

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

KRISTY DUMONT; DANA DUMONT;
ERIN BUSK-SUTTON; REBECCA
BUSK-SUTTON; and JENNIFER
LUDOLPH,

Plaintiffs,

v.

NICK LYON, in his official capacity as
the Director of the Michigan Department
of Health and Human Services; and
HERMAN MCCALL, in his official
capacity as the Executive Director of the
Michigan Children's Services Agency,

Defendants,

and

ST. VINCENT CATHOLIC CHARITIES;
MELISSA BUCK; CHAD BUCK; and
SHAMBER FLORE,

Intervenor Defendants.

No. 2:17-cv-13080-PDB-EAS

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO
INTERVENOR DEFENDANTS'
MOTION TO DISMISS**

Plaintiffs hereby submit this Response in Opposition to Intervenor Defendants' Motion to Dismiss (the "Motion"), ECF No. 19. For the reasons stated below, and as explained more fully in the attached Brief, the Motion should be denied.

1. Plaintiffs incorporate by reference their Response to the State's Motion to Dismiss, ECF No. 28.
2. Plaintiffs have pled facts establishing standing because the Complaint alleges that when Plaintiffs Kristy and Dana Dumont and Erin and Rebecca Busk-Sutton contacted state-contracted, taxpayer-funded child placing agencies to pursue public adoptions, they were turned away solely because of those agencies' religious objections to same-sex couples. As explained in response to the State's Motion to Dismiss, the resulting stigma and practical barrier to adopting a child out of the state-run foster care system constitute cognizable injuries, which were caused by the State of Michigan and are redressable by this Court. Furthermore, all Plaintiffs have state taxpayer standing to raise an Establishment Clause challenge to the State's funding of agencies that carry out a public function using religious criteria.
3. Plaintiffs have pled facts showing that the State authorizes the use of religious eligibility criteria in the public child welfare system, which constitutes an endorsement and promotion of religion in violation of the Establishment Clause. Plaintiffs' Establishment Clause claims are not governed by the historical test of *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2013), which is a narrow exception to the usual

Establishment Clause inquiry applicable only to the context of legislative prayer. Further, even if *Town of Greece* were applicable, there is no historical precedent for the State's practice of contracting with private religious agencies to perform the public function of finding families for wards of the state and then allowing such agencies to turn away prospective families for children in their care based on those families' failure to adhere to the agencies' religious criteria. In addition, the State's practice is not a required or even permissible accommodation of religion because it does not simply exempt private parties from generally applicable law; rather, it authorizes the use of religious eligibility criteria in the provision of a government service.

4. The State's practice of permitting state-contracted child placing agencies to categorically exclude prospective foster and adoptive families headed by same-sex couples, regardless of their ability to care for a child, violates the Equal Protection Clause because it furthers no conceivable legitimate government interest and undermines the core purpose of Michigan's child welfare system—to find loving, stable families for all children who need them.
5. Intervenor Defendants' arguments that the First Amendment mandates the State's practice lack merit. If St. Vincent Catholic Charities

(“STVCC”) does not wish to provide public foster and adoption services in accordance with the mandates of the Constitution, it is under no obligation to do so; but STVCC has no free exercise right to demand that government contracts to perform government services allow it to provide those services using religious eligibility criteria. And in contracting with the State to perform a government service, STVCC is not forced to adopt the State’s view on marriage of same-sex couples, nor does its performance of services amount to compelled speech because any information transmitted in the performance of contracts with the State is not private speech.

Dated: April 20, 2018

/s/ Garrard Beeney

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**BRIEF IN SUPPORT OF
PLAINTIFFS' RESPONSE IN
OPPOSITION TO INTERVENOR
DEFENDANTS'
MOTION TO DISMISS**

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs Kristy and Dana Dumont and Erin and Rebecca Busk-Sutton have pled standing based on the stigma and practical burden of being turned away by state-contracted child placing agencies when they sought to adopt children in the State's custody, solely because of those agencies' religious objections to placing children with same-sex couples.
2. Whether all Plaintiffs have standing to assert an Establishment Clause challenge to the State's provision of taxpayer funds to child placing agencies to carry out public foster care and adoption services under State contract, knowing that certain agencies use religious criteria to screen out prospective families.
3. Whether Plaintiffs have stated an Establishment Clause claim when they have pled facts showing that: (a) the State delegates to private child placing agencies the authority to license and select families for wards of the State knowing that some screen out families based solely on religious criteria; (b) this practice causes harm to children and prospective parents; and (c) the practice promotes a particular religious view about same-sex couples.
4. Whether Plaintiffs have stated an Equal Protection claim when they have pled facts showing that the State permits state-contracted child placing agencies to disqualify prospective foster and adoptive families headed by

same-sex couples, without regard to parenting ability, which harms—rather than helps—children and thus does not rationally further a legitimate state interest.

