



Law Office of the  
**COOK COUNTY PUBLIC DEFENDER**

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Amy P. Campanelli • Public Defender

**To:** Honorable John P. Daley, *Chairman, Finance Committee*  
**From:** Lester Finkle, Chief of Staff for the Law Office of the Cook County Public Defender  
**CC:** Annette C.M. Guzman, *Budget Director*  
Department of Budget & Management Services  
**Date:** July 24, 2020  
**Re:** Request for Information from FY2020 Mid-Year Budget Hearing

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The following information is provided in response to questions posed at our department's hearing held on July 22, 2020 to discuss our FY2020 Mid-Year Budget position.

**I. Request ID#1260-01**

Commissioner Aguilar asked for the number of families that were separated by DCFS due to COVID and if those restrictions were lifted.

**Response:**

As a result of the COVID-19 pandemic, DCFS stopped supervised visits between parents and their children, and also denied supervised visits between siblings. For families who are involved with DCFS, 85% had been receiving weekly supervised visits prior to this change in policy. Our Civil Division currently is representing 2,134 parents from whom approximately 3,900 children were removed. In addition, our Child Protection Conflicts Division currently is representing an additional 1,265 parents (it defends the second parent in a case where a child has been removed). Although we do not have the exact number, calculating 85% of these numbers, based on the number who had been receiving supervised visits, we estimate that 2,900 families have been denied visits during this pandemic.

At the end of June 2020, DCFS changed its policy. It issued a directive that visits would resume starting July 15, 2020. However, the new directive allows only two supervised visits per month (previously, parents received one supervised visit each week), and added a new requirement that a Child and Family Team Meeting had to occur for each family before any visits would be resumed. The Team Meetings have been difficult to schedule, delaying the resumption of visits that have been suspended for the last four months.

Lastly, on Thursday, July 23rd, I emailed to Commissioner Aguilar a copy of the lawsuit that we filed against DCFS. I am attaching what I sent to accompany this memo.

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION**

<b>KRISTEN BUXTON,</b>	)
<b>CHELSEA JOYCE,</b>	)
<b>QUINCITA FLEMING, and</b>	)
<b>KHARIS MCDONALD,</b>	)
	)
<b>Plaintiffs,</b>	)
	)
<b>v.</b>	)
	)
<b>ILLINOIS DEPARTMENT OF</b>	)
<b>CHILDREN AND FAMILY SERVICES,</b>	)
<b>and</b>	)
	)
<b>MARC D. SMITH, in his official capacity</b>	)
<b>as Acting Director of the Illinois</b>	)
<b>Department of Children and Family</b>	)
<b>Services,</b>	)
	)
<b>Defendants.</b>	)

**COMPLAINT**

**COUNT I: DECLARATORY JUDGMENT**

Pursuant to 735 ILCS 5/2-701, Plaintiffs KRISTEN BUXTON, CHELSEA JOYCE, QUINCITA FLEMING and KHARIS MCDONALD complain of defendants ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES and MARC D. SMITH, in his official capacity as Acting Director of the Illinois Department of Children and Family Services, as follows:

**The March 25, 2020 Action Transmittal**

1. On or about March 25, 2020, defendant Marc D. Smith issued Action Transmittal 2020.02 (Updated), which states that “DCFS is suspending all agency supervised visitation that is in-person, between parents and children in foster care and all sibling visitation.” A copy of this

Action Transmittal is attached to this complaint as an Exhibit. The legality of this document is the issue in this case.

### **The Plaintiffs**

2. Plaintiff KRISTEN BUXTON is the mother of one child, T.B.,<sup>1</sup> one year of age.
3. T.B. is a child for whom defendant Illinois Department of Children and Family Services (“the Department”) is legally responsible.
4. The Department is responsible for providing child welfare services to plaintiff KRISTEN BUXTON and T.B.
5. Child welfare services include in-person supervised parent-child visitation.
6. Pursuant to an order of the Circuit Court of Cook County dated February 20, 2020, the Department is required to provide in-person supervised day visits to plaintiff KRISTEN BUXTON and T.B.
7. Until on or about March 19, 2020, the Department had been providing plaintiff KRISTEN BUXTON with in-person supervised visits with T.B.
8. On or about March 19, 2020 plaintiff KRISTEN BUXTON was informed by her caseworker that her visits with T.B. were being suspended based on a new policy by the Department.
9. Because of the March 25, 2020 action transmittal, since on or about March 19, 2020, Defendants have refused to provide any in-person supervised parent-child visits to plaintiff KRISTEN BUXTON and T.B.
10. Plaintiff KRISTEN BUXTON desires to continue receiving in-person supervised parent-child visits with T.B.
11. T.B. is being harmed by the lack of parent-child visits because it is breaking the parent-child psychological bond and is delaying the healing and growth of that bond.

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<sup>1</sup> Because T.B. is a minor, he is referred to only by his initials to protect his anonymity. See Supreme Court Rule 341(f). All minors referred to in this complaint are referred to by their initials.

12. Plaintiff KRISTEN BUXTON is being harmed by the lack of contact with her child because it has caused her acute emotional distress and suffering.

13. Plaintiff CHELSEA JOYCE is the mother of one child, W.C., seven months of age.

14. W.C. is a child for whom defendant Illinois Department of Children and Family Services (“the Department”) is legally responsible.

15. The Department is responsible for providing child welfare services to plaintiff CHELSEA JOYCE and W.C.

16. Child welfare services include in-person supervised parent-child visitation.

17. Pursuant to an order of the Circuit Court of Cook County dated March 13, 2020, the Department is required to provide in-person supervised day visits to plaintiff CHELSEA JOYCE and W.C.

18. Until on or about March 19, 2020, the Department had been providing plaintiff CHELSEA JOYCE with in-person supervised visits with W.C.

19. On or about March 19, 2020 plaintiff CHELSEA JOYCE was informed by text message that her parent-child visits were being suspended.

20. Because of the March 25, 2020 action transmittal, since on or about March 19, 2020, Defendants have refused to provide any in-person supervised parent-child visits to plaintiff CHELSEA JOYCE and W.C.

21. Plaintiff CHELSEA JOYCE desires to continue receiving in-person supervised parent-child visits with W.C.

22. W.C. is being harmed by the lack of parent-child visits because he is only seven months old and should be allowed to bond with his mother.

