No. 07-362 OCT 18 2007

*In the Supreme Court of the United States*

TEEN RANCH, INC, MATTHEW KOCH and MITCHELL KOSTER,

*Petitioners,*

v

MARIANNE UDOW, MUSETTE MICHAEL and DEBORA BUCHANAN,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE SIXTH CIRCUIT COURT OF APPEALS

# BRIEF IN OPPOSITION

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## QUESTION PRESENTED

The State of Michigan places, and funds the care of, abused, neglected, and delinquent children in residential treatment programs, some of which, like Petitioner Teen Ranch, have a religious character. The State ceased placing children, and ceased funding, when it learned that the content of Teen Ranch's program included religious activities such as worship, religious instruction, and proselytization in violation of Michigan law, federal law, and the Establishment Clause of the First Amendment.

Is the State required by the Free Exercise Clause of the First Amendment, 42 USC § 604a, or State law to subsidize these activities?

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## OPINIONS BELOW

The decision of the United States District Court for the Western District of Michigan, Southern District, is reported at 389 F Supp 2d 827 (WD Mich 2005) and is included at Petitioners' Appendix ("Pet. App. ") 18. The United States Court of Appeals for the Sixth Circuit's panel decision[1] affirming the District Court's opinion is reported at 479 F3d 403 (6th Cir 2007) and is included at Pet. App. 1. The denial of Petitioners' petition for rehearing and suggestion for rehearing *en banc* is not reported and is included at Pet. App. 54.

## JURISDICTION

On January 17, 2007, the Court of Appeals entered its order upholding the District Court's grant of summary judgment in favor of Respondents. Petitioners sought *en banc* review, which was denied on June 15, 2007. (Pet. App. 54.) This Court has jurisdiction to review the decision under 28 USC § 1254.

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

US Const, Am I states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

US Const, Am XIV § 1 states:

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[1] The Court of Appeals' decision was initially unpublished; however, upon motion of the Respondents, the decision was published.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The federal law at issue, 42 USC § 604a states in part:

(a) In general.
(1) State options. A State may. . .
(A) administer and provide services under the programs described in subparagraphs (A) and (B)(i) of paragraph (2) through contracts with charitable, religious, or private organizations; and
(B) provide beneficiaries of assistance under the programs described in subparagraphs (A) and (B)(ii) of paragraph (2) with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations.
(2) Programs described. The programs described in this paragraph are the following programs:
(A) A State program funded under part A of title IV of the Social Security Act [42 USCS § 601 *et seq.*] (as amended by section 103(a) of this Act).
(B) Any other program established or modified under title I or II of this Act, that--
(i) permits contracts with organizations; or

(ii) permit certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance.

(b) Religious organizations. The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2), on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

(c) Nondiscrimination against religious organizations. In the event a State exercises its authority under subsection (a), religious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k), neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

(d) Religious character and freedom.

(1) Religious organizations. A religious organization with a contract described in subsection (a)(1)(A), or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B), shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

(2) Additional safeguards. Neither the Federal Government nor a State shall require a religious organization to—

(A) alter its form of internal governance; or

(B) remove religious art, icons, scripture, or other symbols; in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in subsection (a)(2).

(e) Rights of beneficiaries of assistance.

(1) In general. If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2), the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

(2) Individual described. An individual described in this paragraph is an individual who

> receives, applies for, or requests to apply for, assistance under a program described in subsection (a)(2).
> 
> * * *
> 
> (i) Compliance. Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.
> 
> (j) Limitations on use of funds for certain purposes. No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) shall be expended for sectarian worship, instruction, or proselytization.
> 
> (k) Preemption. Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

Michigan appropriations acts 2003 PA 172 and 2004 PA 344 state:

> Sec. 220. (1) In contracting with faith-based organizations for mentoring or supportive services, and in all contracts for services, the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.
> 
> (2) If an individual requests the service and has an objection to the religious character of the institution or organization from which the individual receives or would receive services or

assistance, the department shall provide the individual within a reasonable time after the date of the objection with assistance or services and which are substantially the same as the service the individual would have received from the organization.

(3) The department shall ensure that faith-based organizations are able to apply and compete for services, programs, or contracts that they are qualified and suitable to fulfill. The department shall not disqualify faith-based organizations solely on the basis of the religious nature of their organization or their guiding principles or statements of faith.

(4) The department shall follow guidelines related to faith-based involvement established in section 104 of title I of the personal responsibility and work opportunity reconciliation act of 1996, Public Law 104-193, 42 USC 604a.

## STATEMENT

Petitioner Teen Ranch ("Teen Ranch")[2] alleges that the Michigan Family Independence Agency ("FIA")[3] is required to place, and fund the care of, abused, neglected, and delinquent children at Teen Ranch's juvenile residential treatment program. When FIA ceased placing children at the Teen Ranch in 2004 — because religion was an integral and required part of the program — Teen Ranch sought a temporary restraining

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[2] For purposes of this Brief, Petitioners will be collectively referred to as "Teen Ranch."

[3] The FIA has since been renamed the Department of Human Services ("DHS"); however, this Brief will refer to Respondents as "FIA."

order, preliminary and permanent injunctive relief, a declaratory judgment, and monetary damages against the Respondents in their personal and official capacities as FIA employees.