5. Whether the Free Exercise Clause or the Free Speech Clause of the First Amendment mandates that the State allow state-contracted child placing agencies to employ religious criteria in the performance of public services and to turn away prospective foster and adoptive parents for children in State custody based solely on the agencies' religious objections to placing children with those families.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 570 U.S. 205 (2013); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Empl't Div., Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Teen Ranch v. Udow*, 389 F. Supp. 2d 827 (W.D. Mich. 2005), *aff'd*, 479 F.3d 403 (6th Cir. 2006).

PRELIMINARY STATEMENT

The State of Michigan (“State”) permits state-contracted, taxpayer-funded child placing agencies like St. Vincent Catholic Charities (“STVCC”)—which perform the government functions of recruiting and selecting families to care for children in State custody whom the State has assigned to these agencies—to use religious criteria to exclude same-sex couples from fostering or adopting these children. Compl. ¶ 1, ECF No. 1. The State has admitted as much. Brief in Support of State’s Mot. to Dismiss at 7, ECF. No. 16. And STVCC, Melissa Buck, Chad Buck, and Shamber Flore (the “Intervenor Defendants”) confirm that STVCC will not accept families headed by same-sex couples when acting on behalf of the State. Intervenor Defendants’ Brief in Support of Mot. to Intervene at 10, ECF No. 18. Plaintiffs do not challenge the State’s ability to contract out child welfare services to faith-based agencies, but, when the State hires private agencies to perform a public government function, it must ensure those services are provided in accordance with the U.S. Constitution—just as if the State provided those services directly. Because the State could not, consistent with the Establishment and Equal Protection Clauses, disqualify prospective families headed by same-sex couples based solely on religious objections to such families, the State’s authorization of such conduct by the contractors it hires to find families for wards of the State is unconstitutional.

Intervenor Defendants' Brief in Support of its Motion to Dismiss, ECF No. 19 (hereinafter "Br."), relies on mischaracterizations of the Complaint and improperly attempts to introduce contested facts in support of its Motion to Dismiss. In addition, Intervenor Defendants' legal arguments lack merit.

First, for the reasons set forth in Plaintiffs' Response to the State's Motion to Dismiss, ECF No. 28 (hereinafter "Pl. Response"), Plaintiffs have pled facts establishing standing and showing that the State's practice violates the Establishment Clause and the Equal Protection Clause by authorizing state-contracted, taxpayer-funded child placing agencies to turn away prospective families headed by same-sex couples based on religious objections to those families.

Second, Intervenor Defendants are incorrect that Plaintiffs' Establishment Clause claims are governed by the historical test of *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2013), which is a narrow exception applicable only to legislative prayer. Even if *Town of Greece* were applicable, there is no historical practice of permitting state-contracted child placing agencies to turn away potential foster or adoptive parents for wards of the State on the basis of the agency's religious criteria.

Finally, Intervenor Defendants' arguments that the First Amendment mandates the State's challenged practice lack merit. Intervenor Defendants have

no constitutional rights that are relevant to whether Plaintiffs have pleaded cognizable claims. Because Intervenor Defendants have no entitlement to participate in contracts to perform public services that conform to their private religious preferences, their religious practice would not be burdened by the relief requested in this case. Similarly, ensuring that public adoption and foster care services provided under contract with the State are carried out in accordance with the Constitution would not regulate the private speech of any child placing agency that chooses to enter into such contracts.

LEGAL STANDARD

The Court is required to “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 538 (6th Cir. 2012). A motion to dismiss must be denied where, as here, plaintiffs allege “facts that state a claim to relief that is plausible on its face and that, if accepted as true, are sufficient to raise a right to relief above the speculative level.” *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)).

BACKGROUND¹

Plaintiffs Kristy and Dana Dumont and Erin and Rebecca Busk-Sutton (the “Prospective Parent Plaintiffs”) are two would-be adoptive families that were turned away by state-contracted and taxpayer-funded child placing agencies based on those agencies’ religious objections to same-sex couples. Compl. ¶¶ 57-69. All Plaintiffs are Michigan taxpayers who object to the State’s practice of permitting state-contracted, taxpayer-funded child placing agencies to use religious criteria to turn away prospective foster and adoptive parents for children in the State’s foster care system. Compl. ¶¶ 73-74.