23. Plaintiff CHELSEA JOYCE is being harmed by the lack of contact with her child because it has caused her acute emotional distress and suffering.

24. Plaintiff QUINCITA FLEMING is the mother of three children, J.T., nine; D.G. Jr., two and D.G., three months of age.

25. J.T., D.G. Jr. and D.G. are children for whom defendant Illinois Department of Children and Family Services (“the Department”) is legally responsible.

26. The Department is responsible for providing child welfare services to plaintiff QUINCITA FLEMING and her children.

27. Child welfare services include in-person supervised parent-child visitation.

28. Pursuant to an order of the Circuit Court of Cook County dated March 28, 2019, the Department is required to provide in-person supervised day visits to plaintiff QUINCITA FLEMING and J.T. and D.G. Jr.

29. Pursuant to an order of the Circuit Court of Cook County dated January 29, 2020, the Department is required to provide in-person supervised day visits to plaintiff QUINCITA FLEMING and D.G.

30. Until on or about March 19, 2020, the Department had been providing plaintiff QUINCITA FLEMING with in-person supervised visits with her children.

31. On or about March 19, 2020 plaintiff QUINCITA FLEMING was informed by her caseworker that her parent-child visits were being suspended based on a new policy by the Department.

32. Because of the March 25, 2020 action transmittal, since on or about March 19, 2020, Defendants have refused to provide any in-person supervised parent-child visits to plaintiff QUINCITA FLEMING and her children.

33. Plaintiff QUINCITA FLEMING desires to continue receiving in-person supervised parent-child visits with her children.

34. Her children are being harmed by the lack of in person parent-child visits because it is breaking down the parent-child bond between her and her children, both emotionally and physically, and because she is not allowed to breastfeed D.G.

35. Plaintiff QUINCITA FLEMING is being harmed by the lack of contact with her children because it has caused her acute emotional distress and suffering.

36. Plaintiff KHARIS MCDONALD is the mother of two children, V.M., eleven and V.V., seven.

37. V.M. and V.V. are children for whom defendant Illinois Department of Children and Family Services (“the Department”) is legally responsible.

38. The Department is responsible for providing child welfare services to plaintiff KHARIS MCDONALD and her children.

39. Child welfare services include in-person supervised parent-child visitation.

40. Pursuant to an order of the Circuit Court of Cook County dated February 6, 2020, the Department is required to provide in-person supervised day visits to plaintiff KHARIS MCDONALD and her children.

41. Until on or about March 25, 2020, the Department had been providing plaintiff KHARIS MCDONALD with in-person supervised visits with her children.

42. On or about March 26, 2020 plaintiff KHARIS MCDONALD was informed by her caseworker’s supervisor that her parent-child visits were being indefinitely suspended.

43. Because of the March 25, 2020 action transmittal, since on or about March 25, 2020, Defendants have refused to provide any in-person supervised parent-child visits to plaintiff KHARIS MCDONALD and her children.

44. Plaintiff KHARIS MCDONALD desires to continue receiving in-person supervised parent-child visits with her children.

45. Her children are being harmed by the lack of in person parent-child visits because they are suffering emotionally and psychologically due to being separated from their mother.

46. Plaintiff KHARIS MCDONALD is being harmed by the lack of contact with her children because it has caused her acute emotional distress and suffering.

#### **The General Harm to Children Caused by the Action Transmittal**

47. In general, the suspension of in-person supervised parent-child visits by Action Transmittal 2020.02 (Updated) has the potential to cause permanent harm to affected children.

48. Even short-term separation from a parent lasting only a week is associated with increased aggression and depression in older children.

49. For children under eight, separation from the parent creates feelings of loss, abandonment, anger and anxiety, dysregulation of affect and functional developmental delay. It is a traumatic experience.

50. Children under eight think in images rather than logically. After separation, a child under the age of three can lose the image of their parent within two weeks. A child under the age of eight can lose the image of their parent within a month.

51. In response to the separation from the parent, the child undergoes a grief response.

52. Sudden separation from the parent also disrupts the deepening development of the parent-child emotional attachment, which is the primary source of the child's sense of safety and security.

53. For children under three, efforts to avoid trauma and maintain the parent-child relationship through audio or video calls will likely fail, because as part of their ongoing development of attachment dynamics, children that age depend on proximity in the form of physical interaction with the parent to maintain their internal image of the parent and their sense of safety and security.

54. For children under three, the presence of a surrogate parent, such as a foster parent or relative caregiver, is not an effective substitute for the child's relationship with their natural parent because the child must begin again the development of the attachment dynamic with the foster parent. Research suggests that they must develop an attachment relationship as if a much younger infant under one year of age. Each relationship for a child under three begins at the beginning; they do not have a permanent internal pattern of relating to rely on when beginning a new relationship.

55. Because of the authority that a child accords their parents, when in-person visitation is restored, a child who has had an abrupt and extended stop to visitation with their parent is likely

to have feelings of anger toward their parent because they may believe that the parent had the authority to stop visiting. The separation, and attendant angry, hurt or frightening feelings further complicates the relationship, especially if the parent is psychologically vulnerable and not able to appropriately respond to the child's feelings.

56. Indefinite suspension of supervised visits can be additionally harmful to the parent-child relationship because parents who in the past have not been able to fully meet the emotional needs of their children use supervised visitation to build these skills.

#### **Allegations Specific to a Declaratory Judgment**

57. An actual controversy exists between Plaintiffs and Defendants because Plaintiffs wish to continue in-person supervised visits with their children and Defendants are refusing to provide them.

58. Action Transmittal 2020.02 (Updated) is arbitrary, capricious and contrary to law.

59. A judgment declaring the respective rights and obligations of Plaintiffs and Defendants under Action Transmittal 2020.02 (Updated) will resolve the controversy between them.

WHEREFORE, Plaintiffs pray that:

- A. The Court declare the respective rights and responsibilities of the parties under Action Transmittal 2020.02 (Updated);
- B. The Court grant Plaintiffs such other and further relief as it determines to be equitable and just.

