SUPREME COURT, STATE OF COLORADO Court Address: Colorado State Judicial Building 2 E. 14th Avenue, 4th Floor Denver, CO 80203	
District Court, Adams County, Colorado, Honorable John J. Vigil, presiding, Case No. 00CV1363, Div. D Municipal Court, City of Northglenn, Colorado Honorable Ronald J. Cohen, presiding, Case No. C34350	_____ Case Number:01SC245
Petitioner and Cross-Respondent: CITY OF NORTHGLENN, **Respondent and Cross-Petitioner:** JULIANA IBARRA	
Attorney: Name: Gregory A. Eurich Jim Goh Kimberley A. Dempster of HOLLAND & HART LLP Address: 555 Seventeenth Street, Suite 3200 Post Office Box 8749 Denver, Colorado 80201-8749 Phone Number: (303) 295-8000 Fax Number: (303) 975-5464 E-mail: geurich@hollandhart.com jgoh@hollandhart.com kdempster@hollandhart.com Atty.Reg.#: 2622; 20822; 32049	
COMBINED OPENING-ANSWER BRIEF OF RESPONDENT/CROSS-PETITIONER JULIANA IBARRA	

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ISSUES PRESENTED FOR REVIEW

This Court granted *certiorari* review as to the following two issues as requested by Northglenn in its Petition:

(1) Whether the District Court erred in finding that Northglenn Ordinance No. 1248 discriminates on the basis of familial status in violation of the Federal Fair Housing Act, 42 U.S.C. 3601 *et seq*?

(2) Whether the District Court erred in finding that Northglenn Ordinance No. 1248 violated Defendant's right to freedom of association and the right to personal choice in matters of family life?

In addition, the Court granted *certiorari* review as to the following issue as requested by Ibarra in her conditional cross-petition:

(3) Whether the District Court erred in failing to conclude that Northglenn Ordinance No. 1248 exceeds the Home Rule powers of the City of Northglenn because the place of residence of foster children is a matter of purely statewide concern, or at a minimum a matter of mixed state and local concern and Northglenn Ordinance 1248 conflicts with the provisions of the Colorado Children's Code?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Respondent Juliana Ibarra was convicted of a criminal violation of a municipal ordinance adopted by Petitioner City of Northglenn known as Ordinance No. 1248 because she provided a home for three foster children under the age of 18 who were required to register as youth adjudicated as sexual offenders under Colorado law. This case concerns the validity of Ordinance No. 1248, which makes it a crime for more than one registered sexual offender to reside in the same household within the City of Northglenn, and specifically whether the ordinance discriminates on the basis of familial status in violation of the Federal Fair Housing Act, violates Ms. Ibarra's freedom of association and right to personal choice in matters of family life and/or exceeds the Home Rule powers of the City of Northglenn by regulating a matter of purely statewide concern or at least mixed state and local concern.

II. STATEMENT OF PROCEEDINGS BELOW

The City of Northglenn served Ms. Ibarra with a Summons and Complaint, alleging a violation of Ordinance No. 1248 and ordering her to appear in Northglenn Municipal Court. She responded with a motion to dismiss and request for evidentiary hearing, both of which were denied by written order dated May 4, 2000. R.2, Tab 10. [1]

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[1] The record consists of five volumes. Citations to the record will refer to the volume followed by the page, and line number where applicable. In addition, Volume 2 is organized with numbered tabs and reference will be made to these where appropriate.

At a hearing held on May 11, 2000 on a motion to amend complaint filed by the City, the municipal court determined that the complaint did not need to be amended, concluding that a departure from the definition of "family" under the Ordinance was sufficient to establish a violation of the law despite the fact that the Ordinance did not state that such departure would be a violation, but merely set forth the definition of "family." R.2, Tab 11 at 4.

The municipal court entered judgment after a bench trial on June 1, 2000. A sentence of a seven hundred and fifty dollar fine and court costs of eighteen dollars was imposed the same day and a stay was granted. R.2, Tab 11 at 43:16-25. The court further ordered that six hundred and fifty dollars of the total fine be suspended on the condition that Ms. Ibarra comply with Ordinance No. 1248, Section 11-5-2(B)(58) by June 12, 2000 at 8:00 a.m. R.2, Tab 11 at 43:19-22.

Thereafter, Ms. Ibarra filed a notice of appeal to the Adams County District Court, reasserting many of the arguments presented to the Northglenn Municipal Court. Jurisdiction was based upon C.R.S. § 13-10-116(2), Municipal Court Rule 237(b) and Colo. R. Crim. P. 37, which confer jurisdiction in the district court over appeals of final judgments of a municipal court of record. After full briefing, the district court entered its order reversing the conviction on the grounds that Northglenn Ordinance No. 1248 discriminates on the basis of

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(footnote continued)

Thus, "R. 2, Tab 1 at 23:2-3" would refer to volume 2, page 23, lines 2-3 of the document behind tab 1.

familial status in violation of the Federal Fair Housing Act, 42 U.S.C. 3601 *et seq,* and violated Ms. Ibarra's right to freedom of association and the right to personal choice in matters of family life.

Northglenn filed a Petition for *Certiorari* Review to this Court and Ibarra filed her Opposition and Cross-Petition for *Certiorari* Review. The Court granted both Petitions on September 10, 2001, as clarified by its Order of October 1, 2001.

