UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan.

Defendants.
_____/

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

HON. DAVID R. GRAND

DEFENDANTS' MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL

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**Application for admission forthcoming*

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DEFENDANTS' MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL

Defendants Dana Nessel, Michigan Department of Health and Human Services (MDHHS), Robert Gordon, Michigan Children Services Agency (MCSA), and JooYuen Chang,[1] (collectively, Gordon and Chang are referred to as the "MDHHS Officials") hereby move this Court to disqualify Plaintiff's counsel pursuant to Rules 1.9, 1.10, and 1.11 of the Michigan Rules of Professional Conduct (MRPC). Pursuant to Local Rule 7.1(a), the undersigned contacted Plaintiff's counsel via several email exchanges between May 20, 2019, and June 12, 2019, to ascertain

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this reflects the substitution of Children's Services Agency Executive Director JooYuen Chang for former Acting Children's Services Agency Executive Director Jennifer Wrayno, who was named in her official capacity.

whether this motion would be opposed. Plaintiff's counsel stated his opposition to it in responsive emails.

Respectfully submitted,

Dana Nessel
Attorney General

/s/ Joshua S. Smith
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Dated: June 12, 2019

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Dated: June 12, 2019

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CONCISE STATEMENT OF ISSUES PRESENTED

1. The Michigan Rules of Professional Conduct require this Court to disqualify Plaintiffs' counsel because there is an unexcused conflict of interest.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Michigan Rules of Professional Conduct 1.9
Michigan Rules of Professional Conduct 1.10
Michigan Rules of Professional Conduct 1.11
Debiasi v. Charter County of Wayne, 284 F. Supp.2d 760, 770 (E.D. Mich. 2003)
Manning v. Warring, Cox, James, Skylar, & Allen, 849 F.2d 222, 225-26 (6th Cir. 1988)
Anchor Packing Co. v. Pro-Seal, Inc., 688 F. Supp. 1215, 1220-21 (E.D. Mich. 1988)
Nathan v. Shea (In re Marks & Goergens), 199 B.R. 922, 925 (E.D. Mich. 1996)
Analytica, Inc. v NPD Research, Inc., 708 F.2d 1263, 1267 (7th Cir. 1983)
Cobb Publishing v. Hearst Corporation, 907 F.Supp. 1038, 1048-49 (E.D. Mich. 1995)

INTRODUCTION

In August 2018, John Bursch had just signed an amended contract to continue to serve as lead counsel representing the MDHHS Officials in *Dumont v. Lyon,* Case No. 2:17-cv-13080, in which the plaintiffs alleged that the MDHHS Officials permitted a practice of allowing MDHHS's contracted child placing agencies (CPAs) to discriminate against LGBTQ couples and individuals for religious reasons. Bursch was defending MDHHS Officials against those allegations when he put on his second hat, as Vice President of Appellate Advocacy at the Alliance Defending Freedom (ADF)[2] law firm. In this role, he represented ADF and helped author an amicus brief, which advocated a position contrary to what MDHHS Officials would ultimately take in *Dumont*. More importantly, several months after Bursch took the position at the ADF law firm, ADF agreed to represent Plaintiffs Catholic Charities in this lawsuit *against* MDHHS, challenging a Consent Decree entered in *Dumont* in which the MDHHS Officials

[2] See https://www.adflegal.org/detailspages/biography-details/john-bursch. Last accessed June 11, 2019.

agreed to maintain and enforce the non-discrimination provisions in the CPA contracts.

At the time he joined ADF, Bursch had access to thousands of documents containing confidential MDHHS information gathered through discovery in the *Dumont* litigation, and he participated in confidential client meetings during which additional information was shared. Bursch's prior representation of the MDHHS Officials in *Dumont* disqualifies him from representing Plaintiff in this matter, and such conflict is imputed to all attorneys at ADF. Mich. Rules Prof'l Conduct 1.09, 1.10.

While ADF claims that it erected a conflict screen, it was not put in place until several months *after* Bursch joined ADF, while the parties in *Dumont* were engaged in extensive discovery. No notice was provided to the MDHHS Officials, MDHHS, or the Department of Attorney General, despite the fact that Bursch's representation was pursuant to contract through which he served as a Special Assistant Attorney General (SAAG). This Contract includes agreements to avoid conflicts of interests absent prior written approval from MDHHS. (Ex. A, ¶ 5.2.) But ADF failed to notify either the MDHHS Officials or the

Department of Attorney General of ADF's representation of the present Plaintiff and any effort to screen Bursch from this matter until *after* this lawsuit was filed, via letter dated May 6, 2019. Such notice was ineffective and untimely.

This Court has both the authority and an obligation to disqualify the ADF law firm. The paramount concern in situations like this, where an attorney and, indeed, an entire law firm has switched sides, is to protect client confidences and avoid the appearance of impropriety. ADF and their local counsel, David, Wierenga & Lauka P.C., cannot alleviate these concerns. This Court should disqualify them from representing Plaintiff in this case and provide 30 days for Plaintiff to find new counsel or dismiss this lawsuit.

STATEMENT OF FACTS

On November 20, 2017, Bursch signed a contract with the Michigan Department of Attorney General (AG) whereby he committed to provide legal services to the Michigan Department of Health and Human Services (MDHHS) in *Dumont v. Lyon,* Case No. 2:17-cv-13080 (E.D. Mich. 2017) (SAAG Contract, Ex A, ¶ 1.2.)

Both *Dumont* and the present litigation involve the nondiscrimination clause in MDHHS' standard contract with private CPAs and its applicability to private agencies objecting on religious grounds to the provision of services to LGBTQ individuals or couples. The plaintiffs in *Dumont* challenged MDHHS's alleged "practice of permitting state-contracted and taxpayer-funded child placing agencies to use religious criteria to screen prospective foster and adoptive parents for children in the foster care system and to turn away qualified families on the basis of sexual orientation." (*Dumont* Cplt.*,* No. 2:17-cv-13080, Doc. 1, Pg. ID 1, Ex. F.)

Dumont was resolved through a Consent Decree, entered on March 22, 2019, by Judge Paul Borman of the United States District Court for the Eastern District. The Stipulated Order dismissed *Dumont*

"with prejudice pursuant to the terms of the Settlement Agreement," with Judge Borman retaining jurisdiction over enforcement. (*Dumont* Order on Stipulation of Dismissal, No. 2:17-cv-13080, Doc. 83, Pg. ID 1469, Ex. G.) The Consent Decree requires that MDHHS's standard contracts with CPAs continue to include a Non-Discrimination Provision that precludes, among other things, any contracted, licensed CPA from turning away or sending a potentially qualified LGBTQ individual or same-sex couple to another licensed CPA for services under the contract including orientation, training, and home studies. (*Dumont* Consent Decree, Ex. H.) It also requires MDHHS to enforce the Non-Discrimination Provision against any CPA that is determined to be in violation of such provision "up to and including termination of the Contracts." (*Id.* at Pg. ID 1446.)

The *Dumont* Consent Decree forms the heart of the present lawsuit. Catholic Charities claims that, after the Consent Decree was entered in *Dumont,* MDHHS "sent a directive to Michigan's child placing agencies, including Catholic Charities, purporting to implement the *Dumont* settlement" that purportedly "forces faith-based providers that believe marriage is between a man and a woman to abandon or

violate that belief as a condition to receiving government contracts." (Doc. 1-2, Pg. ID 46-47, ¶¶ 131, 135.) Plaintiff claims that Defendants, through this "new policy" are violating its rights under the state and federal constitution, as well as Michigan law. (Doc. 1-2, Pg. ID 51-62, ¶¶ 156-232.) Plaintiff seeks a preliminary and permanent injunction, as well as monetary damages to remedy the alleged violations. (Doc. 1-2, Pg. ID 62-63.)

MDHHS compensated Bursch well for his services in *Dumont*. He received $558 per hour, which totaled more than $60,000 during approximately a 14-month period.

Both as a member of the Bar and by signing the SAAG Contract, Bursch agreed that his work would be governed by the "Rules of Professional Conduct applicable to members of the Michigan Bar Association." (Ex. A, ¶ 5.10.) He also agreed that his work was, and would continue to be, free from conflicts. Specifically, Bursch agreed not to "undertake representation against the State of Michigan if the representation is related to the subject matter of th[e] Contract and would require [Bursch] to take a position adverse to the State" absent the AG's prior, written approval. (Ex. A, ¶ 5.2.)

The commitment to avoiding conflicts extended to "other lawyers" in Bursch's firm, who were to "be advised of [Bursch's] representation of the Department [of Attorney General]" and who "agreed not to accept, without prior written approval from the [AG] any employment from other interests related to the subject matter of [the] Contract." (*Id.*) No mention is made of any affiliation, much less employment or acceptance of an executive position, by ADF. The only firm identified in the SAAG Contract is Bursch Law, PLLC, and it agreed to "carefully monitor any significant change in assignments or clients of the firm in order to avoid any situation which might affect [Bursch's] ability to effectively render legal services." (*Id.*) Bursch signed a First Amendment to the SAAG Contract on August 16, 2018. (Ex. B.)

When Bursch signed the First Amendment to the SAAG Contract in August 2018, he had apparently joined ADF, the law firm that now represents Plaintiff Catholic Charities in this lawsuit as its the Vice President of Appellate Advocacy. (John Bursch Resume, available at linkedin.com/in/appellate, Ex. I.)

ADF filed an amicus brief in *Dumont* on January 30, 2018. (*Dumont* ADF Amicus, Ex. D.) And on September 4, 2019, Bursch

joined other ADF attorneys in an amicus brief filed in *Fulton v. City of Philadelphia,* 922 F.3d 140 (3d Cir. 2019), a case involving similar allegations brought by Catholic Social Services in Philadelphia. (Ex. E.)