On September 20, 2017, Plaintiffs filed a Complaint naming as defendants Nick Lyon, Director of the Michigan Department of Health and Human Services (“DHHS”), and Herman McCall, Executive Director of the Children’s Services Agency, each in their official capacity (together, the “State Defendants”) and alleging that the State’s practices violate the First and Fourteenth Amendments to the U.S. Constitution. On December 15, 2017, the State Defendants moved to dismiss Plaintiffs’ complaint pursuant to Fed. R. Civ. P. 12(b)(6), ECF No. 16. On December 18, 2017, the Intervenor Defendants moved to intervene as defendants,

¹ Plaintiffs hereby incorporate by reference the entirety of their Brief in Opposition to the State’s Motion to Dismiss.

ECF No. 18, and on December 19, 2017 submitted a proposed Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), ECF No. 19.

On February 6, 2018, Plaintiffs filed a Response in Opposition to the State Defendants' Motion to Dismiss, ECF No. 28, and on March 2, 2018 the State Defendants filed a Reply in Support of their Motion to Dismiss, ECF No. 30. On March 5, 2018, the Court granted the Intervenor Defendants' Motion to Intervene with respect to STVCC, ECF No. 31. On March 22, 2018, the Court granted the Intervenor Defendants Motion to Intervene with respect to the remaining Intervenor Defendants, ECF No. 34. On the same date, Intervenor Defendants' Motion to Dismiss was deemed filed, ECF No. 34 at 26.

ARGUMENT

I. THE PROSPECTIVE PARENT PLAINTIFFS HAVE STANDING BASED ON THEIR INJURIES FROM BEING TURNED AWAY BY STATE DEFENDANTS.

Plaintiffs Kristy and Dana Dumont and Erin and Rebecca Busk-Sutton have established Article III standing because the allegations in the Complaint demonstrate (1) that they have suffered an "injury in fact" that was actual or imminent and not conjectural or hypothetical; (2) that the injury was "fairly traceable" to the challenged action of the State Defendants; and (3) that it is "likely" that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The Dumonts and Busk-

Suttons seek to adopt children from the state foster care system. Compl. ¶¶ 59–63, 67–68. When they contacted certain state-contracted child placing agencies, however, those agencies turned them away solely because of the agencies’ religious objections to same-sex couples. Compl. ¶¶ 61–63, 68.

A. The Prospective Parent Plaintiffs Have Suffered an Injury-in-Fact Because They Were Turned Away from State-Contracted Child Placing Agencies Based on Those Agencies’ Religious Objections to Same-Sex Couples.

Intervenor Defendants do not challenge the Prospective Parent Plaintiffs’ assertion that they were turned away by state-contracted child placing agencies, including STVCC, solely because of the agencies’ religious objections to same-sex couples. Rather, they rehash the State’s argument that the Plaintiffs suffered no injury because they “remain free” to adopt with “other agencies in Michigan.” Br. at 4. This position is at odds with Intervenor Defendants’ argument on the Motion to Intervene that Melissa and Chad Buck would be harmed if they are unable to foster or adopt through their preferred agency, Motion to Intervene at 18–19, ECF No. 18, and wrong as a matter of law.

The injury of state-sanctioned discrimination is neither cured nor mitigated by the existence of other agencies that do not discriminate. Moreover, as explained in Plaintiffs’ Response to State Defendants’ Motion to Dismiss, the Prospective Parent Plaintiffs have suffered both stigmatic and practical injuries, which under longstanding Supreme Court precedent establishes an injury for

purposes of standing. Plaintiffs hereby incorporate by reference the argument on pages 9 through 11 of their Response to State Defendants’ Motion to Dismiss.²

B. The Prospective Parent Plaintiffs’ Injuries Were Caused by the State Defendants’ Practice of Permitting State-Contracted, Taxpayer-Funded Child Placing Agencies to Use Religious Criteria to Turn Away Prospective Foster and Adoptive Parents.

