COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
C.A. NO. 2012-01807-B

JAMES E. FAIRBANKS and
ALAIN J. BERET,

Plaintiffs,

v.

HOUSE OF AFFIRMATION, INC., ROMAN CATHOLIC BISHOP OF WORCESTER, ROBERT MCMANUS, THOMAS J. SULLIVAN, EASTERN ALLIANCE REALTY, LLC, LISANDRA RODRIGUEZ-PAGAN, and ANGEL L. PAGAN,

Defendants.

[PROPOSED] MEMORANDUM OF THE COMMONWEALTH OF MASSACHUSETTS AS *AMICUS CURIAE* IN SUPPORT OF THE PLAINTIFFS

The Commonwealth respectfully submits the following memorandum of law in support of Plaintiffs James Fairbanks and Alain Beret. The motion for summary judgment filed by Defendants House of Affirmation, Inc., Roman Catholic Bishop of Worcester, Robert McManus, and Thomas J. Sullivan (collectively, the "Diocesan Defendants") presents important questions concerning the scope of Massachusetts's antidiscrimination laws, and the extent to which religious freedoms guaranteed by the Massachusetts Constitution permit religious entities to avoid obligations under such laws.[1] The Commonwealth and its laws respect and protect the rights of religious groups. The Attorney General takes action to protect religious rights and to root out discrimination on the basis of religion. The Attorney General also seeks to vindicate the rights of people subjected to other forms of discrimination.

Here, the Diocesan Defendants assert that, *inter alia*, their conduct—the refusal to sell real property to Plaintiffs, two gay men who intended to reside at the property and operate an inn, and their statement concerning that refusal—did not violate G.L. c. 151B, § 4, is not governed by the statute because of certain religious exceptions, or is exempted from the law's requirements by constitutional free exercise protections. Their interpretation of the law is incorrect and, in the context of this case, the rights of religious freedom do not entitle the Diocesan Defendants to discriminate against Plaintiffs on the basis of sexual orientation.[2]

As set forth below, the Commonwealth has a comprehensive and compelling interest in the eradication of sexual orientation discrimination. The exemptions found at G.L. c. 151B,

[1] Defendants Eastern Alliance Realty, LLC and Lisandra Rodriguez-Pagan ("Realtor Defendants") also have moved for summary judgment. For the reasons set forth in this memorandum, their motion fails, insofar as it relies on an argument that the Diocesan Defendants were entitled as a religious organization to discriminate against Plaintiffs.

[2] This case does not implicate the Diocesan Defendants' ability to shape the faith and mission of their church. For example, their right to refuse to perform wedding ceremonies for same-sex couples would not be called into question by denying their free exercise claim here.

§ 4(18) and G.L. c. 184, § 23B do not apply here, and are narrower than the Diocese Defendants contend. Finally, the Commonwealth's interests far outweigh any incidental burden on religious exercise that the Diocesan Defendants can claim in the commercial sale of real property to third parties. Accordingly, the Diocesan Defendants are not entitled to summary judgment.

I. THE COMMONWEALTH HAS A COMPELLING INTEREST IN PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION

A. Pervasive Historical Discrimination Against Gays and Lesbians, Based Solely on Prejudice, Supports Massachusetts's Antidiscrimination Interest

The Commonwealth's compelling interest in protecting gays and lesbians from discrimination derives from their status as a politically vulnerable minority that has suffered a history of discrimination, which continues to this day. Additionally, the bias against gays and lesbians is all the more pernicious because the defining characteristic of the group has nothing to do with the ability of gays and lesbians to contribute to society. And, eliminating discrimination against gays and lesbians serves greater interests than simply opening opportunities in civic society, itself a worthy goal, as doing so significantly benefits public health.

1. History of Discrimination

There can be no dispute that gay men and lesbians, as a discrete minority, have been subject to discrimination historically. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."). Until recently, many state laws prohibited intimate relations of gays and lesbians, which "demean[ed] their existence … by making their private sexual conduct a crime." *Id.* at 578. In addition, the federal government long considered homosexuality to be sufficient grounds for denying a civil service appointment (until 1976) or entry into the country (until 1991). Until last June, federal law treated married same-sex spouses as legal strangers because of the Defense of Marriage Act

("DOMA"). *See United States v. Windsor*, 133 S. Ct. 2675 (2013). Thirty-three states still prohibit gay couples from marrying. To this day, federal law and the laws of many states do not protect gays and lesbians against housing or employment discrimination.