III. STATEMENT OF FACTS

Defendant Juliana Ibarra and her husband Eusebio are owners of a single-family residence within the City of Northglenn, Colorado. They have lived in this house for fifteen years. R.2, Tab 2 at 29:2-3. The Ibarras are foster parents certified by Lost & Found, Inc., a child placement agency licensed by the State of Colorado. *Id.* at 29:7-23. Juliana Ibarra has received special training to be a foster parent for juvenile sex offenders, including almost 90 hours of formal instruction in adolescent development and sexuality; sexual behaviors; and parenting the sexually violated child or perpetrator. *Id.* at 11:15-12:1; 30:1-12; R.2, Tab 4.

As of the date of the citation, the Ibarras shared their home with their natural son, Joel Ibarra, and four foster children, three of whom, Zachary, David, and Aaron, were youth adjudicated as sexual offenders and required to register pursuant to C.R.S. § 18-3-412.5, as amended. R.2, Tab 2 at 29:5-7; 30:13-23. Zachary had lived under the care and supervision of the Ibarras for three years whereas David and Aaron became members of the foster family in 1999. *Id.* at 30:21-23. Two of them were 17 and one

was 18 years of age. *Id.* at 30:24-31:1. These three foster children regarded Ms. Ibarra as their mother and, although unrelated by blood, treated each other as brothers. *Id.* at 32:14-21. They also suffer from emotional illnesses and learning disabilities. *Id.* at 14:15-25; 17:10-13; R.2, Tab 3 at 3, para. 21-24.

On or about November 11, 1999, a bill was introduced in the Northglenn City Council known as Councilman's Bill CB-1330 ("CB-1330"), proposing to amend the Northglenn Zoning Ordinance to prohibit sexual offenders from living together in residential zones. R. 2, Tab 5 at 1, 4 and 8. At all relevant times, the only home in Northglenn that would have violated these provisions was the Ibarra home.

After first reading, referral to the Northglenn Planning Commission and second and final reading on December 9, 1999, CB-1330 purportedly became effective on December 22, 1999.[2] R. 2, Tab 5 at 12; R.2, Tab 6 at 1. The bill became known as Ordinance No. 1243.

On approximately December 21, 1999, Detective Hipp of the City of Northglenn visited the Ibarras' home, and threatened to cite them for violating Ordinance No. 1243. R.2, Tab 2 at 34:15-25; R.2, Tab 6 at 1. Detective Hipp stated that the Ibarras would be criminally prosecuted if they did not remove at least two of the three foster children from their home by January 10, 2000. R.2, Tab 6 at 1.

The Ibarras, through counsel, notified the City of Northglenn by letter dated January 8, 2000, that the use of their home in Northglenn was a legally protected

[2] Because material changes were made to the bill between first and second reading, it was, in fact, ineffective under the Northglenn Municipal Code.

preexisting use under Section 11, Article 26 of the Northglenn Zoning Ordinance, which provides: "The lawful use of land or structures as existing at the time of the passage of this Ordinance or an amendment hereto that does not conform with the regulations of this Ordinance shall be deemed a non-conforming use." R.2, Tab 6 at 2.

Subsequently, the Ibarras, through counsel, reviewed the procedural history of Ordinance No. 1243, and advised Northglenn by letter dated January 14, 2000, that Ordinance No. 1243 had been enacted improperly under the Northglenn City Code insofar as the procedural requirements of the Code had not been complied with. R.2, Tab 7.

By letter dated January 20, 2000, the City Attorney for the City of Northglenn responded, asserting the effectiveness of Ordinance No. 1243, stating that the City of Northglenn had not decided whether to cite the Ibarras for violation of the Ordinance, and promising advance notice of any such service. R.2, Tab 8 at 1.

On January 27, 2000, at 7:00 p.m., without prior notice to the Ibarras, Northglenn enacted Ordinance No. 1248**.** R.2, Tab 5 at 17 and 19. Ordinance No. 1248 purports to prohibit registered sexual offenders from living together in residential zones of Northglenn, and defines a family as not including "more than one individual (or two *or more* individuals related by *blood or* marriage) required to register as a sex offender." R.2, Tab 1 (emphasis indicates changes from Ordinance No. 1243). Ordinance No. 1248 was adopted on first and final reading at a single meeting on January 27, 2000, and declared to be effective *immediately upon enactment* on the ground of a public safety

risk. R.2, Tab 1 at 2. Ordinance No. 1248 also was specifically excepted from the non-conforming use provisions of the Northglenn Zoning Ordinance. R.2, Tab 1 at 2.

By letter dated January 28, 2000, the City Attorney for the City of Northglenn, Herbert C. Phillips, advised counsel for the Ibarras of such enactment and stated that, "should the Ibarras remain in violation of the prohibition against group quarters for registered sex offenders, I would anticipate that they will be served with a Summons and Complaint in Northglenn Municipal Court sometime on Tuesday of next week." R.2, Tab 9 at 2.

Thus, the City of Northglenn gave the Ibarras until Tuesday, February 1, 2000—4 days after the Ordinance at issue was adopted—to move from Northglenn where they have lived for 15 years, break up their family, or be served with a summons and complaint and prosecuted for a criminal violation that carries a criminal penalty of a year in jail and/or a fine of $1,000.00 for each day they were found to be in violation of the Northglenn Zoning Ordinance. *Id.* The Ibarras declined to either move from their long time home or break up their family and Ms. Ibarra was ultimately served with a Summons and Complaint, alleging a criminal violation of Ordinance No. 1248.