Intervenor Defendants also repeat the State Defendants’ argument that the injuries suffered by the Prospective Parent Plaintiffs were not “caused” by the State Defendants for purposes of establishing standing because “Kristy and Dana

² Intervenor Defendants rely additionally on contested assertions of fact, which are irrelevant to the question of whether the Complaint establishes a cognizable injury and which are inappropriate on a motion to dismiss. For example, Intervenor Defendants allege that the Dumonts “could easily have sought licensing with an agency closer to their house.” Br. at 5. The existence of alternatives is not relevant to their injuries as a matter of law, and, in any event, Plaintiffs contend that “at the time the Dumonts sought out these agencies, they were the only viable options within any reasonable [distance]” (ECF No. 33 at 31:24–32:1) and intend to produce evidence showing that these agencies were the only options available in their county at the time that they were rejected on the basis of religious objections to same-sex couples.

Intervenor Defendants also assert that if Plaintiffs were licensed by another agency, they could be matched with children in STVCC’s care through the Michigan Adoption Resource Exchange. Br. at 5. The Exchange is only for that subset of children who are awaiting adoption and need a family to be recruited for them. *See, e.g.*, State of Michigan Department of Human Services, Adopting a Child in Michigan, at 5, *available at* https://www.michigan.gov/documents/dhs/DHS-PUB-0823_221566_7.pdf. And the Complaint alleges that “[u]pon information and belief, each private child placing agency maintains a roster of families that it has licensed or certified that it generally uses for family placements for children assigned to its care.” Compl. ¶ 34. Intervenor Defendants’ point is neither germane to a motion to dismiss nor a dispute that this Court may, respectfully, resolve at this stage of the litigation.

Dumont chose to call St. Vincent, but they could easily have sought licensing with [a different] agency,” and thus their injuries were “self-inflicted.” Br. at 4–5.

But even if the Dumonts had other options in their area, *see supra* Section I(A), that would be irrelevant as a matter of law to the question of causation. As explained in Plaintiffs’ Response to the State Defendants’ Motion to Dismiss, an injury is “fairly traceable” to a defendant for purposes of establishing causation where such injury is caused “at least in part” by the defendant’s actions. *See* Pl. Response at 26. Here, there is no question that Plaintiffs have alleged that the injuries suffered by the Prospective Parent Plaintiffs was caused “at least in part” by the State Defendants’ practice of allowing state-contracted agencies to turn away prospective families based on religious criteria. But for that practice, the injuries could not have occurred.

C. The Prospective Parent Plaintiffs’ Injuries Are Redressable Through Declaratory and Injunctive Relief.

Intervenor Defendants also reprise the State Defendants’ argument that any injury suffered by Plaintiffs is not redressable because “the relief Plaintiffs seek would result in St. Vincent closing its adoption and foster programs to everyone, and Plaintiffs would still be unable to receive their license through St. Vincent.” Br. at 5. As explained in Plaintiffs’ Response to the State Defendants’ Motion to Dismiss, this mischaracterizes the Complaint, and the Prospective Parent Plaintiffs’ injury is redressable as a matter of law because if the State’s practice is

enjoined, the Prospective Parent Plaintiffs and others like them interested in public adoption would no longer be turned away solely because of a contracted child placing agency's religious objection to an applicant's sexual orientation. Pl. Response at 27. In addition, as explained in Plaintiffs' Response to the State's Motion to Dismiss, this argument relies on a factual assertion which cannot be credited on a motion to dismiss and misconstrues the relief sought: Plaintiffs do not seek to work with any particular agency; rather, they seek to have the same agency options that are available to other families and to require the State to ensure equal treatment and prohibit religious exclusion criteria in the provisions of public child welfare services. Pl. Response at 27 n.13. Plaintiffs challenge not the conduct of STVCC or any other child placing agency but rather the practices of the State. STVCC cannot prevent constitutional scrutiny of the State's actions by threatening to close its doors.

II. ALL PLAINTIFFS HAVE TAXPAYER STANDING TO ASSERT ESTABLISHMENT CLAUSE CLAIMS.

Plaintiffs have established taxpayer standing for their Establishment Clause claims because they are Michigan state taxpayers, Compl. ¶¶ 6–7, 20–21, and there is (1) “a logical link between [their] taxpayer status and the type of legislative enactment attacked” and (2) “a nexus between the[ir] taxpayer status and the precise nature of the constitutional infringement alleged.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 139 (2011).

Although the Intervenor Defendants repeat the State Defendants' argument that Plaintiffs cannot establish taxpayer standing because "the State has not allocated any specific funds to any program Plaintiffs challenge, and any spending is the result of executive discretion," Br. at 6, this argument is foreclosed by binding precedent. For example, as set out in Plaintiffs' Response to the State's Motion to Dismiss at 12–14, in *Bowen v. Kendrick*, the Court found taxpayer standing when the challenged funding "flowed through and [was] administered" by an executive agency. *Bowen v. Kendrick*, 487 U.S. 589, 619–20 (1988); *see also*, *e.g.*, *Lamont*, 948 F.2d at 830. States cannot avoid constitutional scrutiny simply by adding some measure of executive "discretion" to the manner in which funds authorized and allocated by the legislature are disbursed.