Though progress has been made, the discrimination and bias persist. After race, sexual orientation is the most common basis for hate crimes nationally. FBI, *Hate Crime Statistics 2011*, http://www.fbi.gov/about-us/cjis/ucr/hatecrime/2011/tables/table-1 (hate crimes motivated by victim's sexual orientation constituted over 20% of total). Since 2008, the Attorney General has brought seven enforcement actions under the Massachusetts Civil Rights Act to combat conduct motivated by homophobic bias. In Massachusetts schools, bullying based on sexual orientation is still prevalent and can have devastating consequences for students.[3]

2. Ability to Contribute

Sexual orientation has no relationship to one's ability to be successful in school, the workplace, or in one's family life. As the Second Circuit recently explained: "There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them." *Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012), *aff'd*, *United States v. Windsor*, 133 S. Ct. 2675 (2013). As a result, bias against gays and lesbians is particularly troubling and damaging because it is based only on stereotypes and prejudice, rather than on the ability of an individual to contribute to society.

3. Impact of Protections

Massachusetts's comprehensive legal protections for gays and lesbians are needed to

[3] *See, e.g.*, Commission to Review Statutes Relative to Implementation of the School Bullying Law, *Recommendations from the Review of Laws Regarding Bullying in Massachusetts, Report to the Massachusetts General Court, Commonwealth of Massachusetts*, June 2011, http://www.mass.gov/ago/docs/community/bullying/bullying-report-june-2011.pdf.

overcome this history of prejudice and to ensure full participation in civil society. Its benefits extend beyond reducing incidents of discrimination, and include the promotion of public health. For example, gays and lesbians living in states with protective policies are significantly less likely to suffer from psychiatric disorders than their counterparts living in states without such policies. *See, e.g.*, Mark L. Hatzenbuehler, et al., *State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, 99 (12) Am. J. Pub. Health 2275 (2009). A related study found that gay men experienced a statistically significant decrease in medical care visits, including mental health care, following the legalization of same-sex marriage. Mark L. Hatzenbuehler, et al., *Effect of Same-Sex Marriage Laws on Health Care Use and Expenditures in Sexual Minority Men: A Quasi-Natural Experiment*, 102 (2) Am. J. Pub. Health 285 (2012).

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Increasingly, courts have relied on these and similar factors to determine that heightened scrutiny applies to classifications based on sexual orientation.[4] As discussed above, these considerations demonstrate the compelling nature of the Commonwealth's interest in eliminating sexual orientation-based discrimination.

B. Massachusetts Law Comprehensively Prohibits Discrimination On The Basis Of Sexual Orientation

Massachusetts law comprehensively protects gays and lesbians from discrimination.

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[4] *See Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) *aff'd*, 133 S. Ct. 2675 (2013); *Obergefell v. Wymyslo*, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). In January, the U.S. Court of Appeals for the Ninth Circuit determined that, based on the decision in *Windsor*, the Supreme Court has already decided that gays and lesbians are to be protected through heightened scrutiny. *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 479-84 (9th Cir. 2014).

These protections derive from decisions by the Supreme Judicial Court, enactments of the Legislature, regulation by the Executive Branch, and litigation by the Attorney General.

1. Massachusetts Judicial Decisions

The Supreme Judicial Court has made clear that Massachusetts's statutes and Constitution guarantee the equal rights of gays and lesbians.[5] More than thirty years ago, the Supreme Judicial Court held that sexual orientation was an improper basis for denying custody or visitation rights to a parent. *Bezio v. Patenaude*, 381 Mass. 563 (1980) (holding that being a lesbian did not render mother unfit to further her children's welfare); *see also Doe v. Doe*, 16 Mass. App. Ct. 502 (1983) (parent's sexual orientation insufficient ground to deny custody of child in divorce action). A decade later, the Supreme Judicial Court expanded the protections afforded gay men and lesbians by permitting the adoption of a child by the birth mother's same-sex partner. *Adoption of Tammy*, 416 Mass. 205 (1993). Following these initial decisions, the Supreme Judicial Court became the first court in the United States to extend the right to marry to same-sex couples. *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003). In its decision, the *Goodridge* court emphasized that "[t]he Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens." *Id.* at 312. Since then, the Supreme Judicial Court has confirmed and extended protections for gay and lesbian individuals and couples, including by rejecting the use of civil unions as a remedy for the constitutional infirmity found in *Goodridge*. *In re Opinions of the Justices to the Senate*, 440 Mass. 1201, 1206 (2004).

