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 cv 5589 (N.D. Ill. 1988); SARAH RIDDLE and KATHERINE WESEMAN,

Proposed Intervening Defendants.

Case No. 11-MR-254

Hon. John Schmidt
Presiding Judge

MEMORANDUM IN SUPPORT OF INTERVENORS'
<u>MOTION FOR INTERVENTION</u>

Proposed 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 cv 5589 (N.D. Ill.), pending in the United States District Court for the Northern District of Illinois ("foster children")[1] and (2) Katherine Weseman and Sarah Riddle who have entered a civil union, reside in Champaign County, and intend in the future to become licensed foster parents to a child or children who are wards of the State of Illinois ("foster parents"). Pierce, Weseman, and Riddle respectfully submit this Memorandum in support of their Motion for Leave to Intervene as Defendants in the above-captioned action pursuant to 735 ILCS 5/2-408.

Introduction

Children in the custody of DCFS are among the most vulnerable children in the state. They are in State custody precisely because they already have suffered abuse and/or neglect at the hands of their birth parents or other responsible caregivers. *See* 20 ILCS 505/5 (k). Once they are found by Illinois courts to be neglected and/or abused, they are made wards of the State of Illinois, DCFS is made their guardian and custodian, and they are placed in DCFS' care. *Id.* Thus, these children are the State's children and the State has ultimate responsibility for them and their well-being. *Id.*

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[1] Ms. Pierce has served as Next Friend in the *B.H.* lawsuit, since 1990. Ex. 1, Pierce Aff. ¶ 6. She seeks to enter the case because the relief Catholic Charities seek in this case regarding their provision of foster care services to the *B.H.* plaintiff class is in conflict with the federal constitutional due process rights of the class in *B.H.* as well as DCFS' on-going and legally binding obligations to the foster children pursuant to the *B.H.* Consent Decree. *See id.* ¶ 7. (citing Pierce Aff., Ex. A (*B.H.* Consent Decree, ¶¶ 34, 55)). The *B.H.* class presently comprises approximately 15,000 children who are wards of the State. Approximately, 2,500 of these children class members presently are receiving foster care through the plaintiff agencies. *See* Motion for Temporary Restraining Order and Preliminary Injunction ("Mot. TRO"), Ex. B, Fox. Decl. ¶ 14)).

By virtue of removing them from their homes, the State has a federal and state constitutional duty to these children to provide reasonable physical and psychological safety, a standard which requires that placement decisions be made on the basis of professional judgment.[2] "Professional judgment" requires that the decision of placing a child in a particular foster home be based solely on the best interest of the child. Illinois law codifies this constitutional duty and mandates that placement *must* be made in accordance with the best interests of the *child*, taking into consideration such factors as the child's attachment to other family members, alternative placement that will be least disruptive to the child, continuity of affection for the child, and the child's sense of security and well-being. 20 ILCS 505/5; 89 Ill. Admin. Code 301.60.

Foster children are best served when there are as many and as diverse placement opportunities as possible, making it more likely to find one that is in the children's best interests. To further that interest, the State allows placements with single foster parents who are living with another adult, and further has made the determination that all foster parents who have entered civil unions will be jointly licensed and included in the pool of foster parents available to the

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[2] *See 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"). The *B.H.* Consent Decree resolves a due process challenge to the quality of services and care to all state wards in foster care in Illinois and requires that DCFS adopt professional standards and place children on the basis of their best interests.

State's children. *See* Am. Compl., Ex. B.[3] The State has rightly determined that foster children should not be denied the opportunity to be placed in these homes based on factors which are not relevant to a child's best interest, including factors like sexual orientation or marital status.

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. When these agencies assume the governmental function of placing the State's wards in foster homes, they stand in the State's shoes and assume responsibility to fulfill the constitutional obligations the State has for these children. Indeed, as a matter of law, the State may not extinguish the children's rights through a delegation of its duties to these private agencies.

The State also requires that contracting organizations follow the *State's* regulations regarding the placement of children as well as state and federal law. 89 Ill. Admin. Code 357.110 ("Purchase of service providers under contract to the Department must comply with Federal and State laws and regulations and Department rules."). In addition to these obligations, both DCFS and the contracting agencies are prohibited by the Illinois Human Rights Act from discriminating in providing services on the basis of religion, sexual orientation, or marital status against *either* the children in their care, *or* the individuals who seek licensure to serve those children in the capacity of foster parents.