III. THE STATE'S PRACTICE VIOLATES THE ESTABLISHMENT CLAUSE.

The State's practice of permitting state-contracted, taxpayer-funded child placing agencies performing a state function to use religious criteria to exclude prospective foster and adoptive parents for children in State custody violates the Establishment Clause. *See* Br. at 13; Compl. ¶¶ 37, 50, 78. This practice constitutes endorsement and promotion of religion, *see Lemon v. Kurtzman*, 403 U.S. 602 (1971), for three different reasons: (1) the State has delegated a public function and allowed it to be impermissibly exercised according to religious tenets; (2) the State's practice privileges religion to the detriment of

third parties; and (3) the practice is intended, and objectively appears, to promote religion. *See generally* Pl. Response at 14–20.

A. *Town of Greece* Is Inapplicable and There Is No Historical Precedent for the Challenged Practice.

Intervenor Defendants argue that the *Lemon* test has been “superseded” by *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), and that the only relevant analysis under the Establishment Clause is whether a challenged practice is consistent with and supported by historical practice, Br. at 21, but the Sixth Circuit has expressly rejected this argument and has held that the test articulated by the Supreme Court in *Town of Greece* is an “exception” applicable only to the special context of examining the “constitutionality of legislative prayer.” *See, e.g., Bormuth v. Cty. of Jackson*, 870 F.3d 494, 514–15 (6th Cir. 2017) (en banc). The Sixth Circuit has moreover continued to apply the *Lemon* test after *Town of Greece*. *See, e.g., Harkness v. Sec’y of Navy*, 858 F.3d 437, 447–51 (6th Cir. 2017) (applying *Lemon* to resolve Establishment Clause challenge to Navy’s delegation of power to promote chaplains to promotion board containing other chaplains); *Smith v. Jefferson Cty. Bd. of Sch. Com’rs*, 788 F.3d 580, 589 (6th Cir. 2015) (applying *Lemon* to resolve Establishment Clause challenge to state contracts with a private religious school).

In any case, even if the *Town of Greece* historical test were applicable, the State’s “specific practice” of allowing state-contracted and taxpayer-funded

child placing agencies to use religious criteria to categorically reject prospective foster and adoptive parents for children in the State's care has no historical foundation and certainly was not "accepted by the Framers." *Town of Greece*, 134 S. Ct. at 1819; *cf. Edwards v. Aguillard*, 482 U.S. 578, 640 n.4 (1987). ("Such a historical approach is not useful in determining the proper roles of church and State in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.").

Intervenor Defendants make no argument—because they could not—that the State's specific practice was in existence at the time the Constitution was adopted. Rather, Intervenor Defendants point to academic works noting that, in the past, adoption was largely handled privately and often by religious organizations, and that adoption agencies often followed the practice of religious matching—placing children with adoptive families that shared the same faith as the child's birth family. *See Br. at 7–9*. This says nothing about whether the government funded and authorized state-contracted child placing agencies to limit the placement of children based on *the agency's*—as opposed to the child's or the prospective parents'—religious beliefs.³

³ The sole source cited by Intervenor Defendants for the proposition that government funding of private religious adoption agencies engaging in the practice at issue here has a long historical pedigree, *see Br. at 8*, provides no support whatsoever for the claim.

At the time of the adoption of the Constitution, the State did not enter into contracts with private religious agencies to perform the public function of finding families for wards of the state, and there is no history of states allowing state-contracted agencies to disqualify prospective parents based on religious criteria. Accordingly, even if *Town of Greece* were applicable, the State's practices are not "a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." 134 S. Ct. at 1819.

B. The State's Practice Is Not a Permissible Accommodation of Religion.

Intervenor Defendants argue that "[t]he Establishment Clause does not prohibit government contracts with religious organizations for the provision of social services." Br. at 9. Plaintiffs agree and, by framing their argument in this way, Intervenor Defendants mischaracterize the Complaint and set up a strawman argument. Plaintiffs do *not* challenge the eligibility of religious organizations to receive government contracts to provide social services; rather, Plaintiffs challenge the use of religious eligibility criteria in the public child welfare system. See Compl. Prayer for Relief. ¶ A (asking the Court to invalidate "the State's practice of allowing state-contracted, taxpayer-funded child placing agencies to disqualify prospective families headed by same-sex couples based on agencies' religious beliefs.")). The relief sought here would not prevent the State from entering into government contracts for the provision of social services with religious

organizations on an equal basis with secular organizations.