SUMMARY OF ARGUMENT

Ordinance No. 1248 treats biological and foster families differently on its face and excludes certain foster families like the Ibarras from the definition of "family" altogether. Thus, the district court correctly found that the Ordinance violates the Federal Fair Housing Act by discriminating on the basis of familial status.

The district court was also correct in finding the Ordinance invalid on principles of substantive due process, concluding that the privacy and associational interests of foster families are fundamental rights, that their infringement implicate the strict scrutiny standard of review and that the Ordinance failed to meet that standard. In particular, the district court correctly found that Northglenn had failed to offer any evidence that public safety was enhanced when sexual offenders were prohibited from living together under one roof.

Finally, the district court should also have found a conflict in this case between the Ordinance and state law regulating a matter of statewide concern. The Ordinance's impact on foster families is unavoidable and undermines state law and policy supporting stable environments for foster children. The Ordinance therefore exceeds Northglenn's home-rule power because state laws relating to foster child placement and the purported regulation of sex offenders overlap, causing the Ordinance to conflict with the state-wide mandate that foster children be placed in the environment that best serves their welfare. The Ordinance forces foster children out of a beneficial placement for reasons not related to their welfare or other criteria legitimately considered in reassigning a foster care placement. Thus, Ordinance No. 1248 regulates the placement of foster children in excess of Northglenn's home-rule powers.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT ORDINANCE NO. 1248 VIOLATES THE FEDERAL FAIR HOUSING ACT

A. The Fair Housing Act Applies to Discriminatory Municipal Zoning Ordinances

Under the Federal Fair Housing Act ("Fair Housing Act" or "FHA"), it is unlawful to "make unavailable or deny" a dwelling to any person "because of race, color, religion, sex, *familial status*, national origin or handicap." 42 U.S.C. § 3604(a)(emphasis added). Further, the FHA itself and its legislative history make clear that it prohibits discriminatory zoning practices:

> Nothing in this subchapter shall be construed to invalidate or limit any law of a state or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective, that grants, guarantees, or protects the same rights as are granted by this subchapter; *but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall be invalid.*

42 U.S.C. § 3615 (emphasis added). According to the House Committee Report, the Fair Housing Act "is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of [protected individuals] to live in the residence of their choice in the community." H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 24 (1988), U.S. Code Cong. & Admin. News 1988, pp. 2173, 2185.

Furthermore, as Northglenn has acknowledged, it has been well settled in case

law from various federal courts[3] that the Fair Housing Act "applies to discriminatory actions taken by municipalities pursuant to zoning Ordinances." *Smith & Lee Assocs., Inc. v. City of Taylor*, 13 F.3d 920, 924 (6th Cir. 1993); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1498 (10th Cir. 1995) (the Act's "prohibitions clearly extend to discriminatory zoning practices"); *Larkin v. State of Michigan Dep't of Social Svs.,* 89 F.3d 285, 289 (6th Cir. 1996) ("Congress explicitly intended for the [Fair Housing Act] to apply to zoning Ordinances"). The law of a state or municipality is expressly preempted and invalidated by the Fair Housing Act if it is a "discriminatory housing practice" under the Act. *Bangerter*, 46 F.3d at 1500 n.15. In short, if Northglenn Ordinance No. 1248 is discriminatory in violation of the Federal Fair Housing Act, it is invalid.

B. The Fair Housing Act Proscribes Discrimination Against Foster Families Such as the Ibarras

The Fair Housing Act includes in the definition of "familial status"

> [O]ne or more individuals (who have not attained the age of 18 years) being domiciled with . . . a parent or another person having legal custody of such individuals; or . . . the designee of such parent or other person having such custody, with the written permission of such parent or other person.

42 U.S.C. § 3602(k). In *Gorski v. Troy*, 929 F.2d 1183, 1189 (7th Cir. 1991), the plaintiffs alleged that they were evicted from their homes because of their attempt to qualify as foster parents. In reversing a dismissal of their claim by the district court for

[3] Although case law from the federal courts is not binding upon this Court, it is highly persuasive in circumstances involving the interpretation of federal law, as here.

lack of standing, the 7th Circuit held that a foster family is protected by the Fair Housing Act's prohibition against discrimination based on "familial status" under this definition in the Act because "foster parent[s] clearly [are] designee[s]" of the state, which, in turn, is the legal custodian of a child committed to its care. *Id.* at 1187. Thus, the Ibarra family's protected familial status under the Act related to David and Aaron, who were both seventeen years of age at the time of service of the citation.

C. Northglenn Ordinance No. 1248 Facially Discriminates Against Foster Families

Ordinance No. 1248 discriminates on its face against foster families like the Ibarras who are protected from such discrimination under the Fair Housing Act. The Ordinance defines "family" as "not includ[ing] more than one individual, (or two or more individuals related by blood or marriage), required to register as a sex offender under the provisions of C.R.S. § 18-3-412.5, as amended." Under the Ordinance, two foster siblings required to register as sex offenders may not live together in Northglenn, but two biological siblings in identical circumstances may. Thus, the Ordinance imposes different occupancy limits depending on the type of relationship between parents and children, thereby facially favoring families related by blood and marriage over foster families like the Ibarras.

Northglenn continues to miss the point in failing to recognize the discriminatory impact of the Ordinance, arguing that "Ordinance No. 1248 does not preclude Respondent from *being* a parent, foster parent, or caring for foster children . . ." Northglenn's Opening Brief at 8 (emphasis added). This is equivalent to reasoning that

a law does not discriminate on the basis of race unless it contains a prohibition against *being* African-American. Under circumstances where two families, one entirely related by blood and the other a foster family, each have two registered sex offenders residing in their household, Ordinance No. 1248 treats them differently ***because of*** their difference in family status. The biological family may remain intact and the foster family must move or break up the family. Differential treatment based on a prohibited ground – familial status – is the essence of what the Fair Housing Act prohibits.