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[3] This professional judgment is entirely consistent with the judgment of all leading organizations who have an interest in child welfare. *See* Int. Mem. MTD/SJ, Ex. 2, Brodzinsky Aff. ¶ 21(citing 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 Social Workers, Evan B. Donaldson Adoption Institute, and the American Bar Association).

It is within this legal construct that Catholic Charities of Springfield, Peoria, Joliet, and Belleville ("Catholic Charities" or "plaintiffs") have filed this suit against the State of Illinois and its officers and agencies. Catholic Charities argue that they have a *right not to fulfill their constitutional obligations to these children*, to change the terms of their State contracts, to disregard the constitutionally-mandated regulations the State has enacted for the placement of its wards, and to violate the State's constitutional and statutory prohibitions against discrimination. Proposed Intervenors are directly affected, and directly harmed, by Catholic Charities' insistence that they have a right to continue to perform governmental functions based on religious principles that are in conflict with the best interests of the State's children. Allowing plaintiffs to continue to provide foster care services will harm the intervening foster children and foster parents and violate the U.S. and Illinois Constitutions, state law, and DCFS regulations and policy.

As set forth more fully below, Proposed Intervenors meet the requirements for intervention as of right because they have enforceable rights at issue in the case and may suffer tangible detriments if Catholic Charities prevail. Additionally, their interests are not adequately represented by other parties in the case. *See infra* pp. 7-19. In the alternative, Proposed Intervenors also plainly meet the requirements for permissive intervention because they have claims and defenses which share common facts and questions of law with those in the lawsuit. *See infra* pp. 19-20. Further, Proposed Intervenors have sought leave to intervene in a timely manner both as to permissive intervention and for intervention as of right. *See infra* pp. 20. Proposed Intervenors' Motion to Intervene accordingly should be granted.

I. Intervention as of right.

"The purpose of intervention is to expedite litigation by disposing of a whole controversy among individuals and/or entities involved in the same cause of action and to avoid multiplicity of actions." *Serio v. Equitable Life Assurance*, 184 Ill. App. 3d 432, 435, 540 (1st Dist. 1989). Intervention statutes are remedial in nature and should be construed liberally "to allow a nonparty to protect interests jeopardized by a pending suit and avoid multiple suits involving issues litigated in a pending suit." *Freesen, Inc. v. City of McLean*, 277 Ill. App. 3d 68, 72 (4th Dist. 1995); *see also City of Chicago v. John Hancock Mut. Life Ins. Co.*, 127 Ill. App. 3d 140, 143 (1st Dist. 1984) (citing Ill. Ann. Stat. ch. 110, par. 2-408, Joint Committee Comments at 462 (Smith-Hurd 1983)); *Maiter v. Chi. Bd. of Educ.*, 82 Ill.2d 373, 381-82 (1980) (citing *Bredberg v. City of Wheaton*, 24 Ill.2d 612, 623 (1962)); *Dowsett v. City of East Moline*, 8 Ill.2d 560, 567 (1956).

Intervention "shall be permitted as of right . . . when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action[.]" 735 ILCS 5/2-408. "[T]he trial court's discretion is limited to determining timeliness, inadequacy of representation and sufficiency of interest; once these threshold requirements have been met, the plain meaning of the statute directs that the petition be granted." *John Hancock*, 127 Ill. App. 3d at 144. The foster children and foster parents have the requisite sufficiency of interest and inadequate representation necessary for intervention.

a. The foster children and foster parents have sufficient interests in the case.

Parties have interests sufficient to intervene if they have "an enforceable right or tangible detriment." *Id.* Here, these elements are easily met because both the foster children and foster parents have legal rights to be free from the harm that Catholic Charities seek to impose.

1. The Foster Children have sufficient interests.

i. The Foster Children have an enforceable right to be placed based on their best interests.

First, the foster children are protected by the *B.H.* Consent Decree, which 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:
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> (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. ¶ 34. If Catholic Charities prevails in this suit, it seeks a judgment which would allow it 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 plaintiffs. Experts in the field and DCFS agree that excluding these couples is not in the best interests of DCFS' wards. *See* Int. Mem. MTD/SJ, Ex. 2, Brodzinsky Aff. ¶ 21; *supra* n.3. Thus, this suit is in direct conflict with a federal consent decree and should be dismissed. *See Ind. Dept. 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 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).