The Department had no knowledge that Bursch took a position at ADF while representing MDHHS Officials under the SAAG Contract. Three attorneys representing Plaintiff Catholic Charities are attorneys directly associated with ADF. In addition, Attorney James Wierenga, the local counsel of record, is described as an "ADF-allied attorney" in a press release published on ADF's website.[3] This press release describes ADF's representation in a pending federal case, for which Wierenga served as "local counsel." Bursch worked with Wierenga on this case, as he is one of two ADF attorneys identified as available to meet with the press to discuss it.[4]

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[3] News Release, Alliance Defending Freedom, Michigan Farmer to Court: Stop City's Religious Hostility, Let Me Sell Food to Everyone (Apr. 10, 2019), https://www.adflegal.org/detailspages/press-release-details/michigan-farmer-to-court-stop-city-s-religious-hostility-let-me-sell-food-to-everyone. Last accessed June 11, 2019.

[4] Indeed, both Bursch and Wierenga are listed as counsel for plaintiffs in *Country Mill Farms, LLC v. City of East Lansing*, 280 F.Supp.3d 1029, 1037 (W.D. Mich. 2017).

It was not until May 6, 2019, several months after the SAAG Contract was terminated and after ADF filed this complaint, that ADF first prepared a letter to Defendants Gordon and Chang, notifying them that John Bursch had been screened from this case. The letters were received by the Department on May 10, 2019. (Ex. C.)

ARGUMENT

I. The Michigan Rules of Professional Conduct require this Court to disqualify Plaintiffs' counsel because there is an unexcused conflict of interest.

This Court must disqualify the ADF law firm and its local counsel from representing Plaintiff Catholic Charities because John Bursch, ADF's Vice President of Appellate Advocacy, the MDHHS Officials in *Dumont v. Lyon*, a substantially related matter to the present case, represented mere months before this Complaint. This conflict has not been excused and is imputed to both the ADF firm and allied attorneys such as David, Wierenga & Lauka, P.C.

"The power to disqualify an attorney from a case is incidental to all courts and is necessary for the preservation of decorum, and for the respectability of the profession." *El Camino Res. LTD. V. Huntington Nat'l Bank,* 623 F.Supp.2d 863, 875-76 (W.D. Mich. 2007) (internal

quotations omitted). It is a judicial obligation. Specifically, this Court is "obliged to take measures against unethical conduct occurring in connection with any proceeding before it[,]" including without limitation, the disqualification of counsel when impermissible conflicts exist. *Musicus v. Westinghouse Electric Corp.*, 621 F.2d 742, 743-44 (5th Cir. 1980); see also *Debiasi v. Charter County of Wayne,* 284 F. Supp.2d 760, 770 (E.D. Mich. 2003).

Although the decision whether to disqualify is a question of federal law, this Court must consider the Michigan Rules of Professional Conduct in making this determination. *In re Ralph Roberts Realty, LLC*, 500 B.R. 862, 864-65 (Bankr. E.D. Mich. 2013) (citing *El Camino,* 623 F.Supp.2d at 876). See also Local Rule 83.22(b). The paramount concerns here are protecting client confidences and avoiding any appearance of impropriety. *Manning v. Warring, Cox, James, Skylar, & Allen*, 849 F.2d 222, 225-26 (6th Cir. 1988).

A. Bursch's association with the ADF law firm disqualifies it from representing Plaintiff Catholic Charities in this lawsuit.

Bursch's representation of the MDHHS Officials in *Dumont* while holding an executive counsel position at ADF, without any screen or

other protection in place to prevent disclosure of his client's confidential information, clearly disqualifies Bursch from representing Defendants. That disqualification is also imputed to and thus warrants the disqualification of both the ADF firm and allied attorneys, including Wierenga, from representing Plaintiff Catholic Charities here.

1. The Rules of Professional Conduct prohibit ADF from representing Plaintiff in this claim against a former client.

Rule 1.9(a) of the Michigan Rules of Professional Conduct unequivocally bars an attorney from representing a party whose interests are adverse to that of a former client in the same or a substantially similar matter:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interest are materially adverse to the interest of the former client unless the former client consents after consultation.

According to the Michigan Court of Appeals, "[i]t is … clear that an attorney may *only* undertake to represent a new client against a former client" where, among other things, "the subject matter of the current representation is not substantially related to a matter in which the attorney represented the former client and, further, where there is

no confidential information received from the former client that is in any way relevant to the representation of the current client." *Barkley v. City of Detroit,* 514 N.W.2d 242, 246 (Mich. App. 1994) (emphasis added.) The Sixth Circuit had made similar observations. *Nat'l Union Fire Ins. Co. v. Alticor, Inc.*, 466 F.3d 456, 459 (6th Cir. 2006), vacated in part on other grounds, 472 F.3d 436 (6th Cir. 2007).

As explained below, neither of these factors apply. The subject matter of this case *is* substantially related to *Dumont*, and Bursch gained client confidences during his representation of the MDHHS officials in this earlier, substantially related litigation.

2. *Dumont* is a substantially related litigation.

There can be no reasonable dispute that *Dumont* is substantially related to the present lawsuit. A substantial relationship does not require identical clients or issues, but merely that "facts pertinent to problems for which the original legal services sought are relevant to the present litigation." *Anchor Packing Co. v. Pro-Seal, Inc.,* 688 F. Supp. 1215, 1220-21 (E.D. Mich. 1988), quoting *United States Football League v. Nat'l Football League,* 605 F. Supp. 1448, 1459 (S.D.N.Y. 1985).

Both *Dumont* and the present litigation involve constitutional challenges to a nondiscrimination clause in MDHHS's standard contract with CPAs and actions taken in enforcement thereof. Both concern whether CPAs in contract with MDHHS can turn away same-sex couples or LGBTQ individuals who request services under the contract. In other words, the cases are two sides of the same coin.

The *Dumont* plaintiffs alleged that MDHHS Officials violated their constitutional rights by maintaining contracts with CPAs that turned away individuals or couples based on sexual orientation. Here, Catholic Charities claims that MDHHS Officials have violated or will violate its constitutional rights by not allowing it to turn away same-sex couples or LGBTQ individuals who request services under the contract. (Cplt., ¶¶ 94-95, 131-36, 144; Doc. 1-2, Pg ID 46-49.) Accordingly, the facts pertinent to resolving this dispute are the same or substantially similar to those in *Dumont*.

B. Bursch received confidential information through his representation of the MDHHS Officials in *Dumont*.

The presence of the substantial relationship creates a strong presumption that ADF will use MDHHS's client confidences against it

in the present litigation. *Nathan v. Shea (In re Marks & Goergens)*, 199 B.R. 922, 925 (E.D. Mich. 1996). This could be significant.

As lead counsel for the MDHHS Officials in *Dumont*, Bursch had access to thousands of client-documents. Numerous documents were flagged for Bursch's review and evaluation and in many cases withheld from production on the grounds of privilege. He also participated in numerous confidential meetings with high-ranking officials regarding the *Dumont* litigation and MDHHS' policy and procedure when working with CPAs like Plaintiff Catholic Charities. Bursch received confidential information from MDHHS as lead counsel in *Dumont*.

Notably, Defendants need not prove, nor must the Court inquire into whether Bursch actually disclosed confidential information to the ADF attorneys assigned to this case, or whether ADF is employing that confidential information here. The purpose for requiring a substantial relationship between the subject matter of the current and past representations is to avoid requiring the Court to directly inquire into whether client confidences were disclosed—an inquiry that would necessarily require the divulgence of such confidences. *Anchor Packing Co.*, 688 F. Supp. at 1226. It is sufficient that Bursch's prior

representation of the MDHHS Officials, while holding an executive position at ADF, provided him access to a significant amount of client confidences that are presumed available in this litigation, and that the litigations are substantially related.

C. Bursch's conflict is imputed to all ADF attorneys.

Moreover, Bursch's conflict is imputed to all attorneys associated with him at ADF. This is not a situation where Bursch joined ADF after his representation of the MDHHS Officials ended. To the contrary, the attorneys representing Plaintiff were, presumably, associated with Bursch since, at least, July 2018 when he joined ADF as executive counsel. (Ex. I.) The following month, he signed a First Amendment to the SAAG Contract and led the representation of the MDHHS Officials in *Dumont* for four months after this.[5] (During that time, he collaborated with other ADF attorneys in at least one case with substantially the same facts and legal issues as raised here. *Fulton v. City of Philadelphia,* 922 F.3d 140 (3d Cir. 2019). (Ex. E.)

[5] The SAAG Contract terminated in January 2019.

None of these attorneys can undertake representation from which Bursch himself is conflicted. The Michigan Rules of Professional Conduct are clear: "While attorneys are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9(a), or 2.2." Mich. Rule of Prof'l Conduct1.10(a).

The situation is akin to *Analytica, Inc. v NPD Research, Inc.* where "the firm itself changed sides." 708 F.2d 1263, 1267 (7th Cir. 1983). Without a screen or other protection against disclosure of client confidences among the firm, the Seventh Circuit found it "irrelevant" whether different attorneys handled the matters at issue in the conflict analysis. *Id.* The crucial factor is whether an attorney "could have obtained confidential information in the first representation that would have been relevant in the second." *Id.*

Similarly, the Michigan Court of Appeals relied on Rule 1.10(a) to disqualify a law firm from representing a potential cross-claimant of a former client in a substantially related litigation. *Avink v. SMG*, 761 N.W.2d 826, 827-31 (Mich. Ct. App. 2009). Like the Seventh Circuit, the Michigan Court of Appeals was not persuaded by the firm's

assertion that different attorneys were employed in the respective litigations. The court recognized that such an argument "ignores MRPC 1.10(a)," through which the court "impute[s] conflict of interest to the entire firm." *Id.* at 831.

This imputed conflict extends to David, Wierenga & Lauka, P.C., Plaintiff's local counsel. While Wierenga may not be employed by ADF full-time, he is described as an "ADF-allied attorney" in a press release published on ADF's website.[6] He also, apparently, worked with Bursch and another ADF attorney as local counsel in the federal district court case described in the above-cited press release, which challenged the application of a local ordinance prohibiting discrimination based on sexual orientation. *Id.* Rule 1.10 extends to attorneys "associated" in a law firm and, Defendants maintain that Wierenga is an "associated" attorney as local counsel and as Bursch's "allied attorney" at ADF.