Intervenor Defendants also argue that the State's practice does not violate the Establishment Clause because "the government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause." Br. at 10–11. Intervenor Defendants rely on *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) and *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012). But those cases concerned whether Congress may or must carve out special exceptions to anti-discrimination statutes for private religious employers filling certain privately funded employment positions. Unlike *Amos* and *Hosanna-Tabor*, this case does not concern a private party's claim for an exemption from a generally applicable law. Rather, here, STVCC claims a special right to receive contracts from the State that conform to its religious preferences and allow it to discriminate, with taxpayer funds, on the basis of religious criteria. The State is neither obligated by the Free Exercise Clause nor permitted by the Establishment and Equal Protection Clauses to offer such contracts.⁴

⁴ In any case, even if the State's practice could be construed as an accommodation of religion, as discussed more fully in Pl. Response at 16–19, it is not a permissible accommodation because it harms third parties. "[A]ccommodation is not a principle without limits," *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994), and "courts must take adequate account of the burdens a requested accommodation may impose on (footnote continued . . .)

Finally, Intervenor Defendants argue that the Establishment Clause is inapplicable because “the Establishment Clause only applies against state actors, and this Court has already rejected the claim that [STVCC] and other adoption agencies qualify as state actors.” Br. at 11. But the Complaint does not argue that STVCC or other agencies are state actors and it does not seek to hold STVCC or other child placing agencies liable for the State’s Constitutional violations. Rather, the Complaint seeks to enjoin representatives of the State in their official capacities from allowing public child welfare services to be provided on the basis of religious and discriminatory criteria. Compl. Relief Requested ¶¶ B, C. There can be no argument that the State Defendants are not state actors.

IV. THE STATE’S PRACTICE VIOLATES THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause requires the government to treat all similarly situated persons alike. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). At a minimum, this prohibits the government from making “distinctions between individuals based solely on differences that are

(. . . footnote continued)

nonbeneficiaries.” *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Here, allowing state-contracted child placing agencies to use religious eligibility criteria when performing public child welfare services on behalf of the State runs afoul of the Establishment Clause because it “would require the imposition of significant burdens,” *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985), on children who lose out on qualified families, and on the families who are turned away.

irrelevant to a legitimate governmental objective.” *Lehr v. Robertson*, 463 U.S. 248, 265 (1983). As discussed in Plaintiffs’ Response to the State’s Motion to Dismiss, under any level of scrutiny,⁵ the State Defendants’ practice of allowing state-contracted agencies to categorically turn away same-sex couples based on religious objections violates the Equal Protection Clause.

Intervenor Defendants fundamentally mischaracterize Plaintiffs’ claims. Plaintiffs do not assert that the State violates the Equal Protection Clause by “favor[ing] any particular religious group,” see Br. at 12; rather, Plaintiffs assert that the State violates the Equal Protection Clause by permitting its contractors to use religious criteria to turn away same-sex couples regardless of their ability to care for a child, a practice which discriminates against same-sex couples, serves no legitimate child welfare interest and subverts the purpose of Michigan’s child welfare system.

Intervenor Defendants argue that the State’s practice is rationally related to the legitimate government interest of getting more families for children in the child welfare system. Br. at 12–14. This argument relies wholly on assertions that contradict factual allegations in the Complaint—which this Court

⁵ Plaintiffs expressly preserve the issue of whether sexual-orientation classifications are suspect or quasi-suspect and trigger heightened Equal Protection scrutiny. See Pl. Response at 20 n.23.

must take as true on a motion to dismiss—that the State’s practice harms rather than helps children by turning away prospective families, thereby exacerbating a shortage of qualified families and denying some children the family best suited to their needs. Compl. ¶¶ 11, 51, 53, 55, 56. Intervenor Defendants also argue that “Equal Protection concerns in this case weigh heavily against the policy Plaintiffs seek, as it would result in a devastating disproportionate impact on minority racial groups.” Br. at 13–14. This argument relies on the same speculation of fact in contradiction to Plaintiffs factual allegations.⁶

Plaintiffs intend to present evidence that, even if STVCC acts on its threat and chooses to stop contracting with the State to offer public adoption and foster care services, there is no basis in reality for Intervenor Defendants’ speculation that this will reduce the number of families available for Michigan children, including black and Native American children. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) (Even under rational basis review, the asserted rationale “must find some footing in the realities of the subject addressed.”); *Minn. v. Clover*

⁶ In any case, the State’s unconstitutional practice of permitting public child welfare services to be performed according to discriminatory and religious criteria is not immune from challenge simply because some of the state’s contractors also provide services to members of minority racial groups.