[5] As discussed in more detail below, *see* Part III, that the compelling interest in this area is of a constitutional nature distinguishes this case from *Attorney General v. Desilets*, 418 Mass. 316 (1994), in which the Supreme Judicial Court questioned the substantiality of the Commonwealth's interest in combatting discrimination based on marital status.

2. State Statutes

The Legislature has specifically proscribed discrimination or bias-motivated conduct based on sexual orientation in a collection of laws designed to eradicate the problem. In 1989, the Legislature amended the state antidiscrimination statute (G.L. c. 151B), the violation of which is the subject of this case, as well as the public accommodation law (G.L. c. 272, §§ 92A, 98), to include sexual orientation as a protected class. *See* Act of Nov. 5, 1989, ch. 516, 1989 Mass. Acts 796. At the time, those expansions of antidiscrimination statutes were almost unprecedented in state or federal law. In 1993, the Legislature added sexual orientation as a protected class to the antidiscrimination law that applies to school admissions, G.L. c. 76 § 5. *See* St. 1993, c. 282. Three years later, the Legislature amended Massachusetts's hate crime statute, G.L. c. 265 § 39, to include punishments for bias-motivated crimes committed on the basis of sexual orientation. *See* St. 1996, c. 163, § 2.

Following the *Goodridge* decision, the Legislature rejected efforts to amend the state's Constitution to narrow the definition of marriage. *See* Mass. Sen. J., Joint Session on Const'l Amends., June 14, 2007. And, on July 31, 2008, Governor Deval Patrick signed two laws—the 1913 law repeal and the MassHealth Equality Act—expanding state protections. St. 2008, c, 216, 217. By repealing the 1913 law, G.L. c. 207, §§ 11-12, Massachusetts enabled couples who reside in states that do not permit or recognize same-sex marriages to marry in Massachusetts. The MassHealth Equality Act, G.L. c. 118E, § 61, provided healthcare coverage to married individuals who were otherwise excluded from federal benefits due to DOMA.

3. Executive Action

Through regulations, executive orders, and enforcement actions, the Executive Branch also has demonstrated a strong commitment to reducing sexual orientation discrimination.

Governor Patrick has issued Executive Order Nos. 526 & 527, which prohibit discrimination based on, and inquiry into, *inter alia*, sexual orientation in all aspects of state government and require the review of agency policies to ensure that barriers to participation and access are removed. As another example, Department of Public Health regulations preclude any entity implementing a wellness program (for tax credit purposes) from discriminating based on sexual orientation. *See* 105 C.M.R. 216.012. In addition, the Attorney General has prosecuted those who engage in unlawful discrimination in housing and to ensure protected rights are not interfered with due to prejudice against gays and lesbians. *See*, *e.g.*, *Commonwealth v. May* (Norfolk Sup. Ct. No. 08-2364) (MCRA injunction against neighbor for homophobic assaults); *Commonwealth v. Weymouth Commons* (Norfolk Sup. Ct. No. 94-322) (consent judgment obtained against landlord in case involving sexual orientation discrimination).

The Attorney General has also helped lead efforts to eradicate discrimination against gays and lesbians under federal law. In 2009, the Attorney General filed an historic lawsuit against the federal government challenging the constitutionality of DOMA. The Attorney General asserted, *inter alia*, that DOMA unconstitutionally required the state to discriminate based on sexual orientation in exchange for the receipt of federal funding. Massachusetts prevailed at both the district court, *Commonwealth v. U.S. Dep't of Health & Hum. Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), and at the U.S. Court of Appeals for the First Circuit, *Commonwealth v. U.S. Dep't of Health & Hum. Servs.*, 682 F.3d 1 (1st Cir. 2012). In addition, the Commonwealth participated as an *amicus curiae* and urged the U.S. Supreme Court to invalidate DOMA in *Windsor*. The Attorney General also has advocated for the right of same-sex couples to marry nationwide by filing *amicus curiae* briefs in cases before the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth and Tenth Circuits. These actions evidence a substantial and

sustained effort to root out discrimination on the basis of sexual orientation at all levels, whether by the federal government or by a landlord.