D. ADF's May 6, 2019 Letter does not evidence a timely or effective screen.

Neither Bursch nor ADF undertook the steps necessary to avoid this conflict. The SAAG Contract, at least, placed Bursch on notice of a

[6] See Alliance Defending Freedom, *supra* note 3.

duty to obtain prior written approval before accepting employment with ADF regarding interests related to the subject matter of the SAAG Contract. (Ex. A, ¶¶ 5.2, 5.10.) There is no record that he did this. Nor is there any record that *at the time Bursch associated himself with ADF*, ADF implemented a screen that protected the MDHHS Officials' confidences from being shared among Bursch's associates at ADF.

The May 6, 2019 letter states that ADF decided to screen Bursch "at the very beginning of its representation" of Plaintiff Catholic Charities in this matter. The letter did not provide a date as to when the representation began, but presumably, it was after the *Dumont* Consent Decree was filed and, therefore, several months after Bursch's association with ADF began. No emails or other records were provided in support of this conclusory statement.

ADF also failed to comply with Rule 1.11 of the Michigan Rules of Professional Conduct. Subsection (a) permits lawyers to represent private clients in matters in which an attorney in the same firm "participated personally and substantially as a public officer or employee" *only* if the conflicted attorney is screened and "written notice is promptly given to the appropriate government agency to enable it to

ascertain compliance with the provisions of this rule." *Id.* "Matter" is defined broadly to include, among other things, a claim or controversy. Mich. Rules Prof'l Conduct 1.11(d)(1).

The "matter" at issue here is whether MDHHS's policy or practice authorizes CPAs like Plaintiff to turn away same-sex couples or LGBTQ individuals who requests services under the CPA contract. As explained above, this was the central issue in the *Dumont* litigation, and Bursch personally and substantially participated in *Dumont* as a SAAG. In August 2018, while Bursch was under contract to represent MDHHS Officials in *Dumont*, ADF was involved in litigation of a same, or at least, nearly identical matter in *Fulton*. Rule 1.11(a) permits this only by implementing a screen and providing prompt notice to MDHHS. Neither was done. In fact, rather than screen Bursch and segregate him from such representation, ADF authorized Bursch's participation, co-authoring a September 2018 amicus brief for ADF that was filed in in *Fulton*. Plaintiff's counsel should be disqualified for failure to comply with Rule 1.11.

Notably, even if ADF had implemented a timely screen, no notice of the conflict or the screen was provided to MDHHS at the time. Rule

1.11(a) requires the ADF law firm not only to implement a screen, but also to provide prompt written notice of the screen to the government agency so that the agency can sufficiently ascertain ADF's compliance with the rule.

The May 6, 2019 letter does not demonstrate prompt notice. Defendants Gordon and Chang received it on May 9, 2019–almost two weeks after the complaint had been filed. While the letter states that a decision to screen Bursch "occurred at the very beginning of representation," it provides no details as to when this representation began. It is unlikely the 42-page complaint, with significant details regarding the services purportedly provided by Catholic Charities under the CPA contract, was drafted overnight. Nor are there details as to what efforts were being taken to screen Bursch, other than a representation that he agreed not to participate in discussion regarding the case.

In *Cobb Publishing v. Hearst Corporation,* this Court disqualified a firm from continuing representation because its notice to the tribunal came 16 days after the conflicted lawyer began working at the firm. 907 F.Supp. 1038, 1048-49 (E.D. Mich. 1995). This Court found this did

not qualify as "prompt" notice to the tribunal as required by Rule 1.10(b) of the Michigan Rules of Professional Conduct. It also found the screen untimely because it was not in place until ten days after the attorney started working at the firm. *Id.* at 1044, 1048-49. Given the timing of the May 6, 2019, letter and the vague information provided therein, similar findings are appropriate here.

CONCLUSION AND RELIEF REQUESTED

For the reasons explained above, the Defendants respectfully request this Court enter an order disqualifying Alliance Defending Freedom and David, Wierenga, & Lauka, P.C. from representing Plaintiff Catholic Charities West Michigan in this case. The Defendants further request that Plaintiff be given 30 days to obtain new counsel and if Plaintiff fails to do so, this case be dismissed without prejudice.

Respectfully submitted,

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Attorney General

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Dated: June 12, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2019, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Joshua S. Smith
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Smithj46@michigan.gov

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan.

Defendants.
_____/

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

INDEX OF EXHIBITS TO DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL

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**Application for admission forthcoming*

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Health, Education & Family Services Division
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Smithj46@michigan.gov

_____/

INDEX OF EXHIBITS TO DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISQUALIFY PLAINTIFF'S COUNSEL

Exhibit A. Bursch SAAG Contract

Exhibit B. First Amendment to Bursch SAAG Contract

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Exhibit D. *Dumont* Amicus brief filed by ADF

Exhibit E. *Fulton* Amicus brief filed by ADF

Exhibit F. *Dumont* Cplt., No. 2:17-cv-13080, Doc. 1, Pg. ID 1

Exhibit G. *Dumont* Order on Stipulation of Dismissal, No. 2:17-cv-13080, Doc. 83, Pg. ID 1469

Exhibit H. *Dumont* Consent Decree

Exhibit I. John Bursch Resume, linkedin.com/in/appellate

EXHIBIT A

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL
LEGAL SERVICES CONTRACT

BILL SCHUETTE, Attorney General of the State of Michigan (Attorney General), and the Department of Attorney General (Department) retain and appoint John Bursch, of the law firm Bursch Law PLLC, as a Special Assistant Attorney General (SAAG) to provide legal services.

The legal services provided to the State of Michigan, Department of Health and Human Services (DHHS), will be pursuant to the following terms and conditions in this Contract:

1. PARTIES/PURPOSE

1.1 Parties. The parties to this Contract are the Department of Attorney General, and John Bursch of the firm Bursch Law PLLC. No other attorney may engage in the practice of law on behalf of the State of Michigan under this Contract without prior approval, a Contract amendment, and a SAAG appointment from the Attorney General.

The Department of Health and Human Services is also a party to this Contract. It agrees to pay all fees and costs associated with the legal services rendered after review and approval by the Department.

1.2 Purpose. The Department, the Department of Health and Human Services, and the SAAG agree that the SAAG will provide legal services in *Dumont v Lyon*, United States District Court, Eastern District of Michigan Case no. 2:17-cv-13080 as requested by the Department.

The SAAG agrees that the Assistant Attorney General (AAG) specifically designated by the Department for this contract (Contract Manager) will act as the liaison between the SAAG and any state employee or agency served by this contract. The SAAG shall work jointly with any assigned AAG on all projects and assignments. Upon request, the SAAG agrees to fully explain any legal opinion or recommendation to any assigned AAG and to assist in the development of AG staff to understand the particular field of law involved in this contract. The SAAG agrees to copy any assigned AAG on all correspondence, provide copies of all pleadings to any assigned AAG, and to promptly advise and provide an opportunity for the AAG to participate in any telephone calls or meetings with any state employee or agency served by this contract. Any time spent by the SAAG training AG staff may be billed under the terms of this contract.

2. **TERM OF CONTRACT**

The initial term of this Contract is November 1, 2017 through December 31, 2018. This Contract may be extended at the option of the Department upon written notice.

3. **COMPENSATION FOR SERVICES PROVIDED**

3.1 The total amount of compensation for services and expenses during the term of this Contract shall not exceed the budget ceiling set forth in paragraph 4.1 of this Contract, unless otherwise amended by a Contract addendum.

3.2 The costs for overhead, electronic legal research (i.e., Westlaw, Lexis, etc.) telephone calls and office supplies utilized by the SAAGs are part of the SAAG's agreed upon fees and such costs will not be separately billed. Unless otherwise provided in this Contract, the SAAG shall not include charges for the services of other employees or members of the SAAG firm, including paralegals and secretarial employees. No additional charges shall be allowed, except by prior written permission of the Department. The SAAG understands that the Department will not pay any additional charges that have not received prior approval.

3.3 Payment for services and reimbursement for expenses incurred shall be the obligation of the Department of Health and Human Services after review and approval by the Department.

4. **CONTRACT BUDGET, BILLING AND REIMBURSEMENT**

4.1 Budget Ceiling. A budget ceiling of $250,000.00 is established to cover all services and expenses performed or incurred in the performance of this contract. Due to the nature of this contract and the difficulty in estimating actual costs and the demand for services, the Contract budget ceiling may be increased, if approved in writing by the Department. An increase in the budget ceiling shall not affect the established hourly rate during the term of this Contract or any amendment.

4.2 Billing for Hourly Services. The SAAG shall bill the Department on a monthly basis. The billing format must indicate the nature of the work performed, time devoted, the individual performing the work and the billing amount. Additional information shall be provided if requested by the Department. All invoices shall be furnished to the Department's Health, Education & Family Services Division at the address listed in Section 6.1 of this Contract.

The hourly rate to be charged for the SAAG work is as follows:

John Bursch - $558 per hour

The SAAG must get prior written authorization from the Department and DHHS before hiring an expert witness.

The Department shall not pay for other time not spent actively performing services under the Contract.

4.3 Reimbursement for Actual Expenses. Actual litigation costs (filing fees, depositions, and postage) may be reimbursed upon presentation to the Department in accordance with the procedures provided in this Contract. The SAAG will provide original copies of all receipts for meals, lodging, and travel reimbursement with the billings. Allowed expenses shall be specifically and individually identified at the end of the bill, resulting in a total cumulative statement with attached original receipts. The Department reserves the right to deny reimbursement of any expenses for which approval was not sought pursuant to this Contract.

The SAAG will be reimbursed for meals, lodging, and travel expenses in accordance with the State of Michigan travel and other expense requirements, which can be found at http://www.michigan.gov/dmb/0,1607,7-150-9141_13132---,00.html. The SAAG acknowledges that he has reviewed the State travel rates posted on the website. All out-of-state travel requires the written approval of the Department. Expenses exceeding State rates will not be reimbursed.

4.4 Registration. The SAAG is required to register as a vendor and complete the electronic funds transfer (EFT) process, as the required method of payment under this Contract, through the Michigan Department of Technology, Management and Budget (DTMB). The SAAG (vendor) and EFT registration must be completed through the DTMB Contract and Payment Express website at www.cpexpress.state.mi.us.