Leaf Creamery Co., 449 U.S. 456, 464 (1981) (Equal protection plaintiffs “may introduce evidence supporting their claim that [government action] is irrational.”).⁷

V. STVCC’S ASSERTED AFFIRMATIVE DEFENSES PROVIDE NO BASIS TO DISMISS THE COMPLAINT.

Intervenor Defendants assert a number of affirmative defenses which provide no basis upon which to dismiss the Complaint. These defenses appear to apply only to STVCC and not the Individual Intervenors. However, STVCC has no constitutional rights that are relevant to whether Plaintiffs have pleaded cognizable claims and, in any case, the relief sought would not violate STVCC’s free exercise or free speech rights.

A. The Relief Sought by Plaintiffs Would Not Violate STVCC’s Free Exercise Rights.

The relief sought by Plaintiffs would not burden STVCC’s free exercise rights because STVCC has no entitlement to carry out a state function in accordance with its religious preferences. Moreover, the relief sought by Plaintiffs

⁷ Intervenor Defendants’ position that allowing faith-based contracted agencies to cast aside qualified families somehow results in *more* families for children rests on the irrational speculation that the only agencies capable of finding families for children, especially children from minority backgrounds and those of Native American descent, are (1) religiously affiliated, and (2) unwilling, based on religious reasons, to accept all qualified families. Experience in other states shows that when agencies leave the child welfare arena due to conflicts between child welfare standards and their religious beliefs, there are plenty of other agencies—including faith-based agencies—who have no objection to accepting all qualified families and complying with the Constitution to serve those children. *See* Pl. Response at 24 n.27.

would neither compel STVCC to provide foster and adoption services on behalf of the State in violation of its religious preferences nor penalize it for failing to do so. If STVCC does not wish to contract with the State within limits imposed by the Constitution, it is under no obligation to do so; but STVCC has no right to a state contract that conforms to its religious preferences. *See Agency for Int’l Dev. v. Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013) (“As a general matter, if a party objects to a condition on the receipt of [government] funding, its recourse is to decline the funds.”).⁸

Because the relief sought would not burden STVCC’s exercise of religion, no further free exercise analysis by this Court is required. However, even if a prohibition on the use of religious criteria in public child welfare services were deemed to incidentally burden STVCC’s exercise of religion, such a burden would be the result of a “valid and neutral law of general applicability” that does not

⁸ *See also Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (“A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”) (citing *Harris v. McRae*, 448 U.S. 297, 317, n.19 (1980)); *id.* (“[A] legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right.”) (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549 (1983)); *Planned Parenthood of Greater Ohio v. Himes*, No. 16-4027, 2018 WL 1833196, at *6 (6th Cir. Apr. 18, 2018) (“[T]he failure to subsidize the exercise of a constitutional right does not abridge the right.”).

violate the Free Exercise Clause. *See Emp't Div., Dept. of Human Res. of Ore. v. Smith*, 494 U.S. 872, 878–82 (1990).

STVCC attempts to get out from under *Smith* by arguing that if the State adopted (or this Court ordered) the requested relief, such a policy would not be a valid and neutral law of general applicability because it “would be ‘enacted because of, not merely in spite of, [its] suppression of [religious conduct].’” Br. at 14–15 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993)). But requiring the State to ensure that public services are not performed on the basis of expressly religious criteria would be a policy aimed at enforcing the Establishment Clause, not a policy aimed at suppressing religion. As the Supreme Court stated in an analogous context, “[t]o hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings.” *McCullum v. Bd. of Educ.*, 333 U.S. 203, 211–12 (1948). In other words, the enforcement of the Establishment Clause is not made suspect by the fact that it imposes rules specifically on the interaction of government and religion.⁹ That is its very purpose.¹⁰

⁹ Similarly, STVCC’s argument that the relief sought would not be a valid and neutral law of general applicability because it would “selectively burden” only
(footnote continued . . .)