Additionally, the State owes a constitutional duty to provide physical and psychological safety to children who the State has removed from their homes because of neglect and/or abuse.

See K.H., 914 F.2d at 851; *B.H.*, 715 F. Supp. at 1395; *In re Rodney H.*, 223 Ill.2d at 523 (recognizing that these rights "implicate[] the due process clauses of the state and federal constitutions"). The constitutional standard for meeting that duty is that placement decisions must be made on the basis of professional judgment. *B.H.*, 715 F. Supp. at 1394. "Professional judgment" requires that the decision of placing a child in a particular foster home be based solely on the best interest of the child. Illinois law codifies this constitutional duty and mandates that placement *must* be made in accordance with the best interests of the child, taking into consideration such factors as the child's attachment to other family members, alternative placement that will be least disruptive to the child, continuity of affection for the child, and the child's sense of security and well-being. 20 ILCS 505/5; 89 Ill. Admin. Code 301.60. The *B.H.* Consent Decree also requires that DCFS adopt professional standards and place children on the basis of their best interests. *See B.H.* Consent Decree ¶ 34.

The State itself cannot engage in such a policy, and thus it cannot contract with Catholic Charities knowing they 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, 465 (1973) (holding unconstitutional state textbook program that benefited private, segregated schools); *Player v. State of Ala. Dep't. of Pensions and Sec.*, 400 F. Supp. 249, 257-58 (M.D. Ala. 1975) (finding unconstitutional the state's contracts with "the child-care institutions … which operate on a segregated basis[.]").[4] *See* Memorandum in Support of

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[4] *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); *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 232 (1964) (finding state's support of private segregated schools unconstitutional); *Coffey v.*

Intervening Defendants' Motion to Dismiss, or, in the Alternative, for Summary Judgment ("Int. Mem. MTD/SJ") at 8-9. Further, Catholic Charities are also bound by these constitutional constraints because, by virtue of voluntarily contracting to carry out the constitutional duty of finding an appropriate placement on behalf of the State, they are state actors. *See Perez v. Sugarman*, 499 F.2d 761 (2d Cir. 1974) (finding that foster care agencies are state actors because the placement function is "essentially and traditionally public"); *Estate of Adam Earp v. City of Philadelphia*, 1997 WL 255506, *2 (E.D. Pa. 1997) (finding that foster care agencies are state actors). *See also* Int. Mem. MTD/SJ at 9-13.[5] Thus, Catholic Charities, themselves, are prevented from engaging in this very behavior.[6]

State Educ. Fin. Comm., 296 F. Supp. 1389, 1392 (S.D. Miss. 1969) (enjoining state grants to private schools that discriminated on the basis of race).

[5] Catholic Charities are also state actors by virtue of the following 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; (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* Int. Mem. MTD/SJ, Ex. 1, Shaver Aff. ¶¶ 7-8; *Lethbridge v. Lula Belle Stewart Ctr.*, 2007 WL 2713733, *4 (E.D. Mich. 2007) ("Given the state's Fourteenth 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."); *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. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

[6] As explained in the Memorandum in support of Summary Judgment, there are significant barriers to Catholic Charities' assertion of religious liberty defenses to these claims. First, since the state could not assert a religious liberty defense or religious-based statutory exemption, as a

Catholic Charities violate their and the state's constitutional duty to foster children when they automatically disqualify otherwise-qualified potential foster or adoptive parents on the basis of their non-married, co-habiting status when making placement determinations for the foster children. That position directly conflicts with accepted professional judgment reflected in child welfare practice standards[7] and the considerations relevant to a "best interests" determination under Illinois law and DCFS rules.

ii. The foster children will suffer a tangible detriment.

If Catholic Charities are allowed to continue to discriminate as foster care agencies, the foster children's interests will be harmed in the following ways:

- Foster children have an interest in being placed in foster homes based on their best interests, rather than discriminatory standards which are potentially harmful to them. *See* Shaver Aff. ¶¶ 14, 16, 18; Brodzinsky Aff. ¶¶ 23, 25, 26.