4.5 Billing and Payment Deadlines. All invoices shall be paid on a current basis, within 30 days after receipt of satisfactory billing submission, unless the parties agree on another arrangement. The SAAG shall complete all work in fiscal year 2018, by September 30, 2018, and submit all payment requests for the fiscal year no later than October 7, 2018.

5. REPRESENTATIONS

5.1 Qualifications. The SAAG, by signing this Contract, attests that he is qualified to perform the services specified in this Contract and agrees to faithfully and diligently perform the services consistent with the standard of legal practice in the community.

5.2 Conflict of Interest. The SAAG represents that he has conducted a conflicts check prior to entering into this Contract and no conflicts exist with the proposed legal services. The SAAG shall not undertake representation against the State of Michigan if the representation is related to the subject matter of this Contract and would require the SAAG to take a position adverse to the State, unless the SAAG obtains prior written approval to do so from the Department. This provision does not prohibit any member of Bursch Law PLLC from representing a client in any matter, including engaging in litigation against the State of Michigan, its agencies, departments, or employees, so long as the matter does not relate to the subject matter of this Contract.

With respect to potential conflicts of interest, other lawyers in the SAAG's firm shall be advised of the SAAG's representation of the Department, and that the firm has agreed not to accept, without prior written approval from the Department, any employment from other interests related to the subject matter of this Contract. Bursch Law PLLC shall carefully monitor any significant change in assignments or clients of the firm in order to avoid any situation which might affect a SAAG's ability to effectively render legal services.

5.3 Services to be Confidential. The SAAG shall keep confidential all services and information, including records, reports, and estimates. The SAAG shall not divulge any information to any person other than to authorized representatives of the Department, except as required by testimony under oath in judicial proceedings, or as otherwise required by law. The SAAG shall take all necessary steps to ensure that no member of his firm divulges any information concerning these services. This includes, but is not limited, to information maintained on the SAAG's computer system.

All files and documents containing confidential information shall be filed in separate files maintained in the office of Bursch Law PLLC, with access restricted to the SAAG and needed clerical personnel. All documents prepared on the Bursch Law PLLC, computer system shall be maintained in a separate library with access permitted only to the SAAG and needed clerical personnel.

5.4 Assignments and Subcontracting. The SAAG shall not assign or subcontract any of the work or services to be performed under this Contract, including work assigned to other members or employees of the SAAG's firm, without the prior written approval of the Department. Any member or employee of the SAAG's firm who received prior approval from the Department to perform services under this Contract is bound by the terms and conditions of this Contract.

5.5 Facilities and Personnel. The SAAG has and will continue to have proper facilities and personnel to perform the services and work agreed to be performed.

5.6 Advertisement. The SAAG, during the term of appointment and thereafter, shall not advertise his position as a Special Assistant Attorney General to the public. The SAAG designation may be listed on the SAAG's resume or other professional biographical summary, including resumes or summaries that are furnished to professional societies, associations, or organizations. Any such designation by the SAAG must first be submitted to and approved by the Department.

5.7 Records. The SAAGs shall maintain complete billing records. This requirement applies to all information maintained or stored in the SAAG's computer system. The records shall be kept in accordance with generally accepted accounting practices and sound business practices. The Department shall have the right to inspect all records of the SAAG related to this Contract.

5.8 Non-Discrimination. The SAAG, in the performance of this Contract, and Bursch Law PLLC, agree(s) not to discriminate against any employee or applicant for employment, with respect to their hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment, because of race, color, religion, national origin, ancestry, age, sex, height, weight, marital status, physical or mental disability unrelated to the individual's ability to perform the duties of the particular job or position. This covenant is required by the Elliott-Larsen Civil Rights Act, MCL *37.2101, et seq.*, and the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq.*, and any breach of the Act may be regarded as a material breach of the Contract. The SAAG agrees to comply with the provisions of the Federal Civil Rights Act of 1964, 42 USC §2000d, in performing the services under this Contract.

5.9 Unfair Labor Practices. The State shall not award a contract or subcontract to any employer, or any subcontractor, manufacturer, or supplier of the employer, whose name appears in the current register compiled by the Michigan Department of Licensing and Regulatory Affairs (DLARA). The State may void this Contract if after the award of the Contract, the name of the SAAG or his law firm appears in the register. 1980 PA 278, MCL 423.321, *et seq.*

5.10 Compliance. The SAAG's activities under this Contract are subject to applicable State and Federal laws and to the Rules of Professional Conduct applicable to members of the Michigan Bar Association. In accordance with MCL 18.1470, DTMB or its designee may audit Contractor to verify compliance with this Contract.

5.11 Independent Contractor. The relationship of a SAAG to the Department in this Contract is that of an independent contractor. No liability or benefits, such as workers compensation rights or liabilities, insurance rights or liabilities, or any other provisions or liabilities, arising out of or related to a contract for hire or employer/employee relationship, shall arise, accrue or be implied to

either party or either party's agent, subcontractor or employee as a result of the performance of this Contract. The SAAG and Bursch Law PLLC, will be solely and entirely responsible for its acts and the acts of its agents and employees during the performance of this Contract. Notwithstanding the above, the relationship is subject to the requirements of the attorney-client privilege.

6. MANAGEMENT OF CASE(S)

6.1 Notifications. The SAAG shall direct all notices, correspondence, inquiries, billing statements, pleadings, and documents mentioned in this Contract to the attention of the Department employee identified below.

For the Department:

Toni L. Harris, First Assistant
Health, Education & Family Services Division
525 W. Ottawa St, Flr. 3
PO Box 30758
Lansing, MI 48909
517-373-7700

For DHHS:

Dr. Herman McCall, Director
Children's Services Administration
mccallh@michigan.gov
517-241-9859

For the SAAG:

John Bursch
Bursch Law PLLC
9339 Cherry Valley Ave SE, No. 78
Caledonia, MI 49316
jbursch@burschlaw.com
616-450-4235

6.2 The SAAG shall promptly inform the Department of the following developments as soon as they become known:

A. Favorable actions or events that enable meeting time schedules and/or goals sooner than anticipated.

B. Delays or adverse conditions that materially prevent, or may materially prevent, the meeting of the objectives of the services provided. A statement of any remedial action taken or contemplated by a SAAG shall accompany this disclosure.

For every case accepted, the SAAG shall:

A. Promptly undertake all efforts, including legal proceedings, as directed by the Department, and shall prosecute any case to its conclusion unless directed to the contrary by the Department.

B. Provide copies of all pleadings filed in any court by the SAAG, or by the opposing party, to the Department.

6.3 Motions. Before any dispositive motion is filed, the supporting brief must be submitted to the Michigan Solicitor General for review and approval for filing with the court.

6.4 Investigative Support. All claims will be vigorously pursued and prepared for filing. If authorized by the Department, use of investigative subpoenas must be thorough and aggressive.

6.5 Discovery Requests. The SAAG will consult with the Department and assist in the preparation of answers to requests for discovery. The SAAG will indicate those requests to which he intends to object.

6.6 Witness and Exhibit Lists. At least ten (10) calendar days prior to the day a witness list or an exhibit list is due, the Department should receive a preliminary witness list or exhibit list for review and recommendation of additional names of witnesses or additional exhibits.

6.7 Mediation. Fifteen (15) calendar days prior to any mediation, the mediation summary should be submitted to the Department for review and recommendation. Immediately following mediation, the SAAG shall submit a status memorandum indicating the amount of the mediation and a recommendation to accept or reject the mediation.

6.8 Trial Dates. The SAAG shall advise the Department immediately upon receipt of a trial date.

6.9 Settlements. All pleas/settlements are subject to approval by the Department. The SAAG must immediately communicate any plea/settlement proposal received along with a recommendation to accept, reject, or offer a counter proposal to any offer received to the Department's designee. "Settlement" includes,

but is not limited to, the voluntary remand of a case to the trial court or by way of stipulation or motion.

6.10 Money. The SAAG shall only accept payment by an opposing party under the following terms:

A. Restitution should be handled as ordered by the court or agreed to in a settlement/plea agreement. The SAAG shall require the payment ordered by the court or by plea/settlement:

i. be made by check, certified check, cashier's check, or money order;

ii. payable to the "State of Michigan";

iii. include the tax identification number/social security number of the payer; and

iv. include the account to which the remittance is to be applied.

B. Any funds received by the SAAG as payment on a case assigned pursuant to court order, plea/settlement shall be transmitted by the SAAG to Department within seventy-two (72) hours of receipt.

6.11 File Closing. The SAAG must advise the Department, in writing, of the reason for closing a file. Requests for reimbursement of legal services (see paragraph 4.2) and expenses (see paragraph 4.3) shall be submitted simultaneously with the closing memorandum.

7. INDEMNIFICATION

The SAAG agrees to save harmless the State of Michigan, its elected officials, officers, agencies, boards, and employees against and from any and all liabilities, damages, penalties, claims, costs, charges, and expenses (including, without limitation, fees and expenses of attorneys, expert witnesses and other consultants) which may be imposed upon, incurred by, or asserted against the State of Michigan for either of the following reasons:

A. Any malpractice, negligent or tortious act or omission attributable, in whole or in part, to the SAAG or any of its employees, consultants, subcontractors, assigns, agents, or any entities associated, affiliated, or subsidiary to the SAAG now existing, or hereafter created, its agents and employees for whose acts any of them might be liable.

B. The SAAG's failure to perform his obligations, either expressed or implied by this Contract.

8. **INSURANCE**

8.1 Errors and Omissions. The SAAG or his law firm shall maintain professional liability insurance sufficient in amount to provide coverage for any errors or omissions arising out of the performance of any of the professional services rendered pursuant to this Contract.

8.2 Certificates of Insurance. Certificates evidencing the purchase of insurance shall be furnished to the Department upon request. All certificates are to be prepared and submitted by the insurance provider and shall contain a provision indicating that the coverage(s) afforded under the policies will not be cancelled, materially changed, or not renewed without thirty (30) calendar days prior written notice, except for ten (10) days for non-payment of premium, and any such notice of cancellation, material change, or non-renewal shall be promptly forwarded to the Department upon receipt.