II. A RELIGIOUS ORGANIZATION ENGAGED IN THE PUBLIC SALE OF REAL PROPERTY IS SUBJECT TO THE REQUIREMENTS OF G.L. C. 151B, § 4

A. Plaintiffs Have Proffered Sufficient Evidence to Show the Diocesan Defendants Violated G.L. C. 151B, § 4

Refusing to sell to Plaintiffs because of their sexual orientation, or making a statement indicating such a bias, violates G.L. c. 151B, §§ 4(7) & (7B). Plaintiffs have proffered sufficient evidence to make out such claims. In response, the Diocesan Defendants argue that their statement, at most, evidences discrimination on the basis of same-sex marriage, which, they say, is not discrimination on the basis of sexual orientation or prohibited by G.L. c. 151B, § 4. Their argument is without merit. In fact, the Supreme Judicial Court, in *Attorney General v. Desilets*, 418 Mass. 316 (1994), rejected the kind of status/conduct distinction that the Diocesan Defendants argue here. The court concluded that a landlord who objected to renting an apartment to an unmarried couple based on religious objection to sexual intercourse outside of marriage (*conduct*) was, in actuality, objecting to the couple's marital *status*. *Id.* at 320.

The U.S. Supreme Court has reached similar conclusions with regard to sexual orientation discrimination. In *Lawrence*, the Supreme Court struck down an anti-sodomy law by explaining that, "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."[6] 539 U.S. at 575. The Supreme Court reaffirmed its rejection of the status/conduct argument with

[6] Justice O'Connor, in a concurring opinion, made even more explicit that discriminating against conduct associated with being gay was unconstitutional: "[T]he conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class." *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring).

respect to sexual orientation in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (the Court's "decisions have declined to distinguish between status and conduct in this context"). Most recently, the New Mexico Supreme Court rejected the conduct/status distinction in a case in which a photography studio was sued for refusing on religious grounds to provide services for a same-sex wedding. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013). The New Mexico Supreme Court held, "[w]e agree [with the U.S. Supreme Court] that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation." *Id*. at 62.

These cases make clear that the Diocesan Defendants' attempt to distinguish between discrimination concerning the hosting of same-sex marriages and Plaintiffs' sexual orientation should be rejected. The Diocesan Defendants admitted that they would not sell the property to Plaintiffs, a married gay couple, "because of the potentiality of gay marriages there." Viewing these facts in the light most favorable to the Plaintiffs, there is sufficient evidence to allow to proceed claims of a discriminatory refusal to sell based on sexual orientation and of a discriminatory statement concerning that refusal.

B. Neither of the Statutory Exceptions Cited by the Diocesan Defendants Are Applicable to the Commercial Sale of Real Property at Issue in this Case

The Diocesan Defendants also argue that two statutory exemptions—G.L. c. 151B, § 4(18) and G.L. c. 184, § 23B—prohibit application of the antidiscrimination law to their refusal to sell the property to Plaintiffs. *See* Defs' Br. at 16-17. Their reading overstates the exemptions and the law, and neither exemption applies to this transaction.

1. G.L. c. 151B, § 4(18)

General Laws c. 151B, § 4(18)[7] relates to the application of the statute to religious groups in connection with their internal functioning, but does not apply to a religious group's commercial sale of real property to third parties, unconnected with the church. *First*, the exemption is of a limited nature and not a total bar to the application of G.L. c. 151B's antidiscrimination prohibitions.[8] If the Legislature had intended a complete exemption, it would have expressly done so in the text of § 4(18) by simply stating that G.L. c. 151B does not apply to any religious institution or organization. Instead, the exemption is limited to the matters specifically described in the subsection.

Second, the limited exemption provided by § 4(18) does not apply to a religious organization's sale of real property to a third party. The text of the provision is the surest

[7] Section 4(18) states, in relevant part: "Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained."

