analyzing federal precedent when interpreting state constitution); *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) (analyzing factors similar to the federal test); *see also Collins*, 727 F. Supp. 2d at 804 (invalidating statute under rational-basis review but noting that heightened scrutiny may be appropriate). The U.S. Department of Justice reached the same conclusion after conducting its own careful examination of the heightened-scrutiny factors. *See* Feb. 23, 2011 DOJ Letter re Defense of Marriage Act ("DOJ Memo"), *available online at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

Additionally, the cases cited by amicus to support its argument that sexual orientation discrimination is not subject to heightened scrutiny were either decided prior to *Lawrence v. Texas*, 539 U.S. 558, 575 (2003), reversing *Bowers v. Hardwick*, 478 U.S. 186 (1986), and thus typically relied on reasoning that sexual orientation could not constitute a suspect classification because same-sex intimate conduct could be criminalized, *see, e.g., Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), or followed pre-*Lawrence* case law without fully analyzing anew the question whether sexual orientation classifications should be scrutinized under heightened scrutiny. *See e.g., Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004). *Romer v. Evans*, 517 U.S. 620 (1996), found that Amendment 2 failed even rational basis review, *id.* at 631-32, so it was unnecessary to consider whether a sexual orientation classification should be reviewed under heightened scrutiny.

Because, as set forth above, the State has a compelling interest in eliminating barriers to suitable foster placements *regardless* of the degree of scrutiny that applies to government policies that classify based on sexual orientation or marital status, this Court need not resolve this issue.

discrimination on the basis of sexual orientation by state-contracted foster care agencies. The U.S. Supreme Court never disputed the New Jersey Supreme Court's conclusion "that New Jersey has a compelling interest in eliminating 'the destructive consequences of discrimination from our society,'" 530 U.S. at 647, including sexual orientation discrimination, but instead found that the Boy Scouts' free speech interests in having a limited private club were greater than the free speech interests claimed in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 544 (1987), and *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 5 (1988). *Dale*, 530 U.S. at 657-59. Thus, contrary to proposed amicus' suggestion (*see* ECFA Br. 14), the Supreme Court did not find that that the state's interest in preventing sexual orientation discrimination was less compelling than the interests in preventing sex, race, and national origin discrimination articulated in those cases. *Id.* The State of Illinois' firm policy against sexual orientation and marital status discrimination, supported by the holdings in sister states, demonstrate that Illinois has a compelling interest in preventing this type of discrimination.

Despite Plaintiffs' claim that referrals could serve as a "least restrictive alternative," courts have held, as a matter of law, that 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 in Intervenors' opening brief, referrals made for a discriminatory reason *are* discrimination and violate the Human Rights Act. *See* Interv. S.J.

Mem. at 26; *see also* Defs. S.J. Mem. at 30 n.7 (referral practice amounts to discriminatory "steering").

3. Interest in preventing harm to the foster parents and foster children

The Court should deny Plaintiffs summary judgment and grant it to Defendants and Intervenors because, as a matter of law, the State has an interest in the welfare of children and in preventing discrimination which cannot be addressed through a less restrictive means. Either ground would be dispositive. However, the foster parents and foster children have also presented uncontested facts that (1) children are harmed by the deviations from the best interest standard proposed by Catholic Charities; (2) that the discrimination proposed by Catholic Charities harms foster parents; and (3) neither of these types of harms can be addressed by less restrictive means. *See supra* Facts 18-30. The State has a compelling interest in preventing these harms. At the time of this briefing, Catholic Charities have not challenged the Intervenors' submission of fact on these points. If the Court does not rule as a matter of law on any of the other dispositive grounds and instead reaches these issues, then the Court should grant summary judgment to Intervenors unless Catholic Charities factually contests these harms. If it does so, there are simply contested material facts and Catholic Charities cannot obtain summary judgment; trial is necessary.

IV. Catholic Charities are Not Entitled to a Permanent Injunction.

If the Court reaches the question of a permanent injunction, on uncontested facts, the Court should deny Catholic Charities' requested relief. In order for a court to grant injunctive relief, the plaintiff "must establish that he or she has no adequate remedy at law, that he or she possesses a certain and clearly ascertainable right, and that he or she will suffer irreparable harm

if no relief is granted" and the court must "balance the equities" by considering the relative hardships involved. *County of Kendall v. Rosenwinkel,* 353 Ill. App. 3d 529, 538 (2d Dist. 2004) (citing *Village of Wilsonville v. SCA Services,* 86 Ill.2d 1, 28 (1981)).

In this case, the harms to the foster children and foster parents outweigh the harm to Catholic Charities from the State's decision not to permit them unilaterally to rewrite their contracts. Intervenors believe that this issue can be resolved as a matter of law because Catholic Charities' actions would infringe on Intervenors' constitutional rights. Additionally, Intervenors have presented uncontested facts showing the harms to foster children that result from the variation from the best interest standard, and the harms to foster parents in facing discrimination, which should result in a denial of summary judgment to Catholic Charities and a grant of summary judgment to Defendants. *See supra* Facts 18-29.