Teen Ranch alleged that the State was required by the United States Constitution and a federal statute, 42 USC § 604a, to subsidize its religious residential treatment program for children. The District Court disagreed, finding that funding the Teen Ranch program would violate the Establishment Clause. The District Court also rejected Teen Ranch's Free Exercise and Freedom of Speech claims and their Due Process and Equal Protection claims. The United States Court of Appeals for the Sixth Circuit affirmed.

**A. Juvenile Residential Care in Michigan.**

FIA is responsible for providing care and supervision to abused, neglected, and delinquent children who have been committed to, or placed in the care of, FIA.[4] FIA may provide out-of-home care to these children or contract with private organizations to provide these services.[5] FIA is responsible for monitoring and evaluating all children's services programs it funds.[6]

FIA contracts with 96 private child care agencies to provide services to FIA youth and their families. Of these, at least 35 are faith-based providers. However, Teen Ranch is the only faith-based provider known to FIA that has incorporated its religious beliefs and teaching into the services funded under its contract with

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[4] *See, generally* MCL 400.114 - 400.115e, and specifically, MCL 400.115(a) and (f), 400.115a(1)(b), 400.115b(1).

[5] MCL 400.115(a); MCL 400.115(1)(f).

[6] MCL 400.115a(1)(b) and (n).

FIA. (Private Agency Contractors Listing, Court of Appeals Joint App. p. 323; Resp. App. p. 2b, Buchanan Affidavit, Court of Appeals Joint App. p. 326.)

Neither a child nor the child's parent independently chooses the child's placement. Rather, in the juvenile delinquent case, it is the State, through a computer assignment system that selects the placement for the child. In an abuse and neglect foster care case, it is the FIA worker and the State Court that decides the placement. (3/24/04 Hearing Transcript, Court of Appeals Joint App. pp. 1107-1117; Slottke Deposition, Court of Appeals Joint App. pp. 1123-1130.) Because Teen Ranch's lawsuit was seeking prospective relief and Teen Ranch indicated it was no longer going to accept abuse and neglect children, the focus of the case became the delinquency placement process.

The focus in treatment in the delinquency placement is on the treatment needs of the child. (Slottke Deposition, Court of Appeals Joint App. pp. 1134, 1137.) The agency with the best treatment match receives the placement. If two facilities are equal, the facility that has waited the longest receives the placement. (3/24/04 Hearing Transcript, Court of Appeals Joint App. pp. 1109-1110.) The caseworker and the court determine any changes to placement. (Slottke Deposition, Court of Appeals Joint App. pp. 1134-1135.) The "one override on the entire situation is if the court has ordered or recommended a specific placement. . . ." (3/24/04 Hearing Transcript, Court of Appeals Joint App. pp. 1109-1110.) Religion is not a factor in the placement process. (Slottke Deposition, Court of Appeals Joint App. pp. 1131-1132.)

## B. Teen Ranch's Residential Program

FIA contracted with Teen Ranch to provide residential treatment and care for youth in need of services.[7] (FIA and Teen Ranch Agreement, Court of Appeals Joint App. p. 187.) In October – November 2003, FIA conducted a Quality Assurance Review of the Teen Ranch program. (11/6/03 letter, Court of Appeals Joint App. p. 228; 12/2/03 letter, Court of Appeals Joint App. p. 232.) That review made FIA aware that Teen Ranch was "improperly incorporating religious teaching into the daily activities and treatment plans" of youth placed there by FIA. (Resp. App. p. 4b-5b; 1/9/04 letter, Court of Appeals Joint App. p. 250.)

The foregoing conclusion was based on interviews with residents, Teen Ranch brochures, and reports from a local FIA office and the Michigan Department of Consumer and Industry Services ("DCIS"), the agency that then licensed child care institutions. (Resp. App. pp. 4b-9b; 1/9/04 letter, Court of Appeals App. pp. 250-252.) Specifically, ten youth reported being required to participate in religious services, including three who stated that they would "lose points" if they did not attend religious services. One stated that he was "placed out of program" and was required to do "criteria" for not participating in religious services, and one reported that she was required to attend "the River," a religious component of the Teen Ranch program. In addition, on November 7, 2003, a local FIA office received a complaint of a child forced to attend church services with her group. On December 4, 2003, DCIS received a complaint

[7] FIA's last contract extension with Teen Ranch expired on October 1, 2003. Because of the pending problems with Teen Ranch, FIA did not sign a contract extension. (Sixth Circuit Apx. p. 224.)

from another youth and her parent that a therapist at Teen Ranch had repeatedly interjected religious issues into therapy with the youth. (Resp. App. p. 5b-6b; 1/9/04 letter, Court of Appeals Joint App. p. 251; 3/24/04 Hearing Transcript, Court of Appeals Joint App. pp. 257-261, 262-265, 266-272.)

It is impractical to recite the breadth of evidence that establishes Teen Ranch's goals of religious indoctrination and pervasive inclusion of religion into the residential program. However, a number of statements encapsulate these facts. Teen Ranch's leadership has professed:

> **Surely we hope to *convert* the wayward youth with whom we come in contact to the knowledge of and devotion to Christ Jesus. . . . This is why church attendance, prayer, Bible study and the like has always been encouraged,** never mandated at Teen Ranch as part of an effective treatment program. . . . [Resp. App. p. 17b; Policy Directive, Court of Appeals Joint App. p. 628 (emphasis added).]