#### **COUNT II: INJUNCTION**

Plaintiffs KRISTEN BUXTON, CHELSEA JOYCE, QUINCITA FLEMING and KHARIS MCDONALD complain of defendants ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES and MARC D. SMITH, in his official capacity as Acting Director of the Illinois Department of Children and Family Services, as follows:

60-116. Plaintiffs reallege and incorporate Paragraphs 1 through 56 of Count I as Paragraphs 60 through 116 of Count II as if fully set forth herein.

117. The implementation of Action Transmittal 2020.02 (Updated) is causing irreparable injury to Plaintiffs' relationships with their children.

118. Plaintiffs have no adequate remedy at law because all of them have filed emergency motions to restore visitation in their Child Protection Division cases have been delayed by being set on a date when the Courts may reopen for general business.

WHEREFORE, Plaintiffs pray that:

A. The Court permanently enjoin Defendants from implementing Action Transmittal 2020.02 (Updated);

B. The Court grant Plaintiffs such other and further relief as it determines to be equitable and just.

### **COUNT III: SECTION 1983**

Pursuant to 42 U.S.C. § 1983, Plaintiffs KRISTEN BUXTON, CHELSEA JOYCE, QUINCITA FLEMING and KHARIS MCDONALD complain of defendants ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES and MARC D. SMITH, in his official capacity as Acting Director of the Illinois Department of Children and Family Services, as follows:

119-175. Plaintiffs reallege and incorporate paragraphs 1 through 56 of Count I as paragraphs 119 through 175 of Count III as if fully set forth herein.

176. Plaintiffs have a federally protected liberty interest in their relationships with their children under the Fourteenth Amendment to the United States Constitution.

177. Action Transmittal 2020.02 (Updated) was issued without notice to the Plaintiffs.

178. Defendants did not afford Plaintiffs a hearing either before or after suspension of their in-person supervised parent-child visits.

179. Defendants did not seek approval of the Court presiding over Plaintiffs' Child Protection Division cases before suspending in-person supervised parent-child visits.

180. Action Transmittal 2020.02 (Updated) does not suspend the parent-child visits of parents with unsupervised visits.

181. Defendants' action in implementing Action Transmittal 2020.02 (Updated) deprives Plaintiffs of their relationships with their children by suspending all in-person supervised parent-child visits without due process of law and denies them the equal protection of the laws.

182. Defendants' actions in issuing and implementing Action Transmittal 2020.02 (Updated) were taken under color of state law.

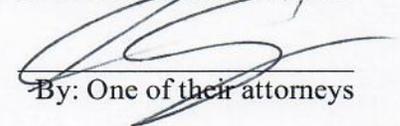
183. Plaintiffs have suffered damages as a result of Defendants' action in implementing Action Transmittal 2020.02 (Updated).

WHEREFORE, Plaintiffs pray that:

A. The Court permanently enjoin Defendants from implementing Action Transmittal 2020.02 (Updated);

B. The Court grant Plaintiffs such other and further relief as it determines to be equitable and just.

KRISTEN BUXTON, et al.

  
By: One of their attorneys

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**ACTION TRANSMITTAL 2020.02 (Updated)**

**Parent – Child and Sibling Visitation**

**PROCEDURES 301 AND 315 SECTIONS PERTAINING TO  
PARENT-CHILD AND SIBLING VISITATION**

**DATE:** March 25, 2020

**TO:** All DCFS and POS Permanency Staff and Supervisors and Adoption Staff and Coordinators

**FROM:** Marc D. Smith, Acting Director

**EFFECTIVE:** Immediately

**I. PURPOSE**

This updated Action Transmittal supersedes ALL other memos on COVID-19 and Parent-Child and Sibling visitation. This updated Action Transmittal will replace Action Transmittal 2020.02 that was issued on March 19, 2020.

The purpose of this Action Transmittal is to notify all DCFS and POS Purchase of Service Permanency Staff and Supervisors and Adoption Staff and Coordinators of actions being taken regarding Parent-Child and Sibling visitation in response to COVID- 19.

**II. PRIMARY USERS**

DCFS and POS Permanency Staff and Supervisors and Adoption Staff and Coordinators.

**III. INSTRUCTIONS**

**Addressing Logistical Problems During the COVID-19 Public Health Crisis**

The citizens of Illinois, and our country, are currently experiencing an unprecedented public health crisis. Following recommendations from the Center for Disease Control and Illinois Department of Public Health, public and private schools are closed, and citizens are advised to stay in their homes and practice social distancing. As the Department and our private agency partners take the necessary steps to comply with these directives, it is crucial that we continue to provide important services to children and families.

**Supervised Visitation**

In light of the extreme circumstances related to COVID-19 and the need to ensure that the health of children is protected through social distancing, DCFS is suspending all agency supervised visitation that is in-person, between parents and children in foster care and all

sibling visitation. **All DCFS and private agency staff as well as caregivers shall identify alternative ways to allow parent/child and sibling contact during this crisis.** Technology such as videoconferencing, telephones, etc. will allow children to continue to have meaningful interaction with their families during this time. Caregivers should use the technology available in their homes for this purpose. (For example, all caregivers are required to have access to a telephone in their home.) Caregivers should work to ensure that the alternative means of contact provides an opportunity for meaningful interaction with parents and siblings given the current public health crisis.

### **Unsupervised Visitation**

**Existing unsupervised visitation may continue.** When in-person unsupervised visitation is continuing, the following pre-screening tool shall be utilized to ensure that it is safe and appropriate to do so. If a parent is unable to participate in an in-person visitation because of sickness or health concerns, **all DCFS and private agency staff shall identify alternative ways to allow parent/child and sibling contact during this crisis.** Technology such as videoconferencing, telephones etc. will allow children to continue to have meaningful interaction with their families during this time. Caregivers should use the technology available in their homes for this purpose. (For example, all caregivers are required to have access to a telephone in their home.) Caregivers should work to ensure that the alternative means of contact provides an opportunity for meaningful interaction with parents and siblings given the current public health crisis.

### **Pre-screening tool (must ask all 3 questions):**

1. Within the last 14 days have you traveled to an area with widespread coronavirus according to the CDC?
2. Within the last 14 days have you had close contact with a person with test-proven COVID-19?
3. Do you have fever, cough or trouble breathing?