8.3 Additional Insurance. If, during the term of this Contract changed conditions should, in the judgment of the Department, render inadequate the insurance limits the SAAG will furnish, on demand, proof of additional coverage as may be required. All insurance required under this Contract shall be acquired at the expense of the SAAG or his law firm, under valid and enforceable policies, issued by insurers of recognized responsibility. The Department reserves the right to reject as unacceptable any insurer.

9. **APPEALS**

The SAAG agrees that no appeal of any order(s) of the Michigan Court of Claims, any Michigan Circuit Court, or any United States District Court will be taken to the Michigan Court of Appeals, the Michigan Supreme Court, or any United States Circuit Court of Appeals, without prior written approval of the Michigan Solicitor General, Department of Attorney General. Further, the SAAG agrees that no petition for *certiorari* will be filed in the United States Supreme Court without prior written permission of the Michigan Solicitor General, Department of Attorney General.

10. **TERMINATION OF CONTRACT AND APPOINTMENT**

10.1 SAAG Termination. The SAAG may terminate this Contract upon thirty (30) days written notice (Notice of Termination). Upon delivery of such notice, the SAAG shall continue all work and services until otherwise directed by the Department. The SAAG will be paid for actual services rendered prior to termination, and for actual services as may be directed by the Department. No

payments under this section shall exceed the budget ceiling amount established in paragraph 4.1 of this Contract.

10.2 Attorney General Termination. The Department may terminate this Contract and SAAG appointment, at any time and without cause, by issuing a Notice of Termination to the SAAG.

10.3 Termination Process and Work Product. Upon receipt of a Notice of Termination, and except as otherwise directed by the Attorney General or his designee, the SAAG shall:

A. stop work under the Contract on the date and to the extent specified in the Notice of Termination;

B. incur no costs beyond the date specified by the Department;

C. on the date the termination is effective, submit to the Department all records, reports, documents, and pleadings as the Department shall specify and carry out such directives as the Department may issue concerning the safeguarding and disposition of files and property; and

D. submit within thirty (30) calendar days a closing memorandum and final billing. Upon termination of this Contract, all finished or unfinished original (or copies when originals are unavailable) documents, briefs, files, notes, or other materials (the "Work Product") prepared by the SAAG under this Contract, shall become the exclusive property of the Department, free from any claims on the part of the SAAG except as herein specifically provided. The SAAG acknowledges that any intentional failure or delay on its part to deliver the Work Product to the Department will cause irreparable injury to the State of Michigan not adequately compensable in damages and for which the State of Michigan has no adequate remedy at law. The SAAG accordingly agrees that the Department may, in such event, seek injunctive relief in a court of competent jurisdiction. The Department shall have full and unrestricted use of the Work Product for the purpose of completing the services. In addition, each party will assist the other party in the orderly termination of the Contract.

The rights and remedies of either party provided by the Contract are in addition to any other rights and remedies provided by law or equity.

11. GENERAL PROVISIONS

11.1 Governing Law and Jurisdiction. This Contract shall be subject to and constructed according to the laws of the State of Michigan, and no action shall be commenced against the Department or the Attorney General, his designee, agents or employees, or the Department of Treasury for any matter whatsoever arising out of the Contract, in any courts other than the Michigan Court of Claims.

11.2 No Waiver. A party's failure to insist on the strict performance of this Contract shall not constitute waiver of any breach of the Contract.

11.3 Additional SAAG. It is understood that during the term of this Contract, the Department may contract with other SAAGs providing the same or similar services.

11.4 Other Debts. The SAAG agrees that he is not, and will not become, in arrears on any contract, debt, or other obligation to the State of Michigan, including taxes.

11.5 Invalidity. If any provision of this Contract or its application to any persons or circumstances shall, to any extent, be judicially determined to be invalid or unenforceable, the remainder of this Contract shall not be affected thereby, and each provision of the Contract shall be valid and enforceable to the fullest extent permitted by law.

11.6 Headings. Contract section headings are for convenience only and shall not be used to interpret the scope or intent of this Contract.

11.7 Entire Agreement. This Contract represents the entire agreement between the parties and supersedes all proposals or other prior agreements, oral or written, and all other communications between the parties.

11.8 Amendment. No Contract amendment shall be effective and binding upon the parties unless it expressly makes reference to this Contract, is in writing, and is signed by duly authorized representatives of all parties and all the requisite State approvals are obtained.

11.9 Issuing Office. This Contract is issued by the Department, and is the only state office authorized to change the terms and conditions of this Contract.

Dated: Nov. 20, 2017

John J. Bursch (P57679),
Bursch Law PLLC

Dated: 12/5/17, 2017

Bill Schuette, Attorney General
or His Designee
Michigan Department of Attorney General

Dated: 11/29, 2017

Nick Lyon, Director
or His Designee
Department of Health and Human Services

EXHIBIT B

FIRST AMENDMENT TO THE
LEGAL SERVICES CONTRACT BETWEEN
THE DEPARTMENT OF ATTORNEY GENERAL
AND
BURSCH LAW, PLLC

The Michigan Department of Attorney General, (Department) and John J Bursch, of the law firm Bursch Law PLLC (SAAG), and the Michigan Department of Health and Human Services agree to amend their Legal Services Contract regarding legal services provided to the State of Michigan, Department of Health and Human Services (DHHS) in *Dumont v. Lyon*, United States District Court, Eastern District of Michigan Case No. 2:17-cv-13080, as follows:

2. **TERM OF CONTRACT**

The term of the Contract is amended and extended from November 1, 2017-December 31, 2018 to December 31, 2019.

All other provisions in the original Contract for Legal Services that have not been changed by this First Amendment remain in full force and effect.

Dated: 8-16-18

John J. Bursch (P57679)
Bursch Law PLLC

Dated: 9/18/18

Bill Schuette, Attorney General
or His Designee
Michigan Department of Attorney General

Dated: 9/13/18

Nick Lyon, Director
Department of Health and Human Services

EXHIBIT C

ALLIANCE DEFENDING
FREEDOM
FOR FAITH FOR JUSTICE

May 6, 2019

Jennifer Wrayno, Acting Executive Director
Michigan Children's Services Agency
333 S. Grand Ave.
Lansing, MI 48909
Via Certified Mail

Re: *Catholic Charities West Michigan v. Michigan Department of Health & Human Services*, No. 19-000072-MM (Mich. Ct. Cl.)

Dear Ms. Wrayno:

Alliance Defending Freedom represents Catholic Charities West Michigan in the above-referenced matter, a lawsuit in which you and your agency are named defendants. We write to inform you that ADF has taken steps to screen one of its attorneys, John Bursch, from this matter. As you likely know, Mr. Bursch previously represented your agency in *Dumont v. Lyon*, No. 2:17-cv-13080 (E.D. Mich.). Because of his involvement in that case, ADF has timely screened Mr. Bursch from any participation in ADF's representation of Catholic Charities and will ensure that he is not apportioned any fee arising from that representation.

More specifically, ADF's decision to screen Mr. Bursch from its representation of Catholic Charities occurred at the very beginning of the representation, and Mr. Bursch has acknowledged his obligation not to communicate with any other ADF attorneys about the subject matter of the representation. Further, ADF attorneys working on the matter have been informed about the screening and instructed not to communicate with Mr. Bursch about ADF's representation of Catholic Charities. As a result of the screening, any material confidential information obtained by Mr. Bursch during his representation of your agency (assuming any) has not been, nor will be, disclosed or used in violation of any applicable ethics rule or rule of professional conduct.

If you have any questions or concerns about the above or would like to discuss in more detail, please do not hesitate to have your attorney contact me at (480) 444-0020 or jgalus@ADFlegal.org.

Sincerely,

Jeremiah Galus
Legal Counsel

cc: Dana Nessel, Michigan AG

ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE

May 6, 2019

Robert Gordon, Director
Department of Health & Human Services
333 S. Grand Ave.
Lansing, MI 48909
Via Certified Mail

Re: *Catholic Charities West Michigan v. Michigan Department of Health & Human Services*, No. 19-000072-MM (Mich. Ct. Cl.)

Dear Director Gordon:

Alliance Defending Freedom represents Catholic Charities West Michigan in the above-referenced matter, a lawsuit in which you and your agency are named defendants. We write to inform you that ADF has taken steps to screen one of its attorneys, John Bursch, from this matter. As you likely know, Mr. Bursch previously represented your agency in *Dumont v. Lyon*, No. 2:17-cv-13080 (E.D. Mich.). Because of his involvement in that case, ADF has timely screened Mr. Bursch from any participation in ADF's representation of Catholic Charities and will ensure that he is not apportioned any fee arising from that representation.

More specifically, ADF's decision to screen Mr. Bursch from its representation of Catholic Charities occurred at the very beginning of the representation, and Mr. Bursch has acknowledged his obligation not to communicate with any other ADF attorneys about the subject matter of the representation. Further, ADF attorneys working on the matter have been informed about the screening and instructed not to communicate with Mr. Bursch about ADF's representation of Catholic Charities. As a result of the screening, any material confidential information obtained by Mr. Bursch during his representation of your agency (assuming any) has not been, nor will be, disclosed or used in violation of any applicable ethics rule or rule of professional conduct.

If you have any questions or concerns about the above or would like to discuss in more detail, please do not hesitate to have your attorney contact me at (480) 444-0020 or jgalus@ADFlegal.org.

Sincerely,

Jeremiah Galus
Legal Counsel

cc: Dana Nessel, Michigan AG

15100 N. 90th Street, Scottsdale, AZ 85260 Phone: 480.444.0020 Fax: 480.444.0028 ADFlegal.org

EXHIBIT D

UNITED STATES DISTRICT COURT
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.

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

Hon. Paul D. Borman

Mag. Elizabeth A. Stafford

GROUP OF 53 MICHIGAN STATE LEGISLATORS' MOTION FOR LEAVE TO FILE AMICUS BRIEF

Proposed Amicus Curiae are a group of 53 Michigan State Legislators ("State Legislators") who either sponsored, voted in favor of, or now support 2015 P.A. 53 ("P.A. 53").[1]

District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *NGV Gaming, Ltd.*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quoting *Cobell v. Norton*, 246 F. Supp. 2d

[1] Amici include 52 current legislators and 1 former state legislator.