Teen Ranch's "mission" is "[p]roviding hope to young people and families through life changing relationships and experiences from a Christian perspective." (Resp. App. p. 23b; 3/5/04 Program Description, Court of Appeals Joint App. p. 396.) Its program description states, "Each model [of residential care] is designed to meet the children's needs through. . . . Spiritual reconciliation through the grace of God." (Resp. App. p. 24b; Program Description, Court of Appeals Joint App. p. 398.) The Teen Ranch Orientation and Information Handbook states:

> The basis of everything done at Teen Ranch revolves around . . . everyone building a closer relationship to Jesus Christ.
>
> * * *
>
> At Teen Ranch your child will receive the kind of environment that is . . . based upon Godly mentoring, and provided by Christian staff. Through the building of healthy relationships, the staff at Teen Ranch offers your child . . . *the knowledge of being made in the Image of God, then equipped with the tools to become a Kingdom Builder.* [Resp. App. p. 32b, 41b, Orientation Handbook, Court of Appeals Joint App. p. 362; see also Resp. App. pp. 49b-52b, March, 2004 Online Letter, Court of Appeals Joint App. pp. 402-404 and Resp. App. pp. 53b-55b, May, 2004 Online Letter, Court of Appeals Joint App. pp. 406-408.]

The religious programs and services that Teen Ranch provides to these children are consistent with Teen Ranch's mission of religious indoctrination. It is against this backdrop that FIA also learned that there was the pervasive inclusion of religion in the specific components and activities of the program. First, religious activities were included in the children's therapy. As part of the treatment program at Teen Ranch, children were required to attend a therapy program called "The River," which was religious in nature. (Resp. App. pp. 56b-62b; January, 2004 Online Letter, Court of Appeals Joint App. pp. 439-443; Resp. App. pp 63b-66b, The River Information, Court of Appeals Joint App. pp. 622-623.) Therapy included religious discussions, devotional time, Bible time, and prayer time. (3/24/04 Hearing Transcript, Court of Appeals Joint App. p. 274; Beatty Deposition, Court of Appeals Joint App. pp. 413, 418.)

Second, religious activities were part of the children's weekly and daily schedule. (Beatty Deposition, Court of Appeals Joint App. p. 412.) This would include daily devotions and prayer and weekly church attendance. (Beatty Deposition, Court of Appeals Joint App. pp. 411-413, 414, 416-417.)

Third, a youth's willingness to participate in religious activities, like church attendance, could affect their privileges and how long they were in the program. (Beatty Deposition, Court of Appeals Joint App. pp. 414, 417, 420-422, 429-430.) Likewise, Teen Ranch's Chief Operations Officer testified how staff announced that it was time for religious activities and how a child could express an objection. However, his testimony indicates how pressure could affect whether a child participated. (3/24/04 Hearing Transcript, Court of Appeals Joint App. p. 276.)

Teen Ranch's opt-in and opt-out procedure for children attending Teen Ranch, which was raised after the start of litigation, was proffered by Teen Ranch as an Establishment Clause cure-all. But, by its terms and Teen Ranch's explanation, that procedure would require Teen Ranch staff and State FIA workers to determine whether a child **truthfully** held an objection to Teen Ranch's **religious program**. (Resp. App. pp. 18b-20b, Policy Directive, Court of Appeals Joint App. pp. 627-630; Koch Deposition, Court of Appeals Joint App. pp. 336-342.) It also does not take into account that abused, neglected, and delinquent children and their parents do not choose the placement. (3/24/04 Hearing Transcript, Court of Appeals Joint App. pp. 1107-1117; Slottke Deposition, Court of Appeals Joint App. pp. 1123-1130.)

Quite simply put, Teen Ranch has advised that "incorporating religious teachings into on-going daily activities of youth and their treatment plans touches at the core of why we were founded, why we are here today, and why we will continue to include such programming for children in our care." (Amendment of Corrective Action Plan, Court of Appeals Joint App. p. 640.)

C. **Procedural History**

On November 6, 2003, FIA imposed a moratorium on new placements at Teen Ranch because FIA believed "Teen Ranch administration and operating practices fail[ed] to assure the safety and well-being of the youth in residence." (11/6/03 letter, Court of Appeals Joint App. p. 228.) This moratorium was not a response to the religious nature of the program; rather it was based on safety issues. Although FIA had interviewed youth, it was not until December 2003 that FIA confirmed that religion was an inherent part of Teen Ranch's program. Only then religion became the issue, and FIA and Teen Ranch attempted to resolve the matter, however, to no avail because Teen Ranch refused to remove religious worship instruction, and proselytization from its program content. (Buchanan Deposition, Court of Appeals Joint App. pp. 280-281; 12/16/03 letter, Court of Appeals Joint App. p. 293; Resp. App. pp. 7b-9b; 1/9/04 letter, Court of Appeals Joint App. pp. 250-252.) Teen Ranch filed suit on February 20, 2004, seeking declaratory, injunctive relief, and damages. Teen Ranch also sought a temporary restraining order, which the District Court promptly denied.