Although the issue has not been litigated often, courts have concluded that ordinances similar to the one at issue here that treat families related by blood or marriage differently than other families violate the FHA. For example, in *Keys Youth Services v. City of Olathe*, 52 F. Supp. 2d 1284 (D. Kan. 1999)("Keys I"), *rev'd on other grounds*, 248 F. 3d 1267 (10th Cir. 2001), the district court struck down as violative of the Fair Housing Act an ordinance that, on its face, favored families related by blood or marriage over other types of families. There, the Ordinance allowed any number of persons in a family related by blood or marriage to occupy a single family home, but placed occupancy restrictions on other types of families, including families (like the Ibarras) consisting of children who are domiciled with designees of the state. The court held that the additional burdens imposed upon those other types of families are a *per se* violation of the Fair Housing Act.[4] *Id.* at 1307. *See also Keys Youth*

[4] The fact that the Ordinance encumbers some, but not all, families does not make it any less discriminatory. *The Children's Alliance v. City of Bellevue*, 950 F. Supp. 1496 n.8 (W.D. Wa. 1997) ("That a law may not burden all members of the protected class does not remove its facially discriminatory character.")

Services v. City of Olathe ("Keys II"), 67 F. Supp. 2d 1228, 1230 (D. Kan. 1999) ("[H]omes in which residents meet the FHA familial status definition are entitled to the same zoning treatment as single-family residences.")

Similarly, in *The Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1496 (W.D. Wa. 1997), a zoning ordinance that imposed different occupancy limits on family dwellings depending on the nature of the familial relationship of residents was found to be facially discriminatory.

Northglenn wrongly claims that these decisions have no continuing precedential value. Although the grant of summary judgment by the district court in *Keys I, supra*, was recently reversed by the 10th Circuit Court of Appeals, that reversal was on grounds that do not affect the reasoning of the district court as it is relevant here. The 10th Circuit merely held that a group home, as distinguished from the Ibarra foster family, was not covered by the Fair Housing Act's definition of "familial status" and therefore not protected by the FHA. The 10th Circuit did not speak at all to the issue presented here -- whether treating a biological family more favorably than a foster family violates the Act. Thus, the rationale of *Keys I, Keys II* and *Children's Alliance v. City of Bellevue*, *supra*, that such differential treatment violates federal law remains persuasive authority. Indeed, Northglenn does not cite a single contrary authority. The district court was correct in finding that the Ordinance violates the FHA.

D. Ordinance No. 1248 Discriminates in its Application to the Ibarra Family Because of Their "Familial Status"

Ordinance No. 1248 also violates the Fair Housing Act in its *application* to the Ibarras in that the Ordinance excludes altogether from the definition of "family" a family that is clearly protected under the FHA. It the baldest terms, Ordinance No. 1248 states that the Ibarra family is not really a family. *See* Ordinance No. 1248, Ex. A to Northglenn's Brief (defining Family "except that a family shall not include [certain members of the Ibarra foster family]").

Zachary, though eighteen years of age, was a foster child in the Ibarra home. Because Zachary is a registered sex offender, under the Ordinance, his presence required the removal of the two other children, David and Aaron. While they have a right to live together as a family under the Act, the Ordinance prohibits them from doing so. Therefore, while Zachary may not have been directly protected under the Act, application of the Ordinance to him nevertheless resulted in a violation of the Act by requiring the removal of David and Aaron. And it did so by defining the Ibarra family as not really a family. That is the essence of intentional discrimination the basis of "familial status."

The Tenth Circuit has held that a plaintiff can prove intentional discrimination under the Fair Housing Act "merely by showing that a protected group has been subjected to explicitly differential—i.e. discriminatory—treatment." *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995). Here, the Ibarra children and the Ibarra family are protected under the Act, and Ordinance No. 1248 subjects them to explicitly differential treatment by disallowing them to live together as a family in their community. *See Larkin v. State of Michigan Dep't of Soc. Servs.*, 89 F.3d 285, 291 (6th

Cir. 1996) (Fair Housing Act "protects the right of individuals to live in the residence of their choice in their community"). Thus, the Ordinance violates the Fair Housing Act in its application as well.

E. Northglenn's New Constitutional Challenge to the Fair Housing Act is Unsupported by Relevant Authority and Has Been Waived.

Northglenn makes a new argument before this Court. In essence it contends that, if the distinctions made by Ordinance No. 1248 between biological and foster families violate the Federal Fair Housing Act, the FHA is unconstitutional in requiring that biological and foster families be treated the same. Northglenn's Opening Brief at 11-14. *Cf.* Northglenn's Response to Motion to Dismiss in Municipal Court, R.1 at 134-138; Northlgenn's Answer Brief in Adams County District Court, R.1 at 265-270. Northglenn may not raise a constitutional challenge for the first time before this Court. *Gallegos v. Phipps*, 779 P. 2d 856, 858 (Colo. 1989).

Moreover, none of the authority upon which Northglenn relies for this challenge to the constitutionality of the Federal Fair Housing Act involves resolving conflicts between biological parents and foster families nor do any of the cases cited require that biological families be preferred over foster families. In short, Northglenn cites nothing to directly support this challenge.