59, 62 (D.D.C. 2003)); *see also United States v. Alkaabi*, 223 F. Supp. 2d 583, 592 (D.N.J. 2002) (the role of an amicus curiae is as a "friend of the court" who can "assist in a case of general public interest, to supplement the efforts of counsel, and to draw the court's attention to law that might otherwise escape consideration.").

Applied here, State Legislators have a unique interest in this case and a unique perspective as those who passed or supported the law being challenged in this case. This perspective will be helpful to this Court in its resolution of the matter.

Pursuant to Local Rule 7.1(a), State Legislators sought the concurrence of counsel for all parties. Defendants Nick Lyon and Herman McCall have no objection to the filing of the proposed amicus brief attached as Exhibit A. Plaintiffs and Defendants-Intervenors St. Vincent Catholic Charities, Melissa and Chad Buck, and Shamber Flore take no position. Therefore, State Legislators respectfully submit this motion to the Court for its consideration and request that this Court grant leave to file the proposed amicus brief accompanying this motion.

Respectfully submitted this 30th day of January, 2018.

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**Pending admission*

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, I electronically filed the foregoing document with the Clerk of Court using the ECF system which will provide electronic copies to counsel of record.

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EXHIBIT A

UNITED STATES DISTRICT COURT
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.

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

Hon. Paul D. Borman

Mag. Elizabeth A. Stafford

AMICUS CURIAE BRIEF OF 53 MICHIGAN STATE LEGISLATORS IN SUPPORT OF DEFENDANTS' AND INTERVENORS' MOTIONS TO DISMISS

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CONCISE STATEMENT OF ISSUES PRESENTED[1]

1. Is mere disagreement with the law sufficient to confer standing for Plaintiffs to challenge a statute under the Equal Protection Clause or the Establishment Clause?

2. Do Plaintiffs have standing to challenge a statute under the Equal Protection Clause or Establishment Clause if Plaintiffs allege the statute inflicts only stigmatic harm?

3. Do Plaintiffs have standing when the alleged injuries were caused by their own actions?

4. Do allegations of a past injury establish standing to obtain declaratory and injunctive relief?

5. Have Plaintiffs stated a claim under the Establishment Clause or Equal Protection Clause when they do not challenge state action?

6. Does Plaintiffs' requested relief create an avoidable conflict with the Michigan Free Exercise Clause, which provides more protection than the Federal Free Exercise Clause?

[1] State Legislators incorporate by reference the first, second and fourth issues presented by Defendants as well as the third and fifth issues presented by the proposed Defendant-Intervenors.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Allen v. Wright, 468 U.S. 737 (1984); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Michigan v. Doran*, 439 U.S. 282 (1978).

INTEREST OF AMICUS CURIAE

Amici are a collection of 53 Michigan state legislators.[2] The amici have an interest in ensuring that 2015 P.A. 53 is interpreted properly. A full list of these legislators appears in Appendix 1 to this brief.

INTRODUCTION

"When it is necessary for a child in this state to be placed with an adoptive or foster family, placing the child in a safe, loving, and supportive home is a paramount goal of this state." Mich. Comp. Laws § 722.124e(1)(a). To achieve that goal, Michigan passed 2015 P.A. 53 which preserves the many child-placement agencies with which Michigan has worked with for decades and allows the religiously-affiliated ones to operate in accordance with their beliefs and constitutional rights. This legislation created a win-win. Michigan can place more children in adoption and foster homes; more child placement agencies can achieve their mission of serving children; more children receive the love and care they deserve.

But two years after P.A. 53 passed, Plaintiffs filed this lawsuit, not because P.A. 53 hinders them from adopting or fostering children—they can currently seek to do so—but because they object on Establishment and Equal Protections grounds to how some religious placing agencies select families for foster and adoption care. Federal courts, however, are not vehicles to vindicate ideological objections of

[2] Amici include 52 current legislators and 1 former state legislator.

concerned bystanders. As those who passed and support P.A. 53, Amici write to explain the purpose of this law and to urge this Court to dismiss this lawsuit for three reasons.

First, Plaintiffs have not alleged a case or controversy. Neither ideological disagreement with the law nor self-inflicted harm for a non-existent injury can confer Article III standing. Second, Plaintiffs' constitutional claims, which allege no state action, lack merit. Michigan's historical practice and P.A. 53's careful crafting comply with the Establishment Clause and avoid Establishment concerns by minimizing state interference with the internal affairs of faith-based organizations. P.A. 53's implementation also satisfies the rational basis review required for equal protection. Third, Plaintiffs' requested relief would violate the free exercise rights of children and child-placing agencies in Michigan. This Court should avoid a ruling that creates unnecessary constitutional conflict. The better course is to dismiss this lawsuit and to continue to allow Michigan's broad array of child-placement agencies to care for the greatest number of children possible.

ARGUMENT

I. P.A. 53 seeks to maximize the welfare of children.

A. Faith-based agencies have played key roles in the foster and adoption area.

Well before the Michigan Department of Health and Human Services ("DHHS") was formed in 1965, faith-based organizations were providing numerous

services to the state's poor and vulnerable.[3] These organizations were the primary providers of child placement services in Michigan. *Id.* For decades, DHHS has sought their assistance to tackle many diverse needs. *See* Mich. Comp. Laws § 722.124e(1)(f) ("Faith-based and non-faith-based child placing agencies have a long and distinguished history of providing adoption and foster care services in this state.").

Today, Michigan has been recognized as a leader for its innovative approach to adoption and its 80% adoption-placement rate.[4] According to DHHS, "[t]he success of Michigan's program can be attributed to the unique partnership between public and private agencies responsible for adoption planning and placement of foster children who become permanent wards."[5]

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[3] *Hearing on H.B. 4188-4190 Before the H. Comm. on Families, Children, and Seniors*, 2015 Sess. (Mich. 02/18/15) [hereinafter *02/18/15 Hearing*] (statement of Tom Hickson) (http://www.house.mi.gov/SharedVideo/PlayVideoArchive.html?video=FAMI-021815.mp4 at 13:10-14:02); *02/18/15 Hearing* at 1:12:28-1:12:38 (testimony of William Blacquiere); Bethany Christian Services, *Our History*, https://www.bethany.org/about-us/our-history (last visited Jan. 15, 2018).

[4] *Hearing on H.B. 4188-4190 Before the House*, 2015 Sess. (Mich. 03/18/15) [hereinafter *03/18/15 Session*] (statement of Rep. Andrea LaFontaine) (http://www.house.mi.gov/SharedVideo/PlayVideoArchive.html?video=Session-031815.mp4 at 1:05:36-1:05:49).

[5] *Hearing on H.B. 4188-4190 Before the Sen. Comm. on Families, Children, and Seniors*, 2015 Sess. (Mich. 04/22/15) [hereinafter *04/22/15 Hearing*] (testimony of Rep. Eric Leutheuser) (Families-Seniors-HumanServ-04-22-2015_0303PM_42_38.mp3 at 1:58-2:09).

These successful public-private partnerships are not just limited to Michigan. Many faith-based organizations have worked with state agencies across the country to serve children's best interests. Unfortunately, a lack of religious tolerance and respect for diversity has led some of these associations to come to an abrupt end.

B. Faith-based agencies were forced to close in other states.

In 2006, Catholic Charities of Boston, which had been engaged in the ministry of adoption for well over a century, faced a difficult choice: violate its conscience, or close its doors. Massachusetts interpreted its antidiscrimination law to require Catholic Charities to place children with same-sex couples. Catholic Charities asked the state legislature to change its interpretation, so that it could continue to practice a tenant of its faith; but Massachusetts refused.[6] The result was a loss for the children of Boston. Catholic Charities closed its adoption services, leaving a huge gap in the fostering and caring of disadvantaged children in the area. *Id.* ("It's a shame because it is certainly going to mean that fewer children from foster care are going to find permanent homes. . . . This is a tragedy for kids.").[7]

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[6] Maggie Gallagher, *Banned in Boston*, THE WEEKLY STANDARD (May 15, 2006), http://www.weeklystandard.com/banned-in-boston/article/13329.

[7] *See also* Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL'Y 297, 298 (2008) (noting that Catholic Charities was responsible for the placement of one-third of all Boston area private adoptions).

A few months later, the Archdiocese of San Francisco faced a similar dilemma.[8] To avoid violating the tenants of the Catholic faith, Catholic Charities was forced to withdraw from direct placement in San Francisco and was instead limited to helping identify children for adoption. *Id*.

In 2010, the Archdiocese of Washington, D.C., which had provided support to children and families for over eighty years through a partnership with the District of Columbia, was forced to drop its foster care and public-adoption program.[9] This was due to D.C.'s passage of a law that officials interpreted to require providers of these services to place children with same-sex couples. *Id.*

In Illinois, faith-based organizations were also shut out. The state did not renew the contracts of religious agencies that refused to sacrifice their religious beliefs, forcing the transfer of hundreds of children and families to other child welfare agencies.[10] Evangelical Child and Family Agency's contract with the Illinois Department of Children and Family Services had been renewed annually for over

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[8] Cicero A. Estrella, *Catholic Charities scaling back its role in adoption services*, SFGATE (August 3, 2006), http://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Catholic-Charities-scaling-back-2515267.php.

[9] Julia Duin, *Catholics end D.C. foster-care program*, THE WASHINGTON TIMES (February 18, 2010), https://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/.

[10] Manya A. Brachear, *Last faith agency opposed to civil union adoptions out of foster care*, CHICAGO TRIBUNE (November 16, 2011), http://articles.chicagotribune.com/2011-11-16/news/ct-met-evangelical-foster-care-gone-20111116_1_ken-withrow-faith-agency-catholic-charities-agencies.

four decades until it was required to violate their beliefs and place prospective foster care with parents in civil unions. *Id.* Catholic Charities' affiliates in Illinois were likewise shutdown, despite also serving in the state's social service network for over forty years.[11] "In the name of tolerance, we're not being tolerated," said Bishop Thomas J. Paprocki of the Diocese of Springfield. *Id.*

The departure of these agencies from providing foster care and adoption services in each of these states left serious holes in the social services landscape. "[F]amilies were disrupted, already transient children were again shuffled around, important services were lost, and state child welfare agencies took on more than they could handle." Exhibit 1A to Reply in Supp. of Proposed-Intervenors' Mot. to Intervene, ECF No. 24-1. It also left these jurisdictions more homogenous, devoid of diversity and private choices that had previously existed for decades.