- Foster children have an interest in having a diverse pool of potential foster parents available to them. Finding the best placement match for children that meets the full range of a child's needs can be a daunting task. *See* Shaver Aff. ¶¶ 17-18; Brodzinsky Aff. ¶¶ 23, 25. The more diverse the pool of an agency's potential foster parents, the better equipped the agency is to find a placement that fits the best interests of the child in need. Shaver Aff. ¶ 6. Categorically eliminating lesbian and gay male individuals and couples reduces the pool of motivated and competent parents who potentially can meet the needs of these children and is inconsistent with accepted practices in the foster care and adoption fields, as well as inconsistent with the best interests of boys and girls who continue to linger in foster care. Brodzinsky Aff. ¶¶ 22-23.

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state actor, Catholic Charities may not assert such a defense either. *See* Int. Mem. MTD/SJ at 27-29. Further, the purported religious exemptions in the Human Rights Act and Civil Union Act simply do not apply to a foster care agency contracting with the State to care for the State's wards. *Id.* at 29-30. Finally, their claim under the IRFRA fails because (1) Catholic Charities cannot establish that a "substantial burden" has been placed on their exercise of religion in the denial of a state contract; (2) the State has compelling interests in (a) placing children in foster homes based on their best interests rather than other means and (b) preventing discrimination; and (3) Catholic Charities' proposed referral system is not an appropriate substitute for either the application of the best interest standard for placing foster children or ending discrimination against foster parents. *Id.* at 44.

[7] *See* Brodzinsky Aff. ¶ 21.

- Some foster children have needs that will best be met by foster parents who are gay men or lesbians. Categorically excluding lesbians and gay men as potential adopters or foster parents eliminates individuals and couples who offer unique resources and strengths for children and youth 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 LGBT or questioning their sexual orientation or gender identity; 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, 28.

- Foster children have an interest in being placed in homes in their own communities. Categorically excluding all unmarried individuals living with a partner, including lesbian and gay male adults, as foster and adoptive parents could also undermine children's well-being if this policy results in subsequent placements that were in a different community from the one in which the children currently resided. Such a move would disrupt children's education and social relationships, as well as the services and resources currently being received. It could also disrupt visitation and reunification efforts with the birth family. Brodzinsky Aff. ¶¶ 25-26.

- Foster children have an interest in being placed in appropriate homes as soon as possible. Categorically excluding lesbian and gay male individuals and couples from the pool of potential adopters 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.

- Foster children have an interest, when appropriate, in being placed with a relative, regardless of their marital status or sexual orientation. Often, DCFS assigns children to an agency having already placed the child with a relative. Many of these relatives are unmarried and cohabitating. Shaver Aff. ¶¶ 10, 14. For an agency whose policies prohibit placement with or licensing of cohabiting, unmarried couples, the agency is presented with several alternatives, all of which may result in harm.

    - First, the agency can return the case to DCFS when it becomes aware of the foster parents' living arrangements, a result that is likely to delay and disrupt the casework and oversight provided to the child at a critical stage. Brodzinsky Aff. ¶ 26; Shaver Aff. ¶ 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 may well 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 may be a denial of services. If the agency continues to provide services to the child and caregiver, the agency may be unwilling to permit the

relative to become a licensed foster parent. This would deprive the caregiver and the child of the enhanced resources and support that being licensed would provide. *Id.*

- Children also have an interest in stable placements which receive the full range of services. Research suggests that many unpartnered lesbians and gay men do not reveal their sexual orientation when they begin working with a child welfare agency. Should a child be placed with them and they later enter into a same-sex relationship and choose to live with the partner, it would not be in the child's best interests for the agency to disrupt the placement or deny services to that foster home because the previously single parent is living with a partner. Brodzinsky Aff. ¶ 26; Shaver Aff. ¶ 16. Nor should the agency deny a license to the partner, if the couple enter a civil union. *See* Shaver Aff. ¶ 16.

- Foster children have an interest in being free from discrimination by Catholic Charities, or any other child care agency which contracts with the state for their care. If Catholic Charities are not bound by the Human Rights Act, as they argue, then foster children may be discriminated against as well.