Finally, a favorable ruling for Plaintiffs would not “exclud[e] [STVCC] from a government benefit program because it is religious.” Br. at 17–19 (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017)). *Trinity Lutheran* offers no support for Intervenor Defendants’ position. In *Trinity Lutheran*, the Supreme Court held that the government cannot disqualify a religious organization from a public benefit solely because of its religious identity. That case dealt with grants to private

(. . . footnote continued)

“conduct motivated by religious belief,” Br. at 15–17 (citing *Lukumi*, 508 U.S. at 543), fails because there is no comparable nonreligious conduct that the requested relief neglects to address. In *Lukumi*, the Court found that an ordinance which pretended to have an interest in promoting public health was actually targeted at suppressing the Santeria religion because it was “underinclusive” with respect to the asserted government interest—it banned ritual Santeria sacrifice while failing to prohibit nonreligious conduct such as slaughter for food purposes that endangered that interest in a similar or greater degree. 508 U.S. at 543–45. Here the government interest in ending the use of religious criteria in public adoption and foster care is compliance with the Establishment Clause. Unlike in *Lukumi*, a prohibition on the use of religious criteria in public adoption and foster care would be perfectly aligned with that interest because a prohibition on turning away families for nonreligious criteria (*e.g.*, “the family may live further away than the agency would like to drive for home visits,” Br. at 17) would not advance Establishment Clause interests.

¹⁰ Indeed, under Intervenor Defendants’ position, any limitations on the religious use of government funds would necessarily violate the Free Exercise Clause because they are religion-specific. But a long line of cases not only permits but requires religion-specific limitations on the use of government funds. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589 (1988); *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722 (6th Cir. 2009); *Teen Ranch v. Udow*, 389 F. Supp. 2d 827 (W.D. Mich. 2005), *aff’d*, 479 F.3d 403 (6th Cir. 2006).

organizations, not the performance of government services, and the Court emphasized that its holding addressed only “express discrimination based on religious identity.” *Trinity Lutheran*, 137 S.Ct. at 2024 n.3. Unlike in *Trinity Lutheran*, the issue at stake here is not about the identity of who may receive a benefit from or contract with the State—Plaintiffs do not challenge the ability of religiously identified agencies to enter into State child placing contracts—but rather about what actions the State may perform or have performed on its behalf. The State may not hire others to employ religious criteria or discriminate on the basis of sexual orientation in the provision of public services regardless of the identity of the contractual counterparty. If Plaintiffs prevail, it would not disqualify any person or organization from participating in government benefit programs. It would simply require the State to ensure that all government contracts, including government contracts with religious organizations, are not performed in a way that violates the Establishment and Equal Protection Clauses.

B. The Relief Sought by Plaintiffs Would Not Violate STVCC’s Free Speech Rights.

The relief sought would not burden STVCC’s free speech rights because any information transmitted in the performance of contracts with the State is not private speech and STVCC has no right to demand that the government affirmatively provide it with a contract to fund and promote its private speech.

STVCC argues that a government policy or court order requiring the State to comply with the Constitution by prohibiting the use of religious criteria in child-placing decisions would violate the Free Speech Clause by compelling the agency to adopt the government's view on the issue of same-sex marriage and provide the State with written assessments of families that conflict with its religious beliefs. Br. at 21–24. However, when a child placing agency provides public adoption services pursuant to contracts with the State, its services under those contracts are not private speech but rather “instances in which the government uses private speakers to transmit information concerning the government's own program.” *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 840 (W.D. Mich. 2005), *aff'd*, 479 F.3d 403 (6th Cir. 2006). A court order requiring the State to ensure state-contracted agencies do not exclude prospective families based on religious criteria would not compel private speech of such contractors.

Similarly, the key case relied upon by Intervenor Defendants for the proposition that the requested relief would force Intervenor Defendants to adopt the government's views, *Agency for International Development*, expressly distinguished between “conditions that define the limits of the government spending program—those that specify the activities [the government] wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.” 570 U.S. at 214–15. Here, any requirement to

issue written assessments on a nondiscriminatory basis would go to the heart of the child placing services under contract with the state and would not regulate the speech of child placing agencies outside of the performance of those voluntarily accepted contracted-for services. *See* Compl. ¶¶ 7, 8.

CONCLUSION

For the reasons set forth above, the Court should deny the State's Motion. In the alternative, Plaintiffs seek leave to amend their Complaint.

Dated: April 20, 2018

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CERTIFICATE OF SERVICE

I hereby certify that, on April 20, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: April 20, 2018

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