### **If the answer is YES to any of these 3 questions:**

- The unsupervised visits will be suspended until the youth/caregiver/family members are well and/or the 14-day quarantine has expired.
- The youth/caregiver/family members will be notified of the COVID-19 risk assessment results.
- The following isolation measures will be implemented.

### **Isolation measures include, but are not limited to:**

- Persons who are ill but without travel or known COVID-19 exposure should stay home until symptom-free for 7 days after onset of symptoms and at least 72 hours without fever above 100.4°F (38°C). In group facilities, they should separate from other residents and have limited contact with staff.

- Persons with travel or contact exposure but without symptoms should follow the 14-day quarantine guideline; and
- Persons with symptoms and travel or contact exposure should contact their medical provider for guidance regarding medical evaluation and possible testing.

**INSTRUCTIONS TO PERMANENCY WORKERS AND SUPERVISORS (AND, WHEN REQUIRED, INTACT WORKERS) DURING THIS PUBLIC HEALTH CRISIS**

**Effective immediately, Permanency Workers shall encourage all foster parents and relative caregivers to facilitate parent-child visitation via video and phone.**

**Within one week of the date of this Action Transmittal:**

- DCFS and POS Permanency Workers must ask, and strongly encourage, caregivers to permit use of available technology in their homes for youth in care to stay in contact with their parents and/or siblings until this public health crisis is over. Permanency Workers should make every attempt to arrange this for a parent or caregiver who has limited access to video and phone capabilities. Possible methods of contact include phone calls, videoconferencing and phone apps which allow for video contact. For caregivers concerned with confidentiality, workers will review how to use \*67 to block caller ID when making phone calls.

Contact with parents and siblings can provide at least one predictable element in a stressful situation, as well as reassure children that their parents and/or siblings are safe. Permanency Workers and caregivers must consider how they can ensure that youth in care continue to have regular and frequent contact with their parents and siblings; and are able to communicate with each other at any holidays or milestones (birthdays, graduations, etc.) during this time.

**Note:** Holidays should include any recognized national or State holidays as well as holidays recognized by the religion or culture of the family of origin.

- Permanency Workers shall establish a visitation and contact plan for each child on their assigned caseloads who are allowed parent-child and/or sibling visits. The visitation and contact plan shall be in effect for the duration of the public health. A copy of this Action Transmittal shall be attached to the visitation and contact plan.
- The visitation and contact plan shall address how parent-child and sibling visits and contacts shall occur using the technology available to the child's caregiver. The Plan shall specify the frequency of visitation and contact that is being authorized, and:
  - identify the dates, times of day, and duration (recommended minimum: 30 minutes, but may extend to 1 or 2 hours) of each scheduled parent-child and/or sibling visit. As noted in Procedures 301 and 315, any time contact

and visitation can be increased, the Permanency Worker should ensure it is done.

- identify, by name, who is expected to participate at parent-child and/or sibling visits;
- state whether the visit will be supervised, and if so, by whom; and
- identify the modes of communication or contact that will be used for the visit.

#### **IV. QUESTIONS**

Permanency staff should direct any questions regarding this Action Transmittal through their chain of command and Private Agency staff should direct questions regarding this Action Transmittal through their APT Monitor. All other staff can direct their questions by e-mail through Outlook at DCFS.Policy. Non-Outlook users may send questions to [DCFS.Policy@illinois.gov](mailto:DCFS.Policy@illinois.gov).

#### **V. FILING INSTRUCTIONS**

Staff should **remove** Action Transmittal 2020.02 that was issued on March 19, 2020 in the following sections of Procedures 301 and 315; and replace it with this updated Action Transmittal:

- 301.55 h), Visitation (temporary placement in Emergency Shelter Care)
- 301.255, Sibling Visitation With and Among Adult Siblings
- Appendix A, Family Visit Planning – Critical Decisions and Documentation Protocol
- Appendix B, Family Visit Planning Guide to Practice
- Appendix C, Sibling Placement and Visitation; Special Considerations
- 315.65, Prepare and File Initial Visitation and Contact Plan
- 315.150, The Visitation and Contact Plan

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION**

<b>KRISTEN BUXTON, et al.,</b>	)
	)
<b>Plaintiffs,</b>	)
	)
<b>v.</b>	)
	)
<b>ILLINOIS DEPARTMENT OF</b>	)
<b>CHILDREN AND FAMILY</b>	)
<b>SERVICES, and</b>	)
	)
<b>MARC D. SMITH, in his official</b>	)
<b>capacity as Acting Director of the Illinois</b>	)
<b>Department of Children and Family</b>	)
<b>Services,</b>	)
	)
<b>Defendants.</b>	)

**MEMORANDUM IN SUPPORT OF  
MOTION FOR TEMPORARY RESTRAINING ORDER**

Plaintiffs submit this memorandum in support of their motion for temporary restraining order:

**I. INTRODUCTION**

Plaintiffs have filed a complaint alleging constitutional rights violations and seeking declaratory and injunctive relief. Plaintiffs allege that Defendants' March 25, 2020 action transmittal which unilaterally, without exception and without seeking the approval of any court, indefinitely suspended all in-person supervised parent-child and sibling visits is unlawful. Simultaneously with filing their complaint, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction supported by affidavits asking the Court to enjoin implementation of the action transmittal.

## II. STATEMENT OF FACTS

Plaintiff Kristen Buxton is the mother of T.B.,<sup>1</sup> two years of age. *See* Affidavit of Kristen Buxton. He is under the care of Defendant Illinois Department of Children and Family Services (“the Department”). The existing court order and visitation plan in his case provide for in-person supervised visits. The Department provided these visits until on or about March 19, 2020. On or about March 19, 2020 she was informed that her visits were being indefinitely suspended due to a new Department policy. She has not had any visits with T.B. since March 19, 2020. She believes the lack of in-person visits is harming T.B. because he is too young to have any meaningful visits by video or phone. She is not able to hold him while she reads to him, hug him or kiss him, as she is able to during in-person visits. She believes that the lack of in-person visits is breaking the emotional bond between her and T.B. and delaying any healing and growth. T.B. does not have the ability to understand the reason for the lack of in-person visits, harming him further.