- Referring gay male and lesbian clients and unmarried cohabiting clients to another agency that does not exclude gay males and lesbians as foster or adoptive parents is not an acceptable solution, both from a child welfare perspective and a mental health prospective. Brodzinsky Aff. ¶ 27; Shaver Aff. ¶ 16.

  - First, 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.

  - Second, referral 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.*

  - Third, in some geographical regions there might not be other agencies to which the clients could be referred. If this is the case, a referral to another agency could involve 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.*

  - Fourth, 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.*

- Foster children have an interest in being supervised by agencies trained in working with lesbian, gay, bisexual, transgendered and questioning (LGBTQ) youth. Because "coming out" is a process and LGBTQ youth do not always self-identify when they enter care, agencies must be prepared to understand and respond to their needs in a sensitive, respectful, and LGBTQ-affirmative manner. 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 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.

b. The foster parents have sufficient interests in the case.

Foster parents Katherine Weseman and Sarah Kiddle have enforceable rights and will suffer a tangible detriment because Catholic Charities' policy directly harms their interests. Katherine and Sarah live in Champaign, Illinois and have been in a relationship for six years. Ex. 2, Weseman Aff. ¶ 1; Ex. 3, Riddle Aff. ¶1. They sought a license for a civil union on June 1, 2011, the first day licenses became available, and entered a civil union on June 13, 2011. *Id.* Katherine and Sarah want children in the future and intend in the future to seek to become licensed foster parents in Illinois. *Id.* ¶ 2. They are interested in having a state ward placed in their home for foster care and possibly adoption. *Id.* They further have an interest in being available as foster parents to all of the children in the DCFS system and not being denied the opportunity to help some children on the basis of their sexual orientation, especially since it may be in a particular child's best interest to be placed with them considering the unique needs of the

child and the skills and qualities that they can offer. *Id.* Under Catholic Charities' policy, Katherine and Sarah will be denied service and will not have the opportunity to make their home available to the foster children assigned to Catholic Charities.

i. The foster parents have a right to be free from discrimination in their licensing application and subsequent relationship with a foster care agency.

By refusing to license or place children with any lesbian or gay male couples, Catholic Charities and DCFS would also be violating foster parents' rights to be free from discrimination on the basis of sexual orientation under the U.S. Constitution. U.S. Const. amend. XIV § 2; Ill. Const. art. I § 2 ("no person shall . . . be denied equal protection of the laws"); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (applying strict scrutiny to sexual orientation discrimination). Further, 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* Mem. MTD/SJ at 22-24.

Foster parents are also protected by the Human Rights Act, which prohibits discrimination on the basis of sexual orientation and marital status. *See* Int. Mem. MTD/SJ at 20-22 (citing 775 Ill. ILCS 5/5-101(Q), 5/5-102 (preventing discrimination in public accommodations); 775 ILCS 5/1-103(C) (prohibiting discrimination by public officials); 775 ILCS 5/6-101(B) (prohibiting aiding and abetting another in violating the act)). Further, they have rights under the Civil Union Act. Catholic Charities, operating as foster care agencies engaging in a state function, must recognize the benefits provided by these acts. *See* Int. Mem. MTD/SJ 35-39.

Additionally, as state actors, Catholic Charities may not rely on religious exemptions in either the Human Rights Act or Civil Union Act. *See supra* pp. 8-9. Nor may they make a RFRA claim. *Id.* Finally, even if absent that constitutional restraint, these defenses are meritless. *See* Int. Mem. MTD/SJ 27-44.

ii. The foster parents are harmed.

If Catholic Charities' discriminatory policy is allowed to continue, the foster parents face the following harms:

- Foster parents have an interest in being free from discrimination in the state licensing process, including in applying to care for DCFS wards without facing segregated facilities.

- Foster parents have an interest in being free from discrimination in the continued monitoring of the placement, including in services provided to the parents by the child welfare agency.

- Gay male and lesbian couples are particularly impacted by the refusal to acknowledge civil unions because civil unions are the only way that they can be recognized as a couple by the state for purposes of foster care.

c. The foster children's and foster parents' interests are sufficient for intervention.