C. Michigan children flourish with a diversity of options.

In Michigan, there are approximately 13,000 children who are in need of foster care and/or adoptive services.[12] Those children come from a myriad of diverse

[11] Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, NEW YORK TIMES (December 28, 2011), http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html.

[12] Mich. Dept. of Health & Hum. Serv., *Foster Care*, http://www.michigan.gov/mdhhs/0,5885,7-339-73971_7117---,00.html (last visited January 15, 2018).

backgrounds.[13] To fully accommodate these large numbers, a broad spectrum of options is needed.

A variety of adoption services better serves a diverse public than does a homogenous system. That was certainly the case in Boston, San Francisco, the District of Columbia, and Illinois, and for Catholic Charities and the other faith-based institutions before they were forced to shut down their vital work in those respective jurisdictions.

In 2015, Michigan State Legislators considered whether to provide more diverse private options or standardize the private options available to help adopted children and families.[14] Recognizing that both "[f]aith-based and non-faith-based child placing agencies have a long and distinguished history of providing adoption and foster care services in [Michigan]," and that "adoption and foster care licensees [] represent a broad spectrum of organizations and groups," the State Legislature determined that:

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[13] The Kids Count Data Center: A Project of The Anne E. Casey Foundation, *Children in foster care by race and Hispanic origin* (Feb. 2017) http://datacenter.kidscount.org/data/tables/ 6246-children-in-foster-care-by-race-and-hispanic-origin#detailed/2/24/false/573/2638,2601,2600,2598,2603,2597, 2602, 1353/12992,12993.

[14] *02/18/15 Hearing* at 1:13:38-1:14:47 (testimony of William Blacquiere); *02/18/15 Hearing* at 1:01:44-1:02:02 (statement of Rep. Anthony Forlini); *04/22/15 Hearing* at 1:07:03-1:07:14 (testimony of Vicki Schultz) ("Without these bills, agencies such as ours may be asked to perform services which would go against our belief system, ultimately forcing us out of the foster care and adoption services.").

> Having as many possible qualified adoption and foster parent agencies in this state is a substantial benefit to the children of this state who are in need of these placement services and to all of the citizens of this state because the more qualified agencies taking part in this process, the greater the likelihood that permanent child placement can be achieved.

Mich. Comp. Laws § 722.124e(1)(c). Catholic Charities and Bethany Christian Services, the two institutions mentioned in Plaintiffs' complaint, together facilitate 25-30% of Michigan's foster care adoptions.[15] While there are many other faith-based agencies in the state, the loss of these two alone would greatly lessen the number and diversity of adoption and foster-care options available.

D. After considering legislation passed in other jurisdictions, Michigan enacted its own law.

Michigan was not the first state to confront this issue. In fact, before passage of P.A. 53, North Dakota and Virginia enacted similar legislation. N.D. CENT. CODE §§ 50-12-03, 50-12-07.1 (2003); VA. CODE ANN. § 63.2-1709.3 (2012). Both of their laws accommodated a broad array of private child-placement agencies, allowing them to serve children without violating their religious beliefs about family or marriage. N.D. CENT. CODE §§ 50-12-03, 50-12-07.1 (2003); VA. CODE ANN. § 63.2-1709.3 (2012). Utilizing this successful legislation as a guide, Michigan determined to pass its own law that would codify its existing practices and allow as many private

[15] *New Michigan law lets agencies cite faith in handling adoptions*, THE COLUMBUS DISPATCH (June 12, 2015), http://www.dispatch.com/article/20150612/NEWS/306129600.

agencies as possible to remain open, thereby creating an environment where the largest number of children could find their "forever home."[16]

On June 11, 2015, Governor Rick Snyder signed P.A. 53 into law, which was a combination of three House Bills (Nos. 4188, 4189 and 4190) sponsored by lawmakers from both parties during the 2015 Legislative Session. Mich. Comp. Laws §§ 722.124e and 722.124f. Section 124e of the law states that a child placing agency "shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency," and the state or local government may not take "adverse action" against the child placing agency for doing so. Mich. Comp. Laws §§ 722.124e(2), (3). Importantly, "'[s]ervices' includes any service that a child placing agency provides, *except for foster care case management and adoption services provided under a contract with the department*." Mich. Comp. Laws § 722.124e(7)(b) (emphasis added).

The statute further provides that if a child placing agency declines to provide services, the child placing agency shall promptly refer the applicant to another agency that is willing to provide the declined services or promptly refer the applicant to the DHHS's website that identifies other licensed agencies. Mich. Comp. Laws

[16] *03/18/15 Hearing* at 1:05:54-1:06:22 (testimony of Rep. Andrea LaFontaine).

§ 722.124e(4). In addition, "[i]f the department makes a referral to a child placing agency for foster care case management or adoption services under a contract with a child placing agency, the child placing agency may decide not to accept the referral if the services would conflict with the child placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency." Mich. Comp. Laws § 722.124f(1).

II. The Complaint should be dismissed for lack of standing.

To bring a federal lawsuit under Article III, Plaintiffs must establish standing. *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015). That means Plaintiffs must show (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is "traceable to the challenged action of the defendant"; and (3) the injury will be "redressed by a favorable decision." *Id.* (quotation marks omitted). Plaintiffs cannot satisfy any of these requirements.

A. No injury in fact.

None of the Plaintiffs allege any legal injury. Although Plaintiffs Dumonts and Busk-Suttons say they are "ready, willing, and able to provide a 'forever family' to children in the foster care system" (Compl. ¶ 5, ECF No. 1), they have no right to work with a specific child placing agency. And P.A. 53 does not stop them from fostering or adopting; at any time, they can work with numerous other agencies to

realize their goal. *See* Def.-Intervenors' Mot. to Dismiss 4-5, ECF No. 19. Likewise, P.A. 53 does not stop Plaintiff Ludolph from fostering and adopting either. Nor does the Complaint allege otherwise. Rather, it alleges that some private placing agencies declined to work with some of the Plaintiffs (Compl. ¶¶ 61, 63, 68, ECF No. 1) and that the Plaintiffs as taxpayers have "strong[] oppos[ition]" to P.A. 53. (Compl. ¶ 73, ECF No. 1).

But those are not viable legal injuries. There is no state action in what religious private placement agencies do. And though Plaintiffs may be deeply offended by what these agencies do and believe, the state did not create that purported harm. Certainly, P.A. 53 does not require the private placement agencies to act in a way Plaintiffs find objectionable. At most, Plaintiffs object to the fact that P.A. 53 exists and DHHS allows these agencies to place children the way they always have.

But that objection is an abstract one—mere disagreement with the law—shared by anyone who shares Plaintiffs' ideology. And mere disagreement does not confer standing. The Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984) (concluding mere disagreement insufficient for equal protection claim); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982) (same for Establishment Clause claim).

Nor can Plaintiffs save their lawsuit by re-characterizing their injury as a stigmatic harm created by P.A. 53. In the Equal Protection context, stigmatic harm only confers standing on those "'who are personally denied equal treatment'" by the government's "challenged discriminatory conduct[.]" *Allen*, 468 U.S. 737, 755 (1984). And P.A. 53 does not cause any differential treatment; it allows a broad array of private parties to place children in homes the children so desperately want and need. *See Moore v. Bryant*, 853 F.3d 245, 249 (5th Cir. 2017) ("Accordingly, to plead stigmatic-injury standing [under equal protection], Plaintiff must plead that he was personally subjected to discriminatory treatment."). The same holds true in the Establishment Clause context. *See Barber v. Bryant*, 860 F.3d 345, 353 (5th Cir. 2017) (rejecting stigmatic harm as basis for Establishment Clause claim because "[w]here a statute or government policy is at issue, the policy must have some concrete applicability to the plaintiff.").

Even more troublesome, some Plaintiffs caused their own alleged injury. For example, Plaintiffs Dumonts and Busk-Suttons went out of their way to seek out religiously-affiliated child placement agencies in the hope of being declined. Def.-Intervenors' Mot. to Dismiss 4-6, ECF No. 19. But self-inflicted injury cannot satisfy the injury-in-fact requirement. *See, e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves…."); *ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 266 (3d Cir.

2001) (rejecting standing when plaintiffs visited display "in order to describe the display for this litigation").

And just as problematic, the Dumonts and Busk-Suttons' *past* decision to use a religious placement agency cannot establish an injury justifying the only relief they seek—prospective relief to prevent *future* harm. *See* Compl., Prayer for Relief, ECF No. 1. "Past exposure to [even] illegal conduct does not in itself show a present case or controversy regarding injunctive relief…." *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974). Because it is completely speculative whether (or when) Plaintiffs will seek to adopt or foster in the future or whether they will intentionally use or coincidentally stumble on a religious placement agency that cannot place children with same-sex families, Plaintiffs lack standing for prospective relief. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (concluding that "some day" intentions insufficient to establish imminent injury).

The only future "injury" Plaintiffs can establish is their objection to the existence of P.A. 53. For this reason, Plaintiffs must invoke taxpayer standing as their primary basis for standing. (Compl. ¶ 7, ECF No. 1). But taxpayers generally do not have standing to challenge a law. *See Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 599 (2007) (summarizing taxpayer standing). As a rare exception, taxpayer standing exists in the Establishment Clause context only when "'tax revenues are expended on the disputed practice.'" *Henderson v. Stalder*,

287 F.3d 374, 380-81 (5th Cir. 2002). And even then, tax revenues must be specifically approved by the legislature and not "discretionary Executive Branch expenditures." *Hein*, 551 U.S. at 608; *see also Sherman v. Illinois*, 682 F.3d 643, 646 (7th Cir. 2012) (applying this requirement to state taxpayer standing).