Plaintiff Chelsea Joyce is the mother of W.C., seven months of age. *See* Affidavit of Chelsea Joyce. He is under the care of the Department. The existing court order and visitation plan in his case provide for in-person supervised visits. The Department provided these visits until on or about March 19, 2020. On or about March 19, 2020 she received a text message saying that her visits were being suspended until April 1, 2020. On April 1, 2020 she received another text message saying that her visits were being suspended until April 30. She believes the lack of in-person visits is harming W.C. because he is only seven months old and should be allowed to bond with his mother.

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<sup>1</sup> Because he is a minor, he is referred to by his initials only to protect his anonymity. *See* Supreme Court Rule 341(f). All minors referred to in this memorandum are referred to by their initials.

Plaintiff Quincita Fleming is the mother of J.T., 9 years old; D.G. Jr., 2 years old and D.G., 3 months old. *See* Affidavit of Quincita Fleming. They are all under the care of the Department. The existing visiting order and visitation plan provide for in-person supervised visits. On March 19, 2020, she was informed by her caseworker that her visits were being suspended due to a new Department policy. She has not had any in-person visits with her children since then. Her children are being harmed by the lack of in-person visits because the parent-child bond between her and them is being broken down and she is not allowed to breastfeed D.G.

Plaintiff Kharis McDonald is the mother of two children, V.M., who is eleven years old, and V.V., who is seven years old. *See* Affidavit of Kharis McDonald. The Department is responsible for her children. Her existing visiting order and plan provide for in-person supervised visits. On March 26, 2020 she was informed by her caseworker's supervisor that her visits were being indefinitely suspended. She has not had any visits since then. Her children are suffering emotionally and psychologically due to being separated from their mother.

### **III. ARGUMENT**

#### **A. Standard for a Temporary Restraining Order**

The elements an applicant must establish to warrant the extraordinary remedy of a temporary restraining order are well-established. As variously stated, the movant must demonstrate (i) an ascertainable right in need of protection, (ii) a likelihood of success on the merits, (iii) irreparable harm in the absence of injunctive relief, and (iv) the lack of an adequate remedy at law. *Bridgeview Bank Group v. Meyer*, 2016 IL App (1st) 160042 ¶ 12 (citations omitted).

#### **B. Ascertainable Right in Need of Protection**

Under substantive due process, the right to familial relations is a fundamental liberty interest protected by the Illinois and United States Constitutions. *In re B.A.*, 283 Ill. App. 3d 930, 935 (3d

Dist. 1996) (citation omitted). A parent's interest in maintaining a parental relationship with her child is clearly a fundamental liberty interest. *In re K.L.P. v. R.P.*, 198 Ill. 2d 448, 466 (2002). The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (parent-child relationship cannot be terminated except by clear and convincing evidence).

Parents also have a statutorily created right to visitation with their children under Article I of the Juvenile Court Act. The definition of “Residual parental rights and responsibilities” states:

“Residual parental rights and responsibilities” means those rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including, but not necessarily limited to, *the right to reasonable visitation* (which may be limited by the court in the best interests of the minor as provided in subsection (8)(b)<sup>[2]</sup> of this Section), the right to consent to adoption, the right to determine the minor’s religious affiliation, and the responsibility for his support.

705 ILCS 405/1-3(13) (emphasis added). Thus, Plaintiffs have demonstrated that they have ascertainable rights in need of protection in this action.

### **C. Likelihood of Success on the Merits**

A party seeking a “preliminary injunction or temporary restraining order is not required to make out a case which would entitle him to relief on the merits; rather, he need only show that he raises a ‘fair question’ about the existence of his right.” *Buzz Barton & Assocs., Inc. v. Giannone*, 108 Ill. 2d 373, 382 (1985).

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<sup>2</sup> Subsection 8, referred to in this provision outlines the meaning of “guardianship of the person”, and 8(b) specifically defines that it includes “the *authority and duty of reasonable visitation*, except to the extent that these have been limited in the best interests of the minor *by court order*.” The action transmittal is not a court order, and there is no court order eliminating the duty to provide Plaintiffs and their respective children visitation with each other.

**1. The Department's Unilateral Action, with no Opportunity for a Hearing to Consider Individual Circumstances, Violates Procedural Due Process**

The essence of procedural due process is meaningful notice and a meaningful opportunity to be heard. *Tolliver v. Hous. Auth. of Cook*, 2017 IL App (1st) 153615 ¶ 22 (citation omitted). To deprive Plaintiffs of their fundamental right to a relationship with their children by suspending visits, Defendants must afford them procedural due process. However, by its own terms, the action transmittal affords no opportunity whatsoever to Plaintiffs to plead their individual cases in a hearing, before or after visits are suspended. Similarly, the Department did not seek the approval of any court before taking action. At least before a court, Plaintiffs would have had the opportunity to make arguments against implementing the policy. Plaintiffs are completely denied any hearing, violating principles of procedural due process. Plaintiffs have raised a fair question of success on the merits based on this argument.

**2. The Department's Action Violates Substantive Due Process Because it is not Narrowly Tailored to Achieve its Purpose**

Government action that infringes upon fundamental rights is subject to strict scrutiny. *Lulay v. Lulay*, 193 Ill. 2d 455, 476 (2000) (citation omitted). To survive strict scrutiny, the action must be narrowly tailored to serve a compelling government interest. *In re H.G.*, 197 Ill. 2d 317, 330 (2001). To be narrowly tailored, the government action must use the least restrictive means consistent with the attainment of its goal. *Id.*

At first glance, one might think that the compelling government interest is the health and safety of children in the Department's care. However, this is belied by the fact that Action Transmittal 2020.02 (Updated ) does not suspend *unsupervised* parent-child visits. If isolating children in its care from all potential sources of infection were the reason for its implementation, then unsupervised visits would have been suspended also.

Instead, with respect to unsupervised visits, the action transmittal implements a pre-screening tool and isolation measures depending on the results of the tool. This shows why the blanket suspension of all in-person supervised parent-child visits is not narrowly tailored. There is no reasoning in the action transmittal why the pre-screening tool is not also appropriate for in-person supervised parent-child visits. The pre-screening tool, coupled with the use of masks and social-distancing for the supervisor of the visits, is an appropriate solution for maintaining the safety of all involved in in-person supervised parent-child visits.