Finally, as the district court observed, "as the [Colorado] Children's Code declares, all foster children are entitled to receive the same care as non-foster children." The lower court found that "[s]ome foster children, specifically those required to register, will not receive the support and nurturing that can be attained though a family

environment because Ordinance 1248." Northglenn's new constitutional argument gives short shrift to the rights and needs of foster children and relegates them to an inferior status not permitted by Colorado law or the Federal Fair Housing Act.

II. THE DISTRICT COURT CORRECTLY HELD THAT ORDINANCE 1248 VIOLATES IBARRA'S DUE PROCESS RIGHTS

The district court correctly held that Ibarra "had a constitutionally protected liberty interest in maintaining her foster family free from governmental interference." Order at 9. Applying the strict scrutiny standard, the court held that Ordinance No. 1248 was not narrowly tailored to serve a compelling governmental interest, which—according to the City, was to "protect the community from sexual offenders." Order at 10. Further, as the court correctly concluded, Ordinance 1248 "create[d] two classes of sex offenders, related sex offenders and unrelated sex offenders, and subject them to disparate treatment without a showing of even a rational basis for the disparity in treatment." *Id.* The district court's holding should be affirmed.

While zoning decisions are presumed valid, and the party challenging the constitutionality of an ordinance such as the Northglenn ordinance at issue here normally bears the burden of proving the asserted invalidity, the discretion of the municipality to promulgate zoning regulations is not absolute, and must satisfy constitutional limitations applicable to all legislative decisions. *See Zavala v. City & Cty. of Denver*, 759 P.2d 664, 670 (Colo. 1988). Thus, Ordinance No. 1248 must satisfy due process standards in order to be constitutional.

The Fourteenth Amendment of the Constitution provides: "No state shall . . . 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 United States Supreme Court has identified two different analytical frameworks for due process: substantive and procedural. Ordinance No. 1248, in its substance, violates the Due Process Clause of the Fourteenth Amendment by infringing on Defendant's fundamental right to personal choice in matters of family life.

For a substantive due process analysis, the court must first determine the nature of the interest involved and then apply the appropriate level of scrutiny. When an ordinance restricts a fundamental right or creates a suspect class, courts must apply strict scrutiny which requires the government to show that the regulation is narrowly tailored to a compelling state interest. *Zavala*, 759 P.2d at 670. If an ordinance does not implicate fundamental rights or a suspect class, but does infringe on important interests, courts apply an intermediate level of scrutiny, requiring the state to show an important government interest and that the ordinance is substantially related to achieving that interest. *Id*. At a minimum, an ordinance that does not implicate a fundamental right, suspect class or important interest must pass the rational basis test, which requires that the ordinance have valid reasons for its enactment and that the terms of the ordinance are rationally related to that goal. *Id.*

A. Ordinance 1248 Implicates Defendant's Fundamental Right To Freedom Of Association

In *Roberts v. United States*, 468 U.S. 609, 617-18 (1984), the U. S. Supreme Court recognized the fundamental right to freedom of association. The right to freedom of association "must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id*. at 618. Among the kinds of personal relationships recognized is the right to cohabitation with relatives. *See Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1997) (plurality decision). These personal relationships receive constitutional protection because they share "not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts*, 468 U.S. at 618.

In a recent decision, one court struck down as unconstitutional a city ordinance prohibiting certain alleged criminals from entering "drug exclusion zones." *Johnson v. City of Cincinnati*, 119 F.Supp.2d 735 (S.D. Ohio 2000). The ordinance in *Johnson* prohibited "persons from all drug exclusion zones who are arrested or taken into custody within any designated drug exclusion zone 'for drug abuse or any drug abuse-related activities,' including nine specified criminal statutes of the Ohio Revised Code." *Id.* at 2. The City Council enacted the ordinance in part because it made express findings that certain areas of the city, including the neighborhood known as Over the Rhine, have "significantly higher incidence of conduct associated with drug abuse activity than other areas of the city." *Id*. The ordinance effectively precluded those

individuals with drug-related offenses from visiting family members who lived within the drug exclusion zone. *Id*. at 5.

The court in *Johnson* applied a strict scrutiny analysis because the ordinance implicated constitutional rights, including the right to freedom of association. The Court "ma[d]e clear that the fact that Plaintiffs are persons who have been arrested for or convicted of an underlying drug-abuse crime does not somehow diminish the fundamental nature of this right." *Id*. at 19. Despite agreeing that the City had a compelling interest in "restoring the quality of life and protecting the health, safety, and welfare of citizen, and preventing the harmful effects of illegal drug use," the court struck down the ordinance because it was not narrowly tailored to achieve that interest. *Id.* Notably, the ordinance made it a "criminal act for [Johnson] to enter Over the Rhine for the purpose of spending time with her family," thereby infringing upon the "highly personalized relationship" that "deserve[s] substantial protection from governmental interference." *Id.* at 12. Concluding that the City could achieve its stated goals in ways that did not interfere with personalized relationships—such as increasing police patrol, organizing neighborhood watches, providing drug counseling services, and stiffening sentences for convicted drug offenders—the court found the ordinance unconstitutional. *Id.* at 16.