The moratorium was lifted briefly, at the advice of counsel, to give FIA time to prepare for the preliminary injunction hearing. (3/24/04 Hearing Transcript, Court of Appeals Joint App. pp. 255-256.) But it was

reinstituted in April 2004 after the District Court denied Teen Ranch's preliminary injunction motion. (Michael Deposition, Court of Appeals Joint App. pp. 300-302.) FIA's primary concerns were the inclusion of religion into the treatment program and situations where youth were required to participate in activities that were infused with religion. (Buchanan Deposition, Court of Appeals Joint App. pp. 282-283.) FIA chose not to remove the State-placed youth in care because it did not want to unnecessarily disrupt placement of children if there was potential to resolve the issue. But case managers were instructed to visit State youth in care at Teen Ranch. (Buchanan Deposition, Court of Appeals Joint App. pp. 284, 285, 290.) Teen Ranch voluntarily closed its residential program in June, 2004. (6/14/04 E-mail, Court of Appeals Joint App. p. 317; Koster Deposition, Court of Appeals Joint App. p. 320.)

The parties filed cross-motions for summary judgment. The District Court heard oral argument and dismissed Teen Ranch's case. (Pet. App. 18.) The Court of Appeals affirmed. (Pet. App. 1.)

## REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

The Court of Appeals' decision is correct and does not conflict with any decision of this Court or any other court. Further, the decision below does not present an important issue of federal law that should be decided by this Court. This Court's review is, therefore, not warranted.

### I. THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT.

#### A. The Court of Appeals correctly concluded that a federal court has no jurisdiction over a 42 USC § 604a claim.

Teen Ranch brought suit under 42 USC § 1983 to enforce an alleged violation of 42 USC § 604a. Section 1983 imposes liability on anyone who, under color of State law, deprives a person of any right "secured by the Constitution and laws."[8] However, not every federal statute creates a "right" enforceable under § 1983.[9] To the extent that Congress intends to confer an enforceable right upon individuals, "it must make its intentions to do so unmistakably clear in the language of that statute."[10]

Congress made it unmistakably clear that 42 USC § 604a does **not** create private rights enforceable in federal court: "any party which seeks to enforce its rights under

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[8] 42 USC § 1983.

[9] *Blessing v Freestone*, 520 US 329 at 340 (1997).

[10] *Gonzaga Univ v Doe,* 356 US 273, 286 (2002), citing *Will v Michigan Dep't of State Police,* 491 US 58, 65 (1989).

this section **may assert a civil action for injunctive relief exclusively in an appropriate state court** against the entity or agency that allegedly commits such violations."[11] Where Congress unequivocally stated that any judicial remedy for enforcement of a § 604a claim must be brought in a State court, the District Court lacked jurisdiction over Teen Ranch's § 604a claim.

Accordingly, the Court of Appeals was correct in its conclusion that a § 604a claim "is not cognizable in federal court." (Pet. App. 16; 479 F3d at 411.)

B. **42 USC § 604a does not apply to programs funded under Title IV-E of the Social Security Act, 42 USC § 670, et seq.**

This case involves State funding of residential treatment for children who are under FIA's care and supervision. (Complaint, ¶¶ 1, 24, Complaint, Court of Appeals Joint App. pp. 13, 16.) The State is eligible for federal reimbursement for a portion of its foster care placement costs under Title IV-E of the Social Security Act.[12] Title IV-E is silent regarding services provided by religious organizations. 42 USC § 604a, cited in the Complaint, is part of Title IV-A of the Social Security Act, 42 USC § 601, *et seq.*, which governs State grants for "temporary assistance for needy families" (TANF).[13] The funds paid to Teen Ranch were not TANF funds.

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[11] 42 USC § 604a(i) (emphasis added).

[12] 42 USC § 670 *et seq.*

[13] TANF is the public assistance program that replaced "Aid to Families with Dependent Children" (ADC). TANF was created through the Personal Responsibility Work Opportunity Reimbursement Act (PRWORA) of 1996, PL 104-193.

By its terms, § 604a only applies to State programs funded under Title IV-A and any other programs "established or modified under Title I or II of the Act."[14] As explained in the "History" section following § 604a, "Title I or II of the Act" refers to Title I or II of the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"). (LEXIS at 42 USC 604A, Court of Appeals Joint App. p. 653.) Title IV-E was established in 1980 through PL 96-272. As reflected in the US Department of Health and Human Services' ("HHS") responses to questions FIA posed to it (6/14/04 E-mail, Court of Appeals Joint App. p. 317), Title I and II of PRWORA made no substantive changes to Title IV-E. Therefore, since any funding that could flow to Teen Ranch would be Title IV-E funding, § 604a is inapplicable to Teen Ranch's claims. (See specifically, Q&A No. 3, 2/23/04 E-mail, Court of Appeals Joint App. p. 659.) The District Court recognized that Teen Ranch failed to demonstrate that § 604a even applied to funding under Title IV-E. (Pet. App. 50; 839 F Supp 2d at 841-842.)

### C. 42 USC § 604a does not require the State to fund programs that include religious activities such as worship, instruction, or proselytization.

Assuming *arguendo* that the District Court had jurisdiction over Teen Ranch's statutory claim and that 42 USC § 604a applied to Title IV-E funded programs, there is, nonetheless, no merit to the claim that FIA's refusal to fund Teen Ranch's religious activities violated § 604a.

Section 604a(a) provides in relevant part:

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[14] 42 USC § 604a(a)(2).

> (1) State options. A State may—
>
> (A) administer and provide services under the programs described in paragraph (2) through contracts with charitable, religious, or private organizations. . . ."

Teen Ranch claimed that FIA violated § 604a(c), which states in relevant part:

> **Except as provided in subsection (k)**, neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance . . . on the basis that the organization has a religious character. [Emphasis added.]

Subsection (k) states:

> Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

Under § 604a(c) and (k), any State constitution or statute that prohibits or restricts the expenditure of State funds in or by religious organizations trumps § 604a's provision regarding discrimination against organizations of a religious character. Michigan law also prohibits direct funding to religious programming that results in religious instruction, proselytization, or worship.[15] Thus, even if Teen Ranch's program did not include sectarian worship, instruction, or proselytization,

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[15] 2003 PA 172.

the State could still choose through its laws or constitution to not fund programs operated by religious organizations under § 604a(k).

But assuming no State law prohibition, under subsection (c), if a State opts to contract with private organizations for services covered under § 604a, the State cannot refuse to do business with a religious character **solely** because the entity is a religious organization. FIA's complaint with Teen Ranch was not that it was a religious organization or was operated by a religious organization, but that it infused sectarian worship, instruction, and proselytization as an integral part of the **program** paid for by the State. Indeed, FIA contracts with dozens of religious-affiliated organizations to provide residential care services. (12/16/03 letter, Court of Appeals Joint App. pp. 293 and 299.)

Furthermore, direct funding of religious **content**-based programs is expressly prohibited by 42 USC § 604a(j):

> No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) shall be expended for sectarian worship, instruction, or proselytization.

In other words, the statute that distinguishes between an organization that simply has a **religious character** and an organization that has a religious character and also incorporates religious worship, instruction, or proselytization as part of its **day-to-day services and programs** it provides to its recipients. Funding of the latter is prohibited under § 604a. Religion was an integral part of the Teen Ranch program. By directly placing children in juvenile residential care at Teen

Ranch and directly funding the placement, the State would violate the statute.

This interpretation is consistent with HHS' interpretation of § 604a, which indicates direct funding of religious activity is inappropriate. (2/23/04 E-mail, Court of Appeals Joint App. pp. 660-663) HHS is the agency that administers both the Title IV-A and IV-E programs at the federal level. HHS' interpretation of the statute it administers is entitled to substantial deference.[16]

FIA consistently acted in conformance with the principles of § 604a. Teen Ranch's claims that FIA was acting to persecute or single out Teen Ranch in violation of the statute because of animosity toward Teen Ranch's religious character are simply wrong. FIA's actions were taken because of the content of the State-funded program. The subjective nature of Teen Ranch's claim can be seen at page 20 of Teen Ranch's Petition for Certiorari when it only partially quotes from the deposition of Debora Buchanan, the Manager for the Purchased Care Division for FIA. But when the full sentence of Ms. Buchanan's position is provided, a different picture emerges. The complete sentence follows:

> My position right now today is that it is improper for the State of Michigan to contract with a provider who incorporates religious beliefs, practices, et cetera, **into their daily treatment and ongoing care for youth.** [Pet. App. p. 71 (emphasis added to note the portion of testimony eliminated by ellipses by Teen Ranch).]

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[16] *Chevron USA Inc v NRDC*, 467 US 837, 844 (1984).

If § 604a applies, FIA's decision to not directly fund the content of Teen Ranch's program that included religious worship, instruction, or proselytization is consistent with § 604a.

**D. Teen Ranch never pleaded a violation of State law.**

Teen Ranch's Complaint alleged no violation of State law. Teen Ranch cannot obtain a judgment on a claim that it failed to plead pursuant to 2003 PA 172 or 2004 PA 344. The District Court properly recognized this point. "Plaintiffs did not clearly allege a violation of State law as a basis for relief in their complaint." (Pet. App. 51; 839 F Supp 2d at 842.) Further, to the extent that Teen Ranch sought prospective injunctive relief, the District Court properly recognized that its claims were against the named FIA employees in their official capacities and are governed by the Eleventh Amendment. (Pet. App. 51; 839 F Supp 2d at 842.) The Eleventh Amendment prohibits federal courts from enjoining State officials for violations of State law.[17]

**E. Even if Teen Ranch had pleaded a cause of action for violation of State law, the claims would lack merit because the State law prohibits direct funding for worship, instruction, and proselytization.**

Assuming the District Court had exercised supplemental jurisdiction and Teen Ranch had pleaded a claim related to 2003 PA 172 or 2004 PA 344, the claims would fail for the same reasons the claim under 42 USC

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[17] *Pennhurst State Sch & Hosp v Halderman*, 465 US 89, 100 (1984).

§ 604a failed. 2003 PA 172 and 2004 PA 344 included the same prohibitory language:

> Sec. 220. (1) In contracting with faith-based organizations . . . the department shall ensure that no funds provided directly to institutions or organizations to provide services and administer programs shall be used or expended for any sectarian activity, including sectarian worship, instruction, or proselytization.

Direct funding of religious activities is prohibited. It is undisputed that religion is an integral part of Teen Ranch's program and that funds provided directly to Teen Ranch by the State would be used for prohibited sectarian activity.

## II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT.

### A. The Court of Appeals' decision does not conflict with Locke v Davey, which recognizes that some funding may be permissible under the Establishment Clause but not required under the Free Exercise Clause.

Teen Ranch argues that the State **must** subsidize its religious program or the State violates the Free Exercise Clause. However, while some funding may be permissible under the Establishment Clause it is not required under the Free Exercise Clause. The State did not encroach upon Teen Ranch's right to free exercise of religion. Therefore, there is no merit to Teen Ranch's argument that FIA **must**, under the Free Exercise Clause, fund placements of its wards at Teen Ranch.

This Court recently addressed this issue in *Locke v Davey* where it held that a State was not required to award State-funded scholarships to students pursuing theology degrees.[18] In reaching this conclusion, this Court stated[19]:

> These two clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. . . . Yet we have long said that "there is room for play in the joints" between them. . . . In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.

*Locke* distinguished a State's refusal to fund a religious activity from State laws imposing penalties on certain religious practices. The former is acceptable under the Free Exercise Clause; the latter is not[20]:

> Davey . . . contends that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc v Hialeah,* [508 US 520 (1993)], the [Promise Scholarship] program is presumptively unconstitutional because it is not facially neutral with respect to religion. . . . We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning. In *Lukumi,* the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. . . . In the

[18] *Locke v Davey,* 540 US 712 (2004).

[19] *Locke,* 540 US at 718-719.

[20] *Locke,* 540 US at 720-721.

> present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. . . . And it does not require students to choose between their religious beliefs and receiving a government benefit. . . . The State has merely chosen not to fund a distinct category of instruction.

As in *Locke,* there was no demonstrable animus toward religion when FIA decided not to contract with providers of children's services —like Teen Ranch — that admittedly incorporated religion into those services and expended State funds on religious activity. FIA has not inhibited religious practice or penalized religious participants civilly or criminally. In fact, FIA has contracted with numerous other religious providers of social services. However, those providers separate their religious activities from their social services. (Resp. App. p. 2b, Buchanan Affidavit, Court of Appeals Joint App. p. 327.) As in *Locke,* the State may permissibly choose not to fund placements of youth in a facility that espouses and advances a religious faith as an integral part of the program.[21]

None of the other cases cited by Teen Ranch supports their claim. In *Employment Div Dept of Human*

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[21] See also *Freedom From Religion v McCallum,* 179 F Supp 2d 950, 981-82 (WD Wis 2002) (a state's refusal to fund social services programs that include religious content does not violate the Free Exercise Clause of the First Amendment).

*Resources of Oregon v Smith,*[22] this Court held that a prohibition against a religious use of peyote was not a violation of the Free Exercise Clause, and denial of unemployment benefits to individuals fired for using peyote as part of a religious ceremony did not violate the Free Exercise Clause. And *Sherbert v Verner,*[23] *Thomas v Review Bd of the Indiana Employment Security Div*[24] and *Hobbie v Unemployment Appeals Comm'n of Florida,*[25] all dealt with denials of unemployment compensation benefits to individuals fired for refusing to work on their Sabbath, or to engage in other activities forbidden by their religion. This Court, in each of these cases, held that the government could not deny a **public benefit**— unemployment compensation—based on the worker's religious beliefs. But no public benefit or entitlement program is involved here. Teen Ranch had no constitutional right to force FIA to purchase its religiously-infused residential treatment services for State wards.

This Court distinguished this line of cases in *Locke.*[26] The State may choose to not fund inherently religious activity and need only have a rational basis for doing so. Similarly, *Locke* distinguished *McDaniel v Paty,*[27] another case cited by Teen Ranch. *McDaniel* held that ministers could not be prohibited from serving as State legislators because the prohibition violated their right to

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[22] *Employment Div, Dept of Human Resources of Oregon v Smith,* 494 US 872 (1992).

[23] *Sherbert v Verner,* 374 US 398 (1963).

[24] *Thomas v Review Bd of the Indiana Employment Security Div,* 450 US 707 (1981).

[25] *Hobbie v Unemployment Appeals Comm'n of Florida,* 480 US 136 (1987).

[26] *Locke,* 540 US at 720-721.

[27] *McDaniel v Paty,* 435 US 618 (1978).

free exercise of religion. As noted in *Locke,* no similar right is involved in cases involving State funding of religious programs.[28] Finally, *Locke* also distinguished *Church of Lukumi Babalu Aye Inc v City of Hialeah* which prohibited the **criminalization** of religious ritualistic animal sacrifices.[29] This Court found no analogy between criminal or civil sanctions for the practice of religion to cases involving government funding of religious activity.[30]

Accordingly, the Court of Appeals properly affirmed the District Court's dismissal of Teen Ranch's Free Exercise Claims. (Pet. App. 12; 479 F3d at 409-410, 411-412.)

### B. The Court of Appeals' decision does not conflict with *Mitchell v Helms* or *Zelman v Harris* regarding funding under the Establishment Clause.

Teen Ranch argues that the Court of Appeals' decision is inconsistent with this Court's decisions on private choice. Private choice can operate as a circuit breaker between the government and religion, and the existence of private choice may allow a funding scenario to pass Establishment Clause muster. However, Teen Ranch's desire for the State to subsidize its religious program for abused, neglected, and delinquent children who do not have true genuine private independent choice, does not pass constitutional muster. The Court of Appeals' decision is consistent with this Court's precedent.

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[28] *Locke,* 540 US at 720.

[29] *Church of Lukumi Babalu Aye, Inc. v City of Hialeah,* 508 US 520 (1993).

[30] *Locke,* 540 US at 720-721.

In *Mitchell v Helms,* a plurality opinion, this Court concluded that a federal law that authorized the federal government to distribute funds to State and local governmental agencies that in turn loaned, on a per capita student basis, educational materials, software, and equipment to religious and nonreligious schools, did not violate the Establishment Clause.[31]

In addressing whether there was governmental indoctrination, a plurality of the Justices opined that the aid was allocated on neutral secular criteria that did not favor or disfavor religion.[32] On the question of whether the act advanced religion, the plurality opined that the program made a broad range of schools eligible without regard to religion and that the aid reached schools only through private decision-making and contained no impermissible content.[33] The plurality attempted to move away from the direct versus indirect aid distinction for purposes of determining governmental indoctrination and instead focused on private choice, which operates as a circuit breaker between the government and religion. But the plurality recognized that the two analyses addressed the same thing, and the direct versus indirect distinction was meant to prevent religion from being subsidized by the government.[34] In *Mitchell,* because private decision-making was involved, the direct aid of materials and equipment was not at issue.[35] But the plurality recognized that the case did not involve direct

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[31] *Mitchell v Helms,* 530 US 793, 835 (2000).

[32] *Mitchell,* 530 US at 829-830.

[33] *Mitchell,* 530 US at 830-832.

[34] *Mitchell,* 530 US at 815-816.

[35] *Mitchell,* 530 US at 815-818; 831.

money payments and noted direct money payments raise "special Establishment Clause dangers."[36]

*Mitchell* does not provide support for Teen Ranch's claims. First, in this case, there was direct payment of money from the State to Teen Ranch. Second, *Mitchell* does not stand for the proposition that funds can be used or diverted to advance the religious missions of religious schools.[37] Third, there was no true private choice in the case at bar because those placed at Teen Ranch were vulnerable children under the State's jurisdiction and supervision, and the children and their parents do not choose the placement. Fourth, *Mitchell* speaks to Establishment Clause concerns and not a claim under the Free Exercise clause.

In *Zelman v Harris*, this Court found no Establishment Clause violation in a school voucher program.[38] In *Zelman*, this Court concluded that the voucher program was one of true private choice because it was neutral as to religion. The Court found no "financial incentive" that "skewed" the program toward religious schools, where there was a full range of religious and nonreligious educational options available to parents.[39]

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[36] *Mitchell*, 530 US at 818-820, quoting *Rosenberger v Rector*, 515 US 819, 842 (1995).

[37] *Mitchell*, 530 US at 840-844 (O'Connor, J, concurring) (Justice O'Connor's opinion was controlling on the Sixth Circuit because it was the narrowest concurrence on a non-majority opinion and did not accept that money can be diverted for religious use. See *Johnson v Economic Development Corporation*, 241 F3d 501, 510 (6th Cir 2001).

[38] *Zelman v Simmons-Harris*, 536 US 639, 662-663 (2002).

[39] *Zelman*, 536 US at 653-656.

There are a number of reasons why the subsidization of Teen Ranch's religious program is not similar to the voucher program in *Zelman*. First, there was no true genuine independent private choice involved because the State determined the children's placement, and neither the children, nor their parents selected from a broad range of choices. Second, the children here were under the care and supervision of the State. Third, there was no intervening step of a voucher. Fourth, *Zelman* did not involve a claim that funding was required under the Free Exercise Clause.

Neither *Zelman* nor the other funding cases argued by Teen Ranch support its claims. *Everson v Board of Education of the Twsp of Ewing,*[40] *Mueller v Allen,*[41] *Witters v Washington Dept of Services for the Blind,*[42] and *Zobrest v Catalina Foothills Sch Dist*[43] all involved payment for certain educational expenses for **families who freely and independently chose** religious educations for their children. Unlike Teen Ranch's situation, the benefits were not paid directly to an organization for religious programs.

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[40] *Everson v Bd of Educ of Twsp of Ewing,* 330 US 1 (1947) (rejected Establishment Clause challenge to authorization for reimbursement to parents with a child in private school for the cost of busing).

[41] *Mueller v Allen,* 463 US 388 (1983) (rejected Establishment Clause challenge to a program allowing tax deductions for educational expenses, including private school tuition).

[42] *Witters v Washington Dept of Services of the Blind,* 474 US 481 (1986) (rejected Establishment Clause challenge to a vocational scholarship program).

[43] *Zobrest v Catalina Foothills Sch Dist,* 509 US 1 (1993) (rejected Establishment Clause challenge to federal program that permitted a sign-language interpreter to assist hearing-impaired students in religious schools).

With the direct payment and without genuine independent choice, the funding of Teen Ranch would not pass constitutional muster under the Establishment Clause. This Court in *Lemon v Kurtzman* articulated a test for determining when a statute or program violates the Establishment Clause[44] and refined the test in *Agostini v Felton.*[45] The three primary criteria the Supreme Court uses to determine whether government aid advances religion are: (1) whether there is governmental indoctrination; (2) whether the participants are defined by reference to religion; and (3) whether there is excessive entanglement between government and religion.[46] The funding of Teen Ranch would violate all prongs of the *Lemon-Agostini* test.

Specifically as to the indoctrination prong, this Court in *Lee v Weisman*[47] and *Santa Fe Independent School District v Doe,*[48] emphasized that a policy that allows a child to opt out of a State-endorsed group religious activity does not shield the activity from Establishment Clause scrutiny. This Court found that placing children in a position where they must affirmatively opt out of a government-endorsed religious activity is unacceptable under the Establishment Clause.[49] As to the other two prongs, the participants would be defined by reference to religion, and attempting to fully advise, judge, and determine a child's religious convictions in light of a **religious program** using an opt-in or opt-out scenario would foster excessive entanglement between the State and religion.

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[44] *Lemon v Kurtzman,* 403 US 602 (1971).

[45] *Agostini v Felton,* 521 US 203, 221-223 (1997).

[46] *Agostini,* 521 US at 234.

[47] *Lee v Weisman,* 505 US 577 (1992).

[48] *Santa Fe Independent Sch Dist v Doe,* 530 US 210 (2000).

[49] *Lee,* 507 US at 593.

Accordingly, the Court of Appeals correctly recognized the lack of true genuine independent private choice regarding the children placed at Teen Ranch, necessary for the funding of Teen Ranch to pass constitutional muster under the Establishment Clause. (Pet. App. 12; 479 F3d at 408-409, 411-412.)

## III. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' DECISION BELOW AND DECISIONS FROM OTHER CIRCUITS.

Teen Ranch attempts to manufacture a conflict between the Court of Appeals' decision and decisions from other circuits. However, there are no conflicts because the cases cited by Teen Ranch involve genuine independent private choice exercised by adults and not cases involving abused, neglected, and delinquent children who do not choose their placements and who are under the supervision of the State.

### A. The facts and reasoning of the Seventh Circuit in *Freedom from Religion v McCallum* are distinguishable from this case.

Teen Ranch alleges that the Court of Appeals' decision conflicts with the Seventh Circuit's opinion in *Freedom of Religion, Inc v McCallum*.[50] In *McCallum* neither the district court nor the Seventh Circuit found an Establishment Clause violation where adult parolees could choose between a Christian half-way house and at least one other secular half-way house.[51] The district

[50] *Freedom of Religion, Inc v McCallum*, 324 F3d 880 (7th Cir 2003) (*McCallum III*).

[51] *Freedom of Religion, Inc v McCallum*, 214 F Supp 2d 905 at 907, 912-913 (WD Wisc 2002) (*McCallum II*); 324 F3d 880 (7th Cir 2003).

court recognized that indirect funding of faith-based organizations occurs through genuine independent private choice of individuals.[52] In that case, the district court recognized that the issue was a close call, and noted that the participants were **not children.**[53] The Seventh Circuit affirmed the district court, equating Faith Works to a school voucher scenario.[54]

*McCallum* is distinguishable from this case for a number of significant reasons. First, this case involves vulnerable and troubled children who are State or court wards and who are not adults capable of making treatment decisions. Second, neither the children, nor their parents, decide the placement. Third, the children had no "genuine independent private choices" of programs. Although Teen Ranch proposed that a child or his parents might "opt out" or "opt in" to Teen Ranch, the initial and ultimate placement decisions are the State's, which makes sense because the children are abused, neglected, and delinquent. Fourth, *McCallum* was brought by taxpayers challenging Faith Works under the Establishment Clause and not by Faith Works claiming funding was required under the Free Exercise Clause. In contrast, Teen Ranch is claiming it **must** be funded.

Accordingly, the Court of Appeals correctly recognized the lack of true genuine independent private choice regarding the children placed at Teen Ranch, necessary for the funding of Teen Ranch to pass

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[52] *Freedom of Religion, Inc v McCallum,* 179 F Supp 2d 950, 970 (WD Wisc 2002) (*McCallum I*).

[53] *McCallum,* 214 F Supp 2d at 907, 915-916, 919 (*McCallum II*).

[54] *McCallum,* 324 F3d at 882, citing *Zelman v Simmons-Harris,* 536 US 639.

constitutional muster under the Establishment Clause. (Pet. App. 12; 479 F3d at 408-409, 411-412.)

**B. The facts and reasoning of the DC Circuit in *American Jewish Federation* are distinguishable from this case.**

The US Court of Appeals for the District of Columbia Circuit in *American Jewish Congress v Corp for National and Community Service,* addressed whether the AmeriCorps Education Awards Program, operated by the Corporation for National and Community Service, advanced religion and thereby violated the Establishment Clause.[55] In *Jewish Congress,* those seeking an award had to perform community service in an approved program. The case involved those who fulfilled this service requirement by teaching in religious schools. The D.C. Circuit concluded that there was no Establishment Clause violation, in part, because there was independent private choice.[56]

The DC Circuit relied on *Zelman,* which is significant for three reasons. First, there was no direct money payment to the funding recipient in *Zelman,* whereas here, there was a direct monetary payment to Teen Ranch. Second, contrary to the facts in *Zelman,* there was no intervening step where a voucher is given to an individual. In *Zelman,* parents were able to make independent choices about the school their child would attend. Third, the youth placed at Teen Ranch were children, especially emotionally fragile or damaged children, who **did not** choose their placements freely or independently.

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[55] *American Jewish Congress v Corp for National and Community Service,* 399 F3d 351 (DC Cir 2005).
[56] *Jewish Congress,* 399 F3d at 356, 358.

Accordingly, the Court of Appeals correctly recognized the lack of true genuine independent private choice regarding the children placed at Teen Ranch, necessary for the funding of Teen Ranch to pass constitutional muster under the Establishment Clause. (Pet. App. 12; 479 F3d at 408-409, 411-412.)

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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Date: October, 2007