As further evidence that the complete suspension of all supervised visits is not narrowly tailored consistent with attainment of the goal, it is of note that Governor Pritzker's stay home orders do not prevent such visitation, but in fact suggest they must continue as essential. The orders deem child welfare and child protection personnel "categorically exempt," from the orders, and require that essential government functions continue. COVID-19 Executive Order No. 8, Sect. 1(10); COVID-19 Executive Order No. 30, Sect. 2(10). The orders further deem that caring for family members, including those in another household, is essential activity not prohibited. COVID-19 Executive Order No. 8, Sect. 1(5)(e); COVID-19 Executive Order No. 30, Sect. 2(5)(v). And essential travel is defined to include "[t]ravel to care for ... minors" and "[t]ravel required by law enforcement or court order, including to transport children pursuant to a custody agreement." COVID-19 Executive Order No. 8, Sect. 1(14); COVID-19 Executive Order No. 30, Sect. 2(14). A myriad of other activities deemed essential that do *not* involve fundamental rights – including fast food services, cannabis dispensaries, and laundry services, to name just a few – have all continued under the COVID-19 executive orders. Particularly given the fundamental right at stake, suspending all supervised visitation is not narrowly tailored consistent with public health goals surrounding COVID-19. Plaintiffs have raised a fair question

of success on the merits with this argument.

### **3. The Action Transmittal Deprives Parents with Supervised Visits of the Equal Protection of the Laws**

Government classifications that affect a fundamental right violate the equal protection clause unless they are narrowly tailored to serve a compelling state interest. *In re L.T.M.*, 214 Ill. 2d 60, 75 (2005). In this case, the relevant classifications are parents with supervised visits with their children as compared to those with unsupervised visits with their children. Parents with supervised visits have had their visits indefinitely suspended without exception. Parents with unsupervised visits must pass a pre-screening tool to identify possible risk. As discussed *infra* the action transmittal offers no justification or compelling reason for this disparate treatment. Blanket suspension of all in-person supervised parent-child visits is the antithesis of being narrowly tailored. There is no reason why the pre-screening tool used for unsupervised visits coupled with additional social distancing and protective measures could not work for in-person supervised parent-child visits. The action transmittal is not narrowly tailored and violates the principles of equal protection.

### **4. The Department's Blanket Action Violates Guidance from the Federal Government**

The Department's blanket suspension of all in-person supervised parent-child and sibling visitation is contrary to guidance issued by the Children's Bureau of the Department of Health and Human Services. The guidance, in the form of a letter from the Associate Commissioner of the Children's Bureau to "Child Welfare Legal and Judicial Leaders," states:

CB is also aware of instances where judges have issued blanket orders suspending or drastically reducing family time (visitation) between children in foster care and parents, sometimes indefinitely. Family time is important for child and parent well-being, as well as for efforts toward reunification. Family time is especially important during times of crisis. CB strongly discourages the issuance of blanket orders that are not *specific to each child and family* that suspend family time; doing so is contrary to the well-being and best

interest of children, may contribute to additional child trauma, and may impede the likelihood of reunification. Department of Health and Human Services, Children's Bureau, letter dated March 27, 2020 (emphasis added).

The Department's action transmittal unilaterally suspending all in-person supervised parent-child and sibling visitation for every child in its care violates the Children's Bureau's guidance that any decision regarding visitation in this time of crisis be "specific to each child and family." Plaintiffs have raised a fair question that they will succeed on the merits of their claim based on this argument.

**5. The Department's Action Violates the Federal Requirement that it Make Reasonable Efforts to Reunify Families under the Social Security Act**

The Department's action transmittal violates the federal requirement that it make reasonable efforts to reunify families. As a condition of receiving federal financial assistance for foster care payments under Title IV-E of the Social Security Act, the Department must adopt a plan that it will, *inter alia*, make "reasonable efforts...to preserve and reunify families— (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to safely return to the child's home." 42 U.S.C § 671(a)(15)(B). Unilaterally cutting off all in-person supervised parent-child visitation is inconsistent with this requirement, since it is through visitation that parents and their children maintain their relationship. Maintenance of the parent-child relationship is critical to successful reunification. Plaintiffs have raised a fair question of success based on this argument.

**6. The Department's Action Violates its Obligation to Make Reasonable Efforts to Reunify Families under the Children and Family Services Act**

The Department is also under an obligation to reunify families under Illinois law. The Children and Family Services Act, which creates the Department, provides, "The Department must make reasonable efforts to reunify the family when temporary placement of the child

occurs unless otherwise required, pursuant to the Juvenile Court Act of 1987.” 20 ILCS 505/5(1-1). In none of Plaintiffs’ Child Protection Division cases has the Department been relieved of this obligation. Suspending in-person visits is inconsistent with the Department’s obligation to make reasonable efforts to reunify families. Plaintiffs have raised a fair question of success on the merits based on this violation.

**7. The Department’s Action Violates its Duty to Provide Visitation under the Juvenile Court Act**

The Juvenile Court Act explicitly establishes the right of parents to visitation with their children and the duty of the Department, as guardian or custodian of the child, to provide visitation. Parents have a statutorily created right to visitation with their children under Article I of the Juvenile Court Act. The definition of “Residual parental rights and responsibilities” states:

(13) “Residual parental rights and responsibilities” means those rights and responsibilities remaining with the parent after the transfer of legal custody or guardianship of the person, including, but not necessarily limited to, *the right to reasonable visitation* (which may be limited by the court in the best interests of the minor as provided in subsection (8)(b) of this Section), the right to consent to adoption, the right to determine the minor’s religious affiliation, and the responsibility for his support.

705 ILCS 405/1-3(13) (emphasis added). Corresponding to this right, in its definition of “Guardianship of the person” the Juvenile Court Act imposes a duty on the guardian or custodian of the child to respect the parent’s right to visitation and to provide visitation:

(8) “Guardianship of the person” of a minor means the duty and authority to act in the best interests of the minor, *subject to residual parental rights* and responsibilities, to make important decisions in matters having a permanent effect on the life and development of the minor and to be concerned with his or her general welfare. It includes but is not necessarily limited to:

\* \* \*

(b) the authority and *duty of reasonable visitation*, except to the extent that these have been limited in the best interests of the minor *by court order*;

\* \* \*

705 ILCS 405/1-3(8) (emphasis added). The Department's action suspending all in-person supervised parent-child visits violates this duty because it is not reasonable under the circumstances and has not been sanctioned by a court. Plaintiffs have raised a fair question of success on this issue.