But Plaintiffs' lawsuit fails on both counts. It does not identify any specific *legislative* provision authorizing funds spent on any practice they object to. At most, DHHS—not the legislature—chooses which private placement agencies to allocate funds to and decides whether that allocation complies with P.A. 53. Mich. Comp. Laws § 722.124e. And DHHS does so in a religiously neutral way, to both religious and non-religious agencies. That type of discretionary *executive* spending unrelated to the objected to conduct is not subject to state-taxpayer suits. *See, e.g.*, *Freedom From Religion Found., Inc. v. Nicholson*, 536 F.3d 730, 741 (7th Cir. 2008) (finding no taxpayer standing when Congress "mandated that the VHA provide medical care to veterans and, at least in a broad sense, it has contemplated that the VA generally will provide chaplain services … [because] no specific congressional action mandates, requires or even intimates that chaplains be used in any particular way to accomplish this goal.") (citation omitted).

B. No causal connection.

Just as Plaintiffs cannot prove injury in fact, they cannot prove any causal connection between their alleged injury and the complained of conduct. *See Lujan*,

504 U.S. at 560-61 (requiring injury be "fairly . . . trace[able] to the challenged action of the defendant.").

In this instance, passage of P.A. 53 and its implementation did nothing to alter the status quo and instead merely codified existing practice.[17] Further, the Dumonts and Busk-Suttons complain about the actions of two child placement agencies, neither of which was sued by Plaintiffs. And Plaintiff Ludolph never alleges that she interacted with any Defendant. Therefore, because the links of causation are not "fairly traceable" to Defendants, and include "the independent action of [at least one] third party not before the court," all of Plaintiffs' claims must be dismissed for lack of causation. *Allen*, 468 U.S. at 739, 757 (finding lack of causation because chain of causation "involve[d] numerous third parties"). *Id*. at 759. *National Family Planning and Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("[E]ven if self-inflicted harm qualified as an injury it would not be fairly traceable to the defendant's challenged conduct.").

C. No redressability.

The last prong, redressability, requires "a likelihood that the requested relief will redress the alleged injury." *Nader v. Blackwell*, 545 F.3d 459, 471 (6th Cir. 2008) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998)).

[17] *03/18/15 Hearing* at 1:05:54-1:06:22 (statement of Rep. Andrea LaFontaine).

Plaintiffs request that Defendants be enjoined from contracting with child placement agencies that "exclude same-sex couples from consideration as foster or adoptive parents …" (Compl. ¶ 1 and Prayer for Relief, ECF No. 1). But this requested relief will not satisfy Plaintiffs' alleged injury.

This relief will certainly not permit the Plaintiffs to foster or adopt children in the future. They can do that now. At most, the relief will alleviate Plaintiffs' legal objection. But that will in turn force some religious agencies to stop foster and adoption placement, leaving many Michigan families and children out in the cold. *See 04/22/15 Hearing* at 1:07:03-1:07:14 (testimony of Vicki Schultz) ("Without these bills, agencies such as ours may be asked to perform services which would go against our belief system, ultimately forcing us out of the foster care and adoption services."). Producing that result redresses no legal harm; it inflicts a practical harm on others.

III. The Complaint should be dismissed for failure to state an Establishment Clause or Equal Protection claim.

A. Plaintiffs do not challenge state action.

Establishment Clause and Equal Protection claims both require state action. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). To discern state action, the Sixth Circuit uses the public-function test, the state-compulsion test, and the symbiotic-relationship or nexus test. *Collyer v. Darling*, 98 F.3d 211, 232 (6th Cir. 1996).

But under no test does mere regulation of a private party convert that private party into a state actor. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (holding private school's personnel decisions not attributable to the state, despite "extensive regulation of the school generally"); *Adams v. Vandemark*, 855 F.2d 312, 316-17 (6th Cir. 1988) (holding private not-for-profit corporation was not a state actor, even though subject to state and federal regulation). Nor does public funding or private use of public property establish state action. *See, e.g.*, *Rendell-Baker*, 457 U.S. at 840 (finding private school's personnel decisions not attributable to the state, despite the fact that "virtually all of the school's income was derived from government funding"); *Wolotsky v. Huhn*, 960 F.2d 1331, 1336 (6th Cir. 1992) (finding private not-for-profit corporation which derived "a significant portion of its funding from the government" and which leased one of its facilities from the government at nominal cost was not a state actor); *Crowder v. Conlan*, 740 F.2d 447, 450 (6th Cir. 1984) (holding the state was not responsible for private hospital's personnel decisions even if the hospital derived "a considerable percentage of its revenues from governmental funding" and the county was "owner and lessor of the hospital's physical plant"). *Id*. at 453.

Applied in this instance, the Plaintiffs do not object to any decision attributable to the state. While potential adoption and foster families "must submit an application for a foster care license or to be certified to adopt" by the state (Compl.

¶ 33, ECF No. 1), child placement agencies make their own independent assessment whether they will place a child with a particular family *before* the state evaluates the family for fostering or adoption.[18] Plaintiffs merely object to this independent assessment made by certain religious placing agencies. (Compl. ¶¶ 61-63, ECF No. 1). The state simply has no involvement in that prior assessment and cannot be blamed for it.

B. P.A. 53 complies with the Establishment Clause because it promotes the secular purpose of protecting children.

In *Marsh v. Chambers*, *Van Orden v. Perry*, and *Town of Greece v. Galloway*, the Supreme Court evaluated Establishment Clause claims by asking whether the challenged action was consistent with the country's historical practices and understandings. *See Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 602 (6th Cir. 2015) (Batchelder, J., concurring in part) (surveying these cases). In contexts different from this case, the Sixth Circuit has continued to apply the *Lemon*/endorsement test rather than the more historical approach. *Id*. at 588 (applying *Lemon* in school context). No matter which approach the Sixth Circuit would use in the adoption context, P.A. 53 complies with the Establishment Clause.

[18] *See 02/18/15 Hearing* at 30:07-30:26 (testimony of Jose Carrera) ("What we do when a family comes to us to become a foster parent, an adoptive parent, we do an assessment and make a recommendation to the state. The state is the one that approves or denies their licensure. So all we're doing is an assessment at that point … for the parents …").

First, P.A. 53 fits the historical practices of our country. As Defendant-Intervenors note, private, mostly religious, organizations developed the adoption and foster care system, and the state did not become involved until somewhat recently. Def.-Intervenors' Mot. to Dismiss 7-9, ECF No. 19.[19] Evaluating P.A. 53 and Defendants' actions against this historical backdrop, there is no unconstitutional establishment of religion. Just as in legislative prayer, religious influences have traditionally served a role in the adoption context. The Establishment Clause should and correctly does accommodate this historical reality.

Next, P.A. 53 satisfies the *Lemon*/endorsement test which analyzes whether the challenged action has a secular purpose, whether it conveys a message endorsing religion to the objective observer, and whether it causes an excessive entanglement with religion. *See Jefferson Cty.*, 788 F.3d at 587 (summarizing this test). As for secular purpose, P.A. 53 achieves the unquestionable secular purpose of "having as many possible qualified adoption and foster parent agencies in this state." Mich. Comp. Laws §§ 722.124e(1)(a)(c)-(e). DHHS's interpretation of the law also protects the free exercise rights of private child placing agencies and families. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 n.2 (1989) (plurality opinion) (noting

[19] *See also 02/18/15 Hearing* at 13:10-13:48 (testimony of Tom Hickson) (noting that "[f]or over 100 years, the Catholic Church has supported charity agencies operating in Michigan to provide a multitude of services to the poor and vulnerable… Historically, the church provided this service through its many agencies since well before the state ever had any involvement in child placement.").

that a state may reasonably conclude "that religious groups generally contribute to the cultural and moral improvement of the community . . . and enhance a desirable pluralism of viewpoint and enterprise."). There is no reason to doubt the authenticity of these secular purposes. *See ACLU v. Grayson Cty.*, 591 F.3d 837, 853 (6th Cir. 2010) (noting that courts must show "deference to the government's stated reasons" in Establishment Clause context).

As for endorsement, the reasonable person would see P.A. 53 and its implementation for what they are: good faith efforts to maximize the number of children in foster and adoption care. In this context, the reasonable person would know that Michigan neutrally allows both private religious and non-religious child placing agencies to work with families of all stripes. Allowing religious groups to live out their faith in the adoption context does not endorse religion; it avoids burdening religion to help place vulnerable children in a loving home. The system as a whole works to benefit everyone, in a religious neutral way.

Finally, as for entanglement, P.A. 53 and its implementation avoid excessive entanglement by ensuring the state does not referee the internal decisions of religious agencies to approve or refer a particular applicant. By taking a more hands-off approach, P.A. 53 lets religious organizations be religious yet still serve the public good. To be sure, Michigan cannot completely take a hands-off approach in the adoption context. The state must monitor families to ensure they are serving the best

interest of children. But that does not require ongoing, excessive monitoring of agencies. And mere "interaction" or "involvement" between the state and a religious group does not create excessive entanglement. *Agostini v. Felton*, 521 U.S. 203, 233 (1997); *see also* Joseph R. Ganahl, *Fostering Free Exercise*, 88 NOTRE DAME L. REV. 457, 467 (2012) (concluding that statutes that allow religious organizations to place families comply with Constitution).

Apart from mere interaction, Plaintiffs can only speculate about excessive entanglement. Such speculation is not enough. *See Wilder v. Bernstein*, 848 F.2d 1338, 1348 (2d Cir. 1988) ("In the context of child care, however, where the state is obliged to act one way or the other to meet religious needs, it is entirely appropriate to accept some risks and assess entanglement primarily on the basis of what occurs in fact, not what is apprehended to occur.").[20]

C. P.A. 53 complies with the Equal Protection Clause because it satisfies rational basis review.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). But not every government distinction triggers strict

[20] Even in the heated abortion context, the government accommodates healthcare providers who have religious objections to performing abortions. *See* Robin F. Wilson, *A Matter of Conviction: Moral Clashes over Same-Sex Adoption*, 22 BYU J