Ordinance No. 1248 is likewise unconstitutional because it is not narrowly tailored to achieve the stated governmental interest. Like the ordinance in *Johnson*, Ordinance 1248 makes it a crime for Defendant to maintain "highly personalized relationship[s]" with members of her family. This interference is even greater than the

visiting rights implicated in *Johnson* because Ordinance 1248 prohibits Mrs. Ibarra from living with her children, as opposed to prohibiting visits to family members. The fact that the Ibarra boys are youth adjudicated as sex offenders in no way diminishes their constitutional rights or those of Ms. Ibarra. *See id.* at 19. Additionally, in contrast to the *Johnson* ordinance that applied only to persons convicted of a crime, Ordinance No. 1248 does not even require *any* prior criminal activity on the part of Ms. Ibarra as a predicate for criminal sanction. Because Ordinance No. 1248 implicates her constitutional right to freedom of association, this Court should apply the strict scrutiny test to find the Ordinance unconstitutional.

B. Ordinance 1248 Implicates Defendant's Fundamental Right to Privacy for Protected Relationships

Ordinance No. 1248 forced Ms. Ibarra to chose between (1) living in her home with *all* of the children for whom she was responsible and facing criminal charges or (2) moving two of her foster children out of her home. This goes to the very heart of traditional notions of privacy.

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Supreme Court applied the strict scrutiny test to strike down an ordinance prohibiting a grandmother from living with her grandson and his cousin, stating: "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *See e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925);

Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972). Moreover, Justice Stevens, in his concurring opinion in *Moore*, recognized the fundamental right of property owners to decide who may reside on their property. *See also Zavala*, 759 P.2d at 672.

As Judge Seymour recognized, concurring in the Tenth Circuit's decision in *Wise v. Bravo*, 666 F.2d 1328 (10th Cir. 1981):

> The right to a relationship with one's child is not created either by the constitution or by state statute. I believe it is one of those fundamental, inherent rights of every individual that predates both the federal Constitution and the state laws. Like the right to marry and have children and the right to live where one wants and pursue a livelihood by any lawful means, this right constitutes a "liberty" interest.

While these cases involve biological or adopted family members, they espouse fundamental principles that apply with equal force in the foster family context.[5] Just as the court noted in *Moore*, "unless we close our eyes to the basic reasons why certain

[5] Courts have not directly addressed the exact nature of the interest a foster family has in living with its foster children and what level of scrutiny should be applied in reviewing laws infringing on this particular liberty interest. In *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 842-43 (1974), the rights of foster parents were being asserted against the state's right to remove foster children from their foster homes along with the intervention of biological parents trying to preserve their rights to family reunification. The *Smith* court declined to resolve the issue of whether a foster family has a liberty interest, except to note that "[w]hatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents." *Id*. at 830-40, 847. In cases where the foster family stands in the place of a biological or adopted family, however, it stands to reason that a foster family has the same fundamental liberty interest and that courts should apply the strict scrutiny standard. Indeed, in considering but not deciding if foster parents have a liberty interest in maintaining custody of their foster children, the Supreme Court unequivocally stated: "[W]e cannot dismiss the foster family as a mere collection of unrelated individuals." *Id.* at 845.

rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice [involving more distant relatives] in this case." *See Moore*, 431 U.S. at 501. Moreover, central to the decisions supporting the fundamental liberty interest in family rights is the governmental interest in preserving the institution of the family. *See e.g., Ginsberg v. New York*, 390 U.S. 629 (1968); *Griswold*, 381 U.S. at 496 (Golberg, J., joined by Warren, C.J., and Brennan, J. concurring). *See Myres v. Rask*, 602 F. Supp. 210, 213 (D. Colo. 1985) ("A culture that draws its strength from family values that long predate the constitution must persistently proclaim and protect those values.").[6]

Here, the Ibarra foster children lived with the Ibarras because they had no biological parents to care for them or protect their interests; the Ibarra family was the only family they know. R.2, Tab. 2 at 32:19-20 (the Ibarras are "the only parent figure that they have in their life [sic]"). Thus, for purposes of analyzing this Ordinance, the

[6] The City relies on cases involving the collision of rights between foster families and biological families. Op. Br. at 19-21. Those cases are not germane: the Ibarras are not asserting their right to the foster children as against the children's biological parents. Here, the Ibarras stand in place of the foster children's biological parents, seeking to preserve the integrity of the only family unit that these children have. Moreover, the City overlooks the fact that Ibarra's Due Process argument is premised on her right to associate with her family members. Thus, whether or not her family members are biologically-related is irrelevant to her constitutional interest in forming and preserving "highly personal relationships" free from "unjustified [governmental] interference." *Robert v. United States*, 468 U.S. 609, 617-18 (1984).

foster children and the Ibarras function as a family.[7] Ordinance No. 1248 forced the Ibarras to dismantle their family unit, a goal in direct contravention of the interests traditionally protected by the courts, and the purposes of state and federal policy concerning placement of foster children and rehabilitation of juvenile offenders. *See* citations to *Colorado Children's Code* at Section III, *infra*. While foster family relationships may differ from biological family relationships in that the state may place and remove foster children from the home more freely in efforts to serve the best interests of the child, this does not permit the state or other governmental entities to indiscriminately terminate a foster care placement for reasons wholly unrelated to the child's welfare. *See* C.R.S. 19-1-102(1.5)(a)(II). This is, however, precisely what Ordinance 1248 seeks to do.

In addition to implicating the fundamental right of freedom of association, Ordinance 1248 implicates Defendant's fundamental privacy rights. Either result mandates that the strict scrutiny analysis be applied to find the Ordinance unconstitutional.