**8. The Action Transmittal Violates the Department's Obligation to Provide Visitation under its own Rules**

The Department's rules on visitation require the establishment of a family visitation plan. However, the Department's action transmittal unilaterally suspends all in-person supervised parent-child visitation. The Department's existing rule on parent-child visitation is found at 89

Ill. Adm. Code 301.210:

a) The Department recognizes that there is a strong correlation between regular parental visits and contacts with a child and the child's discharge from placement services. Therefore, when a child is in placement and the permanency goal is return home, parent-child visits, telephone calls at reasonable hours, and mail are encouraged unless they have been prohibited by court order. The name, address and telephone number of the foster parent/relative caregiver shall not be disclosed to the parents until the assessment has been completed and a determination has been made whether to disclose the information in accordance with Section 301.440(a). The responsible agency shall arrange for parent-child visits and shall advise parents that repeated failure to visit according to the visiting plan shall be considered a demonstration of a lack of parental concern for the child and may result in the Department seeking a termination of parental rights.

b) When the permanency goal is return home, a visiting plan shall:

- 1) be established before placement or within three working days after placement out-of-home unless the placement was an emergency;
- 2) be established within ten working days after an emergency placement;
- 3) specify that visits are to begin immediately;
- 4) specify that parents shall be expected to visit weekly unless there is documentation to the contrary in the case/record;
- 5) increase in length unless specific harm to the child is caused by the visits;

6) specify visiting in the home of the child's parents, if consistent with the safety and well-being of the child. When visits in the home of the child's parents are not consistent with the child's safety and well-being, visits shall be in the most homelike setting possible. Office visits are acceptable if structure is necessary to evaluate or protect the child;

7) specify how contacts are to be maintained if the determination has been made not to release identifying information regarding the foster parent/relative caregiver in accordance with Section 301.440(a); and

8) specify the responsibilities of the Department, the purchase of service providers, the parents, and the child in regard to visitation.

This rule requires the establishment of a family visitation plan with weekly visits. 89 Ill. Adm. Code 301.210(b). The Department's March 25, 2020 action transmittal contravenes this rule by unilaterally suspending all in-person supervised parent child visits, *i.e.*, suspending all family visitation plans calling for in-person supervised parent-child visits.

An administrative agency must follow its own rules. When an administrative agency has adopted rules and regulations under its statutory authority for carrying out its duties, the agency is bound by those rules and regulations and cannot arbitrarily disregard them. *Tolliver*, 2017 IL App (1st) 153615 ¶ 33 (citation omitted). The Department has violated its own rule. Plaintiffs have raised a fair question of success on this issue.

**9. The Action Transmittal is Invalid because it was not Adopted According to the Required Rulemaking Provisions of the Administrative Procedure Act and Violates the Department's Enabling Act**

**a. The Action Transmittal Contravenes an Existing Rule**

As argued *infra*, the Department's rules on visitation require the establishment of a family visitation plan. In contravention of this requirement, the Department's action transmittal unilaterally suspends all in-person supervised parent-child visitation. But the Department did not follow the rulemaking procedures of the Administrative Procedure Act in amending its existing rule. Therefore, the action transmittal cannot be implemented. In order to suspend, amend or

contravene an existing rule, the Department must follow the rulemaking provisions of the Administrative Procedure Act, because its enabling statute explicitly adopts its provisions. 20 ILCS 505/4. But the Department did not follow any of the rulemaking provisions of the Administrative Procedure Act in issuing the March 25, 2020 action transmittal.

The Administrative Procedure Act provides that “No agency rule is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection and filed with the Secretary of State as required by this Act.” 5 ILCS 100/5–10(c); *Illinois Dep't of Revenue v. Illinois Civil Serv. Comm'n*, 357 Ill. App. 3d 352, 370 (1st Dist. 2005). Because it did not follow the rulemaking provisions of the Administrative Procedure Act, the Department’s action transmittal is not valid or effective against any person.

**b. Standing Alone, the Action Transmittal Falls Within the Definition of “Rule” and must be Adopted in Accordance with the Administrative Procedure Act**

Even if the action transmittal did not contravene an existing rule, it falls within the definition of “rule” in the Administrative Procedure Act and must be adopted in accordance with it. The definition of “rule” is:

“Rule” means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (ii) informal advisory rulings issued under Section 5-150 [5 ILCS 100/5-150], (iii) intra-agency memoranda, (iv) the prescription of standardized forms, (v) documents prepared or filed or actions taken by the Legislative Reference Bureau under Section 5.04 of the Legislative Reference Bureau Act [25 ILCS 135/5.04], or (vi) guidance documents prepared by the Illinois Environmental Protection Agency under Section 39.5 or subsection (s) of Section 39 of the Environmental Protection Act [415 ILCS 5/39].” 5 ILCS 100/1-70.

The action transmittal is a statement of general applicability that implements a policy that affects parents’ private right to a relationship with their child. Therefore, it falls within the definition of “rule” and must be promulgated in accordance with the Administrative Procedure

Act. A rule which affects private rights and procedures available to persons outside an administrative agency is specifically included within the definition of a rule in the Administrative Procedure Act. *Sleeth v. Department of Public Aid*, 125 Ill. App. 3d 847, 853 (3d Dist. 1984); *see also Senn Park Nursing Center v. Miller*, 118 Ill. App. 3d 504, 513 (1st Dist. 1983) (explaining that “[a] rule which has a substantial effect on persons outside an agency cannot be characterized as a matter relating solely to agency management; therefore, notice and comment procedures from this Act apply”).

Any rule adopted without following the rulemaking provisions of the Administrative Procedure Act is without effect and cannot be implemented. 5 ILCS 100/5–10(c). Therefore, the action transmittal is void.

**c. As a Rule, the Action Transmittal Contravenes the Department’s Enabling Statute**

Since the action transmittal is properly considered as a rule, it must be consistent with the powers granted to the Department by its enabling statute, the Children and Family Services Act. 20 ILCS 505/1 *et seq.* An administrative agency's authority to adopt rules and regulations is defined and limited by the enabling statute. *Illinois Dept. of Revenue v. Illinois Civil Service Comm’n*, 357 Ill. App. 3d 352, 363 (1st Dist. 2005).