Catholic Charities has oversimplified the harm to children caused by their discriminatory policy. They allege that their referral of unmarried foster parents at the front end of the system does not minimize the potential pool of available foster parents for foster children, and they claim that once a child is placed in one of their homes, the best interests of the child dictate all of their decisions. *See, e.g.*, Fox 3d Decl. ¶¶ 11-13. This oversimplified version of supervising children in foster homes ignores two important realities: (1) there is a great deal of disruption in foster homes after the initial placement, especially for older children, *see* Shaver 2d Aff. ¶ 2; and (2) living situations change and the best placement for a child may be a home where the licensed foster parent or relative subsequently decides to live with a partner after the initial placement is made. (Shaver Aff. ¶ 16.) Catholic Charities' policy harms children by children who experience disruptions of loving families (*see* Shaver 2d Aff. ¶ 2); the policy also harms children placed in homes where there is a change in the family structure by transferring the child's case to another

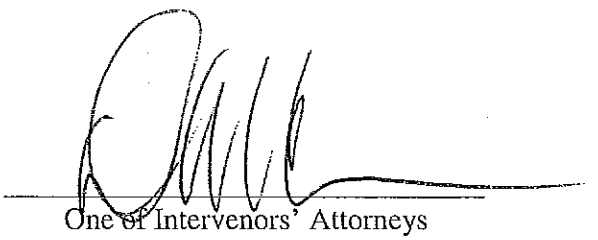
agency, leading to delay of services and the possible harmful rupture of a caseworker relationship, or by refusing to license civil union couple, depriving that family of additional resources and support. Shaver Aff. ¶ 16.

Intervenors believe that no genuine issue of material facts exists, and that they are entitled to summary judgment on this point as a matter of law. If the Court holds otherwise, however, Intervenors request the opportunity to conduct discovery on the issue of harm or any other issue as to which the Court may find presents a genuine question of material fact. *See* Intervenors' attached affidavit in support of discovery (Att. B).

Conclusion

For the reasons set forth in detail above, Plaintiffs' Motion for Summary Judgment should be denied and summary judgment granted to Defendants and Intervenors.

Respectfully submitted,



August 15, 2011

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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, v. 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, 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 C 5589 (N.D. Ill.); SARAH RIDDLE and KATHERINE WESEMAN, Intervening Defendants.	Case No. 11-MR-254 Hon. John Schmidt Presiding Judge

SECOND AFFIDAVIT OF MICHAEL SHAVER

The undersigned declares that he is an adult over the age of 18 and is competent to testify to the following matters if called as a witness:

1. This is the second verified Affidavit that I have submitted in this case. My professional and educational background are described in my first Affidavit. I have personal knowledge of the matters stated herein.

2. Although DCFS often identifies the first placement option for a child entering the foster care system, the child may not remain in his or her first placement. Unfortunately, placement disruptions are far too common, especially with older children and children who are difficult to place based on special needs. For example, based on published reports by the University of Illinois Children and Family Research Center for 2010 in DCFS's Southern Region of Illinois, which includes the counties under the jurisdiction of Catholic Social Services of Southern Illinois, nearly a quarter of all the children entering foster care in that region experienced more than two placements in their first year in care. For children ages 15 and older, disruption affects more than half of the placements. After a child has been placed in a foster home that is under the supervision of a private agency, it is almost always the agency supervising the child, not DCFS, that decides where the child will live if there is a disruption in the placement. As a result, supervising agencies must continually make many placement decisions after a child has been initially assigned by DCFS to a private agency.

3. Some agencies, such as Catholic Social Services of Southern Illinois, have in-house mental health professionals who provide counseling services to some of the children in the homes they supervise. If those agencies transfer their cases to another agency, there is nothing that would preclude DCFS from facilitating an arrangement with the providers to continue to

serve the children with whom they have developed a counseling relationship. There are at least two ways this could be accomplished: (1) the newly assigned agency could hire the mental health professionals if they have an in-house clinical program; (2) the Department could maintain the counseling relationship through the same agency by facilitating contracts for providing counseling services. There are private sector provider solutions that would allow another child welfare agency to contract directly with Catholic Charities to continue to provide counseling services to foster children, regardless of the supervising agency.

4. Though Children's Home and Aid is a nonsectarian social services agency, we recognize that people of faith often serve as foster and adoptive parents and, like many other private agencies, we rely on churches and other religious bodies for recruitment of foster homes.

Under penalties as provided by law, pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to such matters therein stated to be on information and belief and as to such matters, the undersigned certifies as aforesaid that he verily believes the same to be true.

Dated: 8/13/11

Michael Shaver

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was forwarded to:

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by depositing the same in a United States Post Office box in Springfield, Illinois, enclosed in an envelope, address as identified above, with proper postage fully prepaid on August 15, 2011.