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[7] The City quarrels with the district court's finding that the Ibarra foster children will not likely be reunified with their biological families. Op. Br. at 24-25. This is much ado over nothing. To begin with, contrary to the City's argument, the record amply supports the district court's conclusion. *See* R.2, Tab. 2 at 15:7-11 (the oldest foster child would likely be placed in independent living); *id.* at 17:4-7 (the middle child is "not likely to go home now. . . . [but] likely to go into independent living."); *id.* at 19:7-11 (the youngest child "will also be placed in independent living" if ousted by the Ordinance from the Ibarra home). Equally important, even if there were a possibility of reunification—which, as the district court properly noted, was not established in the record—surely the City does not suggest that the Ordinance is valid as applied to foster children with an expectation of reunification with their biological families but is invalid as against foster children with no such expectation of reunification.

C. Ordinance No. 1248 Cannot Satisfy the Strict Scrutiny Standard

Ordinance No. 1248 fails the strict scrutiny analysis. Assuming that the compelling state interest relied upon by Northglenn is the protection of the community from sexual offenders, as the City contends, the Ordinance fails because it is not narrowly tailored to achieve that end. The City's interest is based upon the faulty and unsupported premise that sexual offenders are more likely to perpetrate sex crimes if they live in the same house. Northglenn has offered no support whatever for the bald assertion that the Ordinance serves the public safety. To the contrary, the City itself has admitted that "reasonable minds might differ" on the advisability of concentrating sexual offenders in one home. Given this record, a blanket prohibition against congregate living of juvenile and adolescent sex offenders is not narrowly tailored to achieve the governmental interest in preserving public safety.

The City's interest in promoting public safety from potential sex crimes can be achieved through means that do not impinge upon Defendant's constitutionally-protected freedom of association and privacy of family relationships. As the *Johnson* court observed, the City could increase police patrol, organize neighborhood watches, increase criminal penalties for sex crimes, and implement a host of other endeavors to preserve public safety without interfering with these constitutionally-protected rights. Because Ordinance 1248 is not narrowly tailored to its stated goals, it must be stricken as unconstitutional.

D. Even Under the Rational Basis Test, Ordinance 1248 Fails to Pass Constitutional Muster

In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 11 (1974), the Supreme Court required that, at a minimum, all social and economic legislation be reasonable, not arbitrary, and bear a rational relationship to a permissible state objective. *See also Mosgrove v. Town of Fed. Hts.*, 543 P.2d 715, 718 (Colo. 1975). In further explaining this standard, the Court stated that "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests." *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447 (1985) (citations omitted).

Ordinance No. 1248 fails to meet even this minimal constitutional standard. In *McMinn v. Town of Oyster Bay*, 482 N.Y.S.2d 773, 780 (N.Y. 1984), the court declined to presume that the Town Board investigated and found sufficient facts to support the restrictions it enacted because of the lack of evidence in the record of any such investigation. Here, the City has likewise failed to conduct any investigation, studies or research to support its presupposition that congregate living of sex offenders increases the risk to public safety. Indeed, the language of the Ordinance itself evinces the questionable and speculative nature of the City's reasoning: "[t]he City Council further finds and determines that registered sex offenders have a high incidence of recidivism, and that having such individuals living together *may increase* the instance of recidivism." R.2 at Tab 1 (emphasis added). The City further admitted that "reasonable minds might differ" on whether having multiple sex offenders living in one home increases the risk to the community. Thus, absent *any* evidence that multiple unrelated

sex offenders living together actually increases the risk of recidivism, Ordinance No. 1248 is arbitrary, and should be stricken.

In addition, the arbitrary nature of this Ordinance is evidenced by the irrational prohibition on multiple *unrelated* sex offenders—but not multiple *related* sex offenders—from living in the same home. As the district court correctly held, the City unreasonably and arbitrarily assumed that a relationship by blood or marriage among sex offenders changes the risk to the community at large—an assumption that not only lacks evidentiary support but wholly defies logic.

The City has also failed to make any distinction between adult versus juvenile or adolescent sex offenders in terms of assessing either the risk they pose to their community or their rehabilitation needs. Instead, the City chose the broadbrush approach of lumping together these very different types of offenders with very different recidivism rates—yet another testament to the arbitrary and unreasonable nature of Ordinance 1248. R.2, Tab. 2 at 19:15-22:6.

In addition, there is no reasonable relationship between the goal of reducing the risk from sex offenders in a neighborhood and an ordinance that prohibits multiple unrelated sex offenders from living in the same house. Ironically, the Ordinance permits one registered sex offender to live in each and every house in a neighborhood, thus defeating the very purpose of protecting a neighborhood. The Ordinance is, therefore, arbitrary and bears no reasonable relationship to its stated goals, and should be stricken.

III. ORDINANCE NO. 1248 ATTEMPTS TO REGULATE MATTERS OF STATEWIDE CONCERN AND AS SUCH IS PREEMPTED BY THE COLORADO CHILDREN'S CODE

Although the district court gave great emphasis to the requirements of Colorado law concerning the care and nurturing of all foster children in the state (Order at 4-5, R.1 at 431-432), the lower court incorrectly decided that very real impact of Ordinance No. 1248 on foster children did not exceed the home rule powers of the City of Northglenn on an issue of statewide concern. Without considering its impact on foster children, the district court simply noted that Ordinance No. 1248 is a zoning ordinance "that attempts to regulate the use of property and, as such, is a matter of purely local concern." Order at 11, R.1 at 438. Although zoning ordinances generally do not have an impact on maters of state-wide concern, they generally do not violate the Federal Fair Housing Act nor impact the fundamental rights of free association or right to personal choice in matters of family life either. Ordinance No. 1248 has a far greater impact and pernicious effect than most zoning ordinances and as a result exceeds Northglenn's home rule powers.