However, as discussed *infra*, the action transmittal violates the Department’s obligation in the Children and Family Services Act to make reasonable efforts to reunify families. 20 ILCS 505/5(1-1). Agency rules cannot alter or extend the scope of the enabling statute. *Illinois Dept. of Revenue*, 357 Ill. App. 3d at 364. Rules that conflict with the enabling statute are void *ab initio*. *Id.* at 367. The action transmittal is void for this reason.

**D. Irreparable Injury**

Irreparable harm means that “monetary damages cannot adequately compensate the injury

and the injury cannot be measured by pecuniary standards.” *Happy R Sec., LLC v. Agri-Sources, LLC*, 2013 IL App (3d) 120509, ¶ 36 (citation omitted). Transgressions of a continuing nature are also sufficient. *Cent. Water Works Supply, Inc. v. Fisher*, 240 Ill. App. 3d 952, 959 (4th Dist. 1993). Generally, a continuing violation of a constitutionally protected right is irreparable harm as a matter of law. *Walters v. Thompson*, 615 F.Supp. 330, 341 (N.D. Ill. 1985) (internal citation omitted); *see also De Leon v. Perry*, 975 F.Supp. 2d 632, 663 (W. Dist. TX 2014). In this case, therefore, because their constitutionally protected right to a relationship with their children is being violated, Plaintiffs have established irreparable injury as a matter of law.

However, even if that were not the case, the harm caused to Plaintiffs’ children’s psychological development and the parent-child relationship by the suspension of in-person visits is irreparable injury. Suspension of visits has the potential to cause permanent harm to affected children. *See* Affidavit of Molly Romer Witten, ¶ 12(a). And even short-term separation from a parent lasting only a week is associated with increased aggression and depression in older children. *Id.* at ¶ 12(j).

For children under three, separation from the parent creates feelings of loss, abandonment, anger and anxiety, dysregulation of affect and functional developmental delay. *Id.* at ¶ 12(b). A child under the age of three can lose the image of their parent within two weeks. *Id.* at ¶ 12(d). In response to the loss of their parent the child undergoes a grief response. *Id.* at ¶ 12(e). Separation from the parent also disrupts the development of the parent-child emotional attachment, which is the primary source of the child’s sense of safety and security. *Id.* at ¶ 12(f), (g).

The measures in the action transmittal to maintain contact through video and other calls will not prevent these harms. Children under three depend on the physical proximity of the parent to

maintain their image of the parent and their sense of safety and security. *Id.* at ¶ 12(h). “Mothers who have left the home environment, even if available by phone, are perceived as unavailable. Maternal availability is particularly important within the first two years of life because of the infant’s limited understanding of the reasons for maternal absence and the timing of her return.” Howard K, Martin A, Berlin LJ, Brooks-Gunn J. Early mother-child separation, parenting, and child well-being in Early Head Start families. *Attach Hum Dev.* 2011;13(1):5–26. P2 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3115616/>. Parent-child separation in children of this age group is associated with child aggression and child negativity. *Id.* at 10. The data is clear that “physical proximity to primary caregivers is key to the formation of child-parent attachments” and that both short term and long-term parent-child separation can be associated with negative consequences to the children. *Id.* Involuntary separations likely negatively impact the minors to a higher degree than voluntary separation, where the parent has had the chance to mitigate the separation. *Id.* at 12.

The presence of a foster parent is not an effective substitute for the presence of the parent. For children under three, the child must begin again the development of the attachment dynamic with the foster parent. *Witten Aff.* at ¶ 12(i). The foster parent cannot simply step in to provide the sense of safety and security offered by the child’s relationship with their parent.

Although it is especially acute for children under three, children up to the age of eight depend on maintaining an image of the parent as their source of safety and security. *Id.* at ¶ 12(k). They undergo the same emotional reactions to the loss of the image of the parent as children under three. *Id.* at ¶ 12(m). This can occur within a month. *Id.* at ¶ 12(l).

After suspension of visits, resumption of them can create additional problems. The child may experience anger toward the parent because they believe the parent had the authority to stop

visiting. *Id.* at ¶ 12(n). If the parent is psychologically vulnerable and not able to appropriately respond to these feelings, this further complicates the parent-child relationship. *Id.* Similarly, parents who have not been able to meet the emotional needs of their children use supervised visits to build those skills and cannot do so if visits are suspended. *Id.* at ¶ 12(o).

The harm caused to children, especially infants, by depriving them of physical contact with their parent is irreparable. And additionally, interference with the constitutionally protected parent-child relationship is irreparable injury for purposes of injunctive relief. *Doe v. Mattingly*, 2006 U.S. Dist. LEXIS 88320 \*6; 2006 WL 3498564.

#### **E. No Adequate Remedy at Law**

An adequate remedy is one that is clear, complete, and as practical and efficient as the potential equitable remedy. *Granberg v. Didrickson*, 279 Ill. App. 3d 886, 890 (1st Dist. 1996); *see also Clinton Landfill, Inc. v. Mahomet Valley Water Auth.*, 406 Ill. App. 3d 374, 380 (4th Dist. 2010) (explaining that irreparable harm and adequacy of a remedy at law are separate factors).

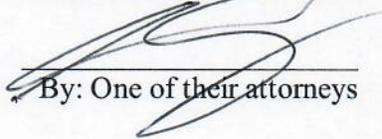
Here, Plaintiffs have no adequate remedy in their pending cases in the Child Protection Division because the Presiding Judge has issued a gatekeeping order limiting access to the courts to emergencies and has not allowed Plaintiffs to proceed on an emergency basis on their motions to enforce existing visitation orders. Copies of affidavits of the respective attorneys are attached to the motion for a temporary restraining order. These Plaintiffs and minor children affected by Action Transmittal 2020.02 (Updated) are being harmed on a continuous and irreparable basis. The inability to be heard in any timely or reasonable fashion in the Child Protection Division renders them without a remedy at law, let alone a practical, efficient, or complete remedy.

#### IV. CONCLUSION

For the reasons set forth in this memorandum, Plaintiffs request that the Court grant their motion for a temporary restraining order and for such other relief it determines to be equitable and just.

Respectfully submitted,

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By: One of their attorneys

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