The interests of the foster parents and foster children far exceed the requirement for intervention. They have constitutional and statutory rights to be free from the harm which Catholic Charities seek to inflict. In comparison, courts have found sufficient interests where far less was at stake. *See People ex rel. Hafer v. Flynn*, 13 Ill.2d 368, 371 (1958) (where the City changed its policies on taxi cab licenses, companies were allowed to intervene to protect their statutory interest in the licenses); *John Hancock*, 127 Ill. App. 3d at 144 (granting intervention where a homeowner, claiming health and economic interests, sought to intervene in the City's enforcement of the health and safety code against her condominium association); *City of*

Chicago v. Zik, 63 Ill. App. 2d 445 (1st Dist. 1965) (where a leaseholder intervened in an action for building code violations). Here, the foster parents and foster children stand to lose the protection of the U.S. and Illinois constitutions and Illinois' civil rights laws—a far greater detriment. *See California ex rel. Lockyer v. U.S.*, 450 F.3d 436, 441 (9th Cir. 2006) (granting intervention to persons who were "intended beneficiaries" of a statute that was being challenged as unconstitutional).[8]

Further, if denied intervention, the foster parents and foster children have affirmative claims against both Catholic Charities and DCFS for violating their constitutional and statutory rights. The foster children and foster parents have a right to intervene in this suit in order to "avoid relitigation in another suit of issues which are being litigated in [the] pending suit." *Freesen, Inc.*, 277 Ill. App. 3d at 71.

d. The foster children's and foster parents' interests are not adequately represented by other parties in the case.

The foster parents and foster children also meet the requirement that their interests are not adequately represented by other parties in the litigation. The requirement of showing inadequate representation "should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), cited by *John Hancock*, 127 Ill. App. 3d at 145. Proposed intervenors "need show only that there is a *potential* for inadequate representation." *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999). An applicant for intervention can establish inadequate representation "by

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[8] As the Illinois intervention statute "has been modeled after" Federal Rule of Civil Procedure 24, the case law addressing motions under Rule 24(a) is "highly relevant" to motions brought pursuant to section 408(a). *Maiter*, 82 Ill. App. 3d at 382; *see John Hancock*, 127 Ill. App.3d at 145 (Federal Rule of Civil Procedure 24(a) is "analogous"); *In re Adoption of Ruiz*, 164 Ill. App. 3d 1036, 1041 (1st Dist. 1987) ("Rule 24(a) is similar to section 408(a).").

showing that his interest in the case is different from that of the party representing him or that the representative party was ineffective in the defense of the action." *Redmond v. Devine,* 152 Ill. App. 3d 68, 74 (1st Dist. 1987).

Since the government is a party, the proposed intervenors "must have an interest greater than that of the general public, so that the party may stand to gain or lose by the direct legal operation and effect of a judgment in the suit." *People ex rel. Birkett v. City of Chicago*, 202 Ill.2d 36, 57-58 (2002); *see In re Estate of K.E.S.*, 347 Ill. App. 3d 452 (4th Dist. 2004); *Serio v. Equitable Life Assurance*, 184 Ill. App. 3d at 435-36. Here, there is no question that the foster children and foster parents have greater interests than the public at large. They are the beneficiaries of the constitutional and statutory protections at issue in this case.

While DCFS has a general interest in having its policies enforced, the foster children and foster parents have a direct stake in the lawsuit because they will bear the impact of Catholic Charities' discriminatory acts and face the loss of important statutory and constitutional rights. *See John Hancock*, 127 Ill. App. 3d at 146 (granting intervention where the interest "is more tangible and immediate than the interest of the public at large"). Thus, the foster children's and foster parents' interests in being free from discrimination are "more tangible and immediate" than the government's interest in preventing discrimination. *Id.*

Further, the Attorney General has a mechanism to enforce the Human Rights Act, but the foster children and foster children have a private right of redress. *See* 775 ILCS 5/7A-102(b) (allowing private parties to bring suit in Circuit Court). If Catholic Charities succeeds in enjoining the enforcement of the act, it could impede their private rights to sue. In similar circumstances, private parties with a direct interest have been allowed to intervene in cases where the government sought to enforce statutes on their behalf. *See Trbovich*, 404 U.S. 528

(holding that a union member could intervene to press his individual complaint in a case brought by the Secretary of Labor, who was charged with the public interest.); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) (quoting *Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977) ("We have here . . . the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible. The cases correctly hold that this kind of a conflict satisfies the minimal burden of showing inadequacy of representation."); *see also Lockyer*, 450 F.3d at 441; *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789 (7th Cir. 2005) (allowing employee to intervene in EEOC's prosecution of employment discrimination case).