Article XX, Section 6 of the Colorado Constitution, of course, provides for home rule. This means that in matters of local concern, both the home-rule city and the state may legislate. *U.S. West Communications, Inc. v. City of Longmont*, 948 P.2d 509, 515 (Colo. 1997) (citing *City and County of Denver v. State*, 788 P.2d 764, 767-72 (Colo. 1990). For matters of purely local concern, where there is a conflict, the home rule provision supersedes any conflicting state provision. *Id*. In matters of statewide concern, however, the state legislature may adopt legislation and preempt the power of

the home rule municipalities to enact any conflicting legislation. *Id*. Finally in matters of mixed state and local concern, the home rule ordinance may coexist with the state statute so long as there is no conflict, and in the event of a conflict, the state statute supersedes the ordinance. *Id*.

Thus, the essential issue for a home-rule analysis is determining the type of interest involved. *Fraternal Order of Police v. City and County of Denver*, 926 P.2d 582, 587 (Colo. 1996). While this Court has determined that this decision must be made on a case-by-case basis, it has identified the following four factors to be considered: (1) the need for statewide uniformity; (2) whether the municipal legislation has an extraterritorial impact; (3) whether the subject matter is traditionally one governed by state of local governmental; and (4) whether the Colorado Constitution specifically identifies that the issue should be regulated by state or local legislation. *Voss v. Lundvall Brothers, Inc.*, 830 P.2d 1061, 1067 (Colo. 1992). The Court has further noted that "[a] critical factor in that consideration is the interest of the state in regulating the matter." *Fraternal Order*, 926 P.2d at 587-88.

In applying these four factors to the present matter, it is clear that the regulation of where foster children may reside is a matter of purely statewide concern. First, the need for uniformity is paramount as the goals of the state's Children's Code apply to *all* children adjudicated neglected and dependent. As explained in the legislative declaration, the state's purpose is to "secure for each child subject to these provisions such care and guidance, preferably in his own home, as will best serve his welfare and the interest of society." C.R.S. § 19-1-102(1)(a). Moreover:

> The General Assembly declares that it is in the best interests of the child who has been removed from his own home to have the following *guarantees*: (I) To be placed in a secure and stable environment; (II) To not be indiscriminately moved from foster home to foster home; and (III) To have assurance of long-term permanency planning.

C.R.S. § 19-1-102(1.5)(a) (emphasis added). Finally, the provisions in the Children's Code are to be liberally construed to serve the welfare of children and the best interests of society. C.R.S. § 19-2-102(2). Thus, the State has clearly asserted its exclusive role in safeguarding the rights of abused and neglected children through the adoption of the Children's Code. It is paramount that the Children's Code be applied in a uniform manner—without regard to the particular municipality in which the State places a foster child. Requiring foster children to change residences because of a local zoning ordinance clearly violates the express purpose in the Children's Code for consistency of placement.[8]

Ordinance No. 1248 also has an extraterritorial effect because it prevents certain children from being placed in an otherwise suitable foster home, thus affecting the entire statewide child placement system. Moreover, the Ordinance would result in differential treatment of foster children depending on the municipality in which the state may place them. Finally, if each local government passed a similar Ordinance, as has happened with respect to the issues addressed by Ordinance No. 1248,[9] the child

[8] Although the State of Colorado has join in the Brief of Northglenn as Amicus, it gives no explanation for doing so and is essentially indistinguishable from Northglenn, being represented by the same counsel.

[9] See Amicus Brief of Colorado Association of Family and Children's Agencies ("CAFCA") at 2.

placement system could be left with an unmanageable or even impossible situation with regard to placement of foster children.

There is no question that the regulation of child welfare is a matter traditionally within the province of the state. The *parens patriae* interests in the welfare of children has never been a matter of local regulation. *See In re Custody of C.C.R.S.*, 872 P.2d 1337 (Colo. App. 1993), *aff'd* 892 P.2d 246 (Colo. 1995), *cert. denied*, 516 U.S. 837 (1995) ("[T]he Children's Code is a comprehensive legislative scheme devised to administer the state's parens patriae responsibility to minor children.").

Ordinance No. 1248, while not explicitly mentioning the subject of foster families, has as its most profound effect in this case the arbitrary destruction of an otherwise stable and secure foster family placement. By *mandating* indiscriminate transfer to another foster home, the Ordinance seeks to usurp the State's authority. Because the Ordinance conflicts with state legislation regarding a matter of purely statewide concern, it is preempted and therefore invalid.

CONCLUSION

For all of the reasons set forth above, Respondent Julianna Ibarra respectively requests that this Court affirm the decision of the Adams County District Court, directing that the Municipal Court of Northglenn grant Ibarra's Motion to Dismiss the citation against her.

Date: January 30, 2002.

Gregory A. Eurich, #2622
Jim Goh, #20822

Kimberley A. Dempster, #
of HOLLAND & HART LLP
IN COOPERATION WITH THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
555 Seventeenth Street, Suite 3200
Post Office Box 8749
Denver, Colorado 80201-8749
(303) 295-8000

Mark Silverstein, #26979
American Civil Liberties Union Foundation of Colorado
400 Corona Street
Denver, CO 80218
(303) 777-5482

ATTORNEYS FOR RESPONDENT AND CROSS-PETITIONER JULIANA IBARRA