[8] This Court should not be distracted by the statement in *Desilets* that "[t]he Commonwealth concedes, and we therefore *assume for the purposes of this case*, that G.L. c. 151B, § 4, provides an exception from *all* its coverage for a religious institution[.]" 418 Mass. at 326 n.8 (emphasis added). The exemption was not at issue in *Desilets* (because the defendants there were not religious institutions), and the observation does not even rise to the level of dictum. Furthermore, the court noted "the statute permits discrimination by a religious organization *in certain respects* … if to do so promotes the principles for which the organization was established." *Id*. at 330 (emphasis added). As should be clear, the Commonwealth's position is that the plain language of § 4(18) does *not* exempt religious institutions *entirely* from the prohibitions of § 4.

evidence of this interpretation.[9] To begin, the exemption permits "limiting admission to or giving preference to persons of the same religion or denomination." This case is not about admission to the church or whether individuals are members of the church. Plaintiffs were not passed over for other purchasers because they are not members of the Catholic Church. Next, the exemption provides for "taking any action with respect to matters of *employment, discipline, faith, internal organization* … which are calculated by such organization to promote the religious principles for which it is established or maintained." (Emphasis added.) This clause, too, is limited to internal church matters, including whom the church employs, discipline of parishioners and clergy, control of the faith itself, and, expressly, internal organization. Finally, religious organizations are exempted where they are "taking any action with respect to matters of … ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained." This clause only exempts actions under those rules, customs, or laws that are "ecclesiastical." A commercial property transaction with third parties is a transaction governed not by ecclesiastical law, but by Massachusetts law.

The Commonwealth's reading of § 4(18) tracks longstanding constitutional understandings regarding free exercise protection of internal church matters. For example, the "***ministerial exception***" "precludes application of employment discrimination legislation to claims concerning the employment relationship between a religious institution and its ministers," because of the First Amendment and analogous state constitutional protections. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 705 (2012); *see also Temple Emanuel of Newton v. MCAD*, 463 Mass. 472 (2012). This exception appears in the language of

[9] The Commonwealth's research uncovered no reported judicial interpretations of § 4(18), or of G.L. c. 184, § 23B, discussed *infra*.

§ 4(18), which expressly refers to "matters of employment." Ministers, in whose hands "members of a religious group put their faith," will generally be outside the scope of antidiscrimination laws. *Hosanna-Tabor*, 132 S. Ct. at 706 (applying a functional test to determine whether employee of a religious institution is covered by ministerial exception). Not all matters of employment are insulated by free exercise protections, however. *See Temple Emanuel*, 463 Mass. at 472. In fact, the Supreme Judicial Court has made clear that not even all matters concerning ministers are to be exempted from the Commonwealth's laws. *See Alberts v. Devine*, 395 Mass. 59, 73 (1985). These limitations to the ministerial exception similarly track § 4(18), which does not exempt all matters of employment, but only those "which are calculated by such organization to promote the religious principles for which it is established."

Church property disputes are a second category of cases that track and support the Commonwealth's reading of § 4(18). These disputes concern the disposition of church property and are usually between a church and members, or between the church and a governing authority. A typical example of such a dispute is when a church closes a parish and there are questions as to who maintains ownership of the property. Churches have significant autonomy to resolve such disputes, not least because *ecclesiastical* rules may govern some or all of the dispute. *See Fortin v. Roman Catholic Bishop of Worcester*, 416 Mass. 781, 785-87 (1994) (collecting and discussing cases). Nevertheless, even in that context, where a church is dealing with an internal matter and may be applying ecclesiastical rules, courts have a role to play and civil law can be applied in certain circumstances without running afoul of free exercise protections. *See Antioch Temple, Inc. v. Parekh*, 383 Mass. 854, 867 (1981) (courts may examine "the constitutions and by-laws of the religious organizations involved, especially in so far as they pertain to the ownership and control of church property")*; Jones v. Wolf*, 443 U.S.

595, 602 (1979) (states are constitutionally entitled to adopt "neutral principles of law" to resolve church "property disputes"). Here, the Court is not being asked to resolve an internal property dispute governed by ecclesiastical rule. Instead, the Diocesan Defendants and Plaintiffs, third-parties unrelated to the church, were engaged in the kind of commercial transaction that occurs many times each day throughout the Commonwealth, and which is governed by Massachusetts law.

In sum, the text of G.L. c. 151B, § 4(18) makes clear that it is a limited exemption, concerned with the integrity of a church's internal functioning. That reading of the exemption is supported by case law concerning free exercise protections for matters of church autonomy, and none of the circumstances for protecting internal church functions arises in this case.

2. G.L. c. 184, § 23B

The Diocesan Defendants argue that G.L. c. 184, § 23B[10] is another basis for exempting them from Massachusetts's antidiscrimination laws, Defs' Br. at 17, but the exemption does not apply to this case. *First*, and most importantly, this case involves no "instrument," such as a lease or title, purporting to limit the use of real property on the basis of religion. The exemption therefore is wholly inapplicable.[11] *Second*, and in any case, though § 23B's antidiscrimination

[10] "A provision in an instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease thereof to individuals of a specified race, color, religion, national origin or sex shall be void. Any condition, restriction or prohibition, including a right of entry or a possibility of reverter, which directly or indirectly limits the use for occupancy of real property on the basis of race, color, religion, national origin or sex shall be void, excepting a limitation on the basis of religion on the use of real property held by a religious or denominational institution or organization or by an organization operated for charitable or educational purposes which is operated, supervised or controlled by or in connection with a religious organization." G.L. c. 184, § 23B.

[11] That both sentences of § 23B apply to documents conveying property is clear from the title of the statute that enacted § 23B, St. 1969, c. 523, "An Act Invalidating Restrictive Covenants and Conditions Relating to Real Property on the Basis of Race, Color or Religion and Prohibiting the

prohibitions apply to sales, leases, or other transactions, the exemption for religious organizations is confined to "limitations … on the use of property *held by*" the church or a church-controlled organization (emphasis added). It therefore exempts only property religious organizations continue to hold; it does not apply to real property that a religious organization transfers through a sale, notwithstanding the Diocesan Defendants' misleading quotation of the provision (merging portions of its two sentences) in their brief in opposition to Plaintiffs' motion. Defs' Opp. Br. at 13.

The statute at issue in *Intermountain Fair Housing Council v. Boise Rescue Mission*, 657 F.3d 988 (9th Cir. 2011), a case relied upon by the Diocesan Defendants, Defs' Br. at 17, offers an instructive contrast to both § 4(18) and § 23B. The federal Fair Housing Act expressly exempts from its coverage a religious organization that seeks to "limit[] the *sale*, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or [] giv[e] preference to such persons." 42 U.S.C. § 3607(a) (emphasis added).[12] The Massachusetts Legislature, however, did not exempt religious groups from antidiscrimination laws in the *sale* of property. Instead, the statutory exceptions protect against interference that application of an antidiscrimination provision might cause with internal church functioning, where the religious organization owns, manages, and remains associated with the property. For example, the Diocesan Defendants likely would be entitled under § 23B to include a limitation on the basis of religion in the lease of property owned by the church.

Use of Such Covenants.

[12] Similarly, the statute in *Elane Photography* exempts from its coverage religious organizations that "mak[e] selections of *buyers*, lessees or tenants as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established or maintained." N.M. Stat. Ann. § 28-1-9(B) (2013).

III. PROHIBITING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN THE SALE OF REAL PROPERTY DOES NOT VIOLATE THE DIOCESAN DEFENDANTS' FREE EXERCISE RIGHTS

Applying G.L. c. 151B, § 4 to the Diocesan Defendants in this case would not violate the free exercise protections of Amendment Article 46 of the Massachusetts Constitution ("No law shall be passed prohibiting the free exercise of religion.").[13] The Supreme Judicial Court employs a four-part compelling interest test to review such free exercise claims: (1) whether the matter concerns a sincerely held religious belief; (2) whether the law at issue substantially burdens the free exercise of that sincerely held religious belief; (3) whether the Commonwealth has an interest sufficiently compelling to justify that burden; and (4) whether granting an exemption to persons in the requester's position would unduly burden the fulfillment of that interest. *Rasheed v. Comm'r of Correction*, 446 Mass. 463, 467 (2006) (citing *Desilets*, 418 Mass. at 322-25). As explained below, though the Diocesan Defendants assert a sincerely held religious belief, their free exercise claim fails the rest of the compelling interest test, and they are not entitled to an exemption.

A. The Diocesan Defendants Are Not Substantially Burdened

Whether a party's religious exercise is substantially burdened cannot be established by bare assertion. Courts examine whether the party seeking an exemption actually is substantially burdened by the application of a law as a practical matter. *See, e.g.*, *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (court "[a]ccepted as true the factual allegations that [plaintiff's] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened").

[13] The Diocesan Defendants also assert that the First Amendment entitled them to refuse to sell Oakhurst to Plaintiffs. However, the U.S. Constitution provides narrower free exercise protections than the Massachusetts Constitution. *See Desilets*, 418 Mass. at 321.

The burden about which the Diocesan Defendants complain is not a "substantial burden" within state or federal constitutional jurisprudence. The Diocesan Defendants do not articulate a substantial burden in their papers. Rather, they say that the "Oakhurst property was used for religious purposes," and that the "Roman Catholic church objects to same sex marriage on religious principles," "[t]herefore the Diocese would be within its rights, based on religious principles, to decline to sell the property to any individuals, heterosexual or homosexual, if those individuals intended to perform gay wedding ceremonies at the property." Defs' Br. at 16. The Diocesan Defendants argue that they are entitled to act contrary to antidiscrimination laws when they believe that the *purchaser* will use the parcel for a purpose that contradicts one of their (the *seller's*) sincerely held religious beliefs. Defs' Opp. Br. at 10. On the facts of this case, the Diocesan Defendants are offended either by having to engage in a commercial transaction with gay men or by a third party's prospective conduct on property no longer owned by the church. Such taking of offense is not a substantial burden under free exercise doctrine.

A religion-based objection to a particular use to which a purchaser of real property may or will put the land, or that the purchaser's guests or customers may or will make of the property, is both too contingent and too attenuated to substantially burden the objector. For example, courts have rejected religious-based challenges to spending programs where the objector asserts revenues will be used for purposes that violate his faith. *See, e.g., Bd. of Educ. v. Allen*, 392 U.S. 236 (1968) (rejecting Free Exercise claim concerning state-funded program that provided textbooks to religious schools); *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) (use of university registration fee to fund student health insurance plan did not substantially burden free exercise rights of students who objected to abortion because, in part, "plaintiffs are not required to accept, participate in, or advocate in any manner for the provision of abortion services").

Application of G.L. c. 151B's prohibition in the context of a church's commercial sale of real property does not require the church to do anything that violates the church's disapproval of same-sex marriage. The Diocesan Defendants need not perform, endorse, host, or remain silent concerning what their faith teaches them about the morality of same-sex marriage or homosexuality. And no reasonable person would think that a wedding that took place on a property no longer owned by a church was endorsed by that church. *Cf. Freedom from Religion Found. v. Hanover School Dist.*, 626 F.3d 1, 10-12 (1st Cir. 2010) (Establishment Clause endorsement test asks whether reasonable person would think government act favored or supported religion).

B. The Compelling Interest Justifies Burdening the Diocesan Defendants

Even if the Court concludes that the Diocesan Defendants would be substantially burdened in this case, prohibiting discrimination on the basis of sexual orientation is supported by a compelling and substantial state interest (as discussed in Part I), which outweighs the burden. This conclusion is supported by thorough consideration of the two Supreme Judicial Court opinions that have conducted the free exercise balancing test, outside of the prison context, in the last 20 years, *Desilets* and *The Society of Jesus of New England v. Commonwealth*, 441 Mass. 662 (2004).

In *Desilets*, the Supreme Judicial Court expressed skepticism about the strength of the Commonwealth's interest in combatting discrimination against cohabitating, unmarried couples. The *Desilets* court noted that there was no constitutionally-based prohibition against discrimination on the basis of marital status, and that "by statute and judicial decision the law has not promoted cohabitation and has granted a married spouse rights not granted to a man or woman cohabitating with a member of the opposite sex." 418 Mass. at 327-28; *see also id.* at

328 n.10 ("There are numerous statutes granting husbands and wives rights which do not extend to unmarried partners."). The absence of constitutional, statutory, and judicial support for the antidiscrimination interest at stake in *Desilets* was central to that court's determination. With respect to the antidiscrimination interest at stake in this case, however, there is substantial, specific, concrete constitutional, statutory, judicial, and executive support. *See* pp. 4-8, *supra*. It is simply not the case with respect to prohibiting discrimination on the basis of sexual orientation—a goal thoroughly supported by all branches of government—that the Commonwealth's interest is evidenced merely by the "simple enactment of the prohibition [in 151B]." *Desilets*, 418 Mass. at 329. Gays and lesbians are to be treated equally in the Commonwealth not only because G.L. c. 151B says so, but because the entire legal apparatus of the Commonwealth holds that there is no basis to distinguish between our citizens on the basis of sexual orientation. *See Goodridge*, 440 Mass. at 312.[14]

The free exercise burden at issue in *Desilets* was also of a vastly different nature. In fact, the limitation in G.L. c. 184, § 23B to property *held* by a religious organization evidences this very point. In *Desilets*, application of the law would have required the landlord to permit a cohabitating, unmarried couple to reside on the landlord's property. Such an arrangement would have required an ongoing relationship between the landlord and the couple whose behavior the landlord considered to be sinful. In that vein, the religious objector could be viewed by others as condoning, or at least permitting, such conduct on his property. By contrast, in this case, the property was put on the real estate market—and marketed through brokers—to be sold to a

[14] The Supreme Judicial Court also noted that *Desilets* was the first case of which it was aware concerning marital status discrimination, even though the law was then twenty years old. The same is certainly not true of sexual orientation discrimination. In addition to cases pursued by the Attorney General, the Massachusetts Commission Against Discrimination reports that 2-3% of its matters each year—more than 100 complaints annually—concern sexual orientation discrimination.

member of the general public. There is no ongoing relationship between the Diocesan Defendants and the purchasers, and no endorsement of a planned use of the property. The only burden, then, is that a subsequent use of property formerly owned by them offends them.

In *Society of Jesus*, the Supreme Judicial Court held that the asserted governmental interests outweighed the burden on the Jesuit order's free exercise. 441 Mass. at 673. In that case, the court examined whether the Jesuit order was required to comply with a subpoena requiring the production of documents relating to the confidential, internal reviews of a priest. *Id.* at 662. The Supreme Judicial Court concluded that the Commonwealth's interests in prosecuting the crimes at issue and in securing evidence that might avoid the need for young victims to testify at trial outweighed any burden on the Jesuits. *Id.* at 672. Though the governmental interest in eliminating sexual orientation discrimination differs from the interests at issue in *Society of Jesus*, it is also a compelling and well-established interest. Moreover, the Diocesan Defendants' interests in the sexual orientation of the purchasers of real property, or the use made of property it no longer owns, are significantly less substantial than the autonomy interests concerning internal clergy communications—interests that themselves were found *in*sufficient in *Society of Jesus*. Both *Desilets* and *Society of Jesus*, then, support the conclusion that the Commonwealth's interest is sufficiently compelling to require compliance by the Diocesan Defendants with the antidiscrimination law.

C. Granting a Free Exercise Exemption to the Diocesan Defendants Would Undermine the Commonwealth's Compelling Antidiscrimination Interest

The final consideration is whether granting the requested exemption would undermine the asserted compelling interest. It undoubtedly would. *First*, it would undercut Massachusetts's thoroughgoing protections for gays and lesbians if the Diocesan Defendants, or others, are permitted to discriminate on the basis of sexual orientation when engaged in the commercial sale

of real property. *Second*, gays and lesbians remain a group vulnerable to discrimination, particularly when the discrimination is religiously-justified.[15] *See, e.g.*, *Elane Photography*, 309 P.3d at 53. Exempting religious entities (or religiously-motivated actors) from prohibitions against discrimination in the real estate marketplace would increase barriers to housing and commercial opportunities for gays and lesbians. These two points specifically refute, in the context of sexual orientation discrimination, the *Desilets* court's conclusions about the less-than-compelling need for enforcement of the marital status provision.

Third, there is no meaningful alternative to enforcement of the antidiscrimination provisions here. Real property is unique, not fungible, under well-established principles of Massachusetts law. *See, e.g.*, *Greenfield County Estates Tenants Ass'n, Inc. v. Deep*, 423 Mass. 81, 88 (1996) ("[R]eal property is unique and . . . money damages will often be inadequate to redress a deprivation of an interest in land."). Plaintiffs sought to purchase the particular property the Diocesan Defendants marketed for sale. They were denied the opportunity to purchase that specific property on the basis of sexual orientation. Advising plaintiffs that they should simply find another property runs counter to the status that real estate has in the law.

Finally, enforcing the law here remedies a real harm, not only to the Plaintiffs but to gays and lesbians more generally. In fact, a growing body of social science shows that the mere existence of laws extending rights and protections has a positive effect on health outcomes for gay and lesbian individuals and their children. These final two points mirror the court's rationale for enforcement of the subpoena in *Society of Jesus*—namely, the lack of alternatives and the desire to avoid further harm to the victims.

[15] In just the last month, the Arizona State Legislature and the Kansas House of Representatives have passed bills permitting individuals, on the basis of their religious beliefs, to discriminate against gays and lesbians by denying services to them.

CONCLUSION

For all of the reasons set forth above, the Commonwealth asks that the Diocesan Defendants' motion for summary judgment be denied.

Respectfully submitted,

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