In addition, the court must also consider "the extent to which the interests of the applicant and of existing parties converge or diverge, the commonality of legal and factual positions, the practical abilities of existing parties in terms of resources and expertise, and the vigor with which existing parties represent the applicant's interests." *John Hancock*, 127 Ill. App. 3d at 145; *see Argonaut Ins. Co. v. Safeway Steel Prods., Inc.*, 355 Ill. App. 3d 1, 7-8 (1st Dist. 2004). Here, in its initial brief on the preliminary injunction, the State did not argue that the *B.H.* Consent Decree preempts this matter, or that the foster parents' and foster children's constitutional and statutory rights would be violated by Catholic Charities' discriminatory policy. Further, the State did not argue that the U.S. and Illinois Constitutions prevent it from entering a contract with Catholic Charities after they have affirmed they will refuse to use the legally required and professionally sound best interest placement standard and will discriminate, or that Catholic Charities are state actors and bound by these same constitutional and statutory constraints. Neither did the State argue that, as state actors, Catholic Charities may not raise religious liberty

defenses, or that Catholic Charities are not excluded from the requirements of the Civil Union Act and Human Rights Act by virtue of their religious beliefs. While the State did argue that Catholic Charities would not succeed in its RFRA claim, it failed to explain, or put on evidence of the harm to the foster children and foster parents. *See Grutter*, 188 F.3d at 401 (granting intervention where intervenors would present evidence of past discrimination the government may be hesitant to present). The foster children and foster parents must be allowed to intervene in this case in order to protect their interests and legal rights.

II. In the alternative, the Court should grant permissive intervention.

The court *may* allow intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." 735 ILCS 5/2-408. The proposed intervenors do not have to show a "direct interest," "but the applicant must have an enforceable or recognizable right and more than a general interest in the subject matter." *Maiter*, 82 Ill. App. 3d at 382, (citing *Cooper v. Hinrichs*, 10 Ill.2d 269, 277 (1957)). Here, as described above, the foster children have a right to be placed in foster homes based on a best interest standard and not other criteria, and foster parents have a strong interest in being free from discrimination. Courts have allowed intervention in cases with less of a potential for direct harm to the intervening parties. *See id.* at 382-83 (granting discretionary intervention where parents formerly had a role in selecting principals in their schools, and the selection criteria changed, removing their input).

The court should allow the foster parents and foster children to intervene to protect their rights. They will also provide evidence of the harms at stake, thereby "significantly contribut[ing] to [the] full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Spangler v. Pasadena Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977); *see also Daggett v. Comm'n on Gov't Ethics & Election*

Practices, 172 F.3d 104, 113 (1st Cir. 1999) ("in exercising its discretion, a court may consider a variety of factors, including whether the intervenor's participation would "be helpful in the fully developing the case"). Much of the evidence of harm will not be presented by another party in the case. It is in the interests of justice to allow the foster children and foster parents to intervene.

III. Timeliness

The foster children and foster parents have clearly filed a timely application required for either intervention as of right, or discretionary intervention. "Factors for determining timeliness include the time an intervenor became aware of the litigation, the amount of time elapsed between initiation of the action and filing of the petition, and the reason for failing to seek intervention at an earlier date." *Freesen*, 277 Ill. App. at 71 (granting intervention after summary judgment was entered and reversed). Catholic Charities filed this case on June 7, 2011. The foster parents and foster children have filed their motion prior to DCFS' filing of responsive pleadings and prior to DCFS' and Catholic Charities' filing of cross motions for summary judgment. No discovery has taken place and no substantive rulings have been issued in the case. No party would be prejudiced in any way by the grant of intervention at this stage of the case. Thus, the petition for intervention is clearly filed in a timely manner. *John Hancock*, 127 Ill. App. 3d at 143-44 (finding a petition filed "within weeks of the commencement of the action . . . was timely beyond any doubt").

V. Conclusion

For the reasons stated above, the foster children and foster parents should be allowed to intervene as a matter of right. Alternatively, permissive intervention should be granted.

Respectfully submitted,

Dated: ___________________ By: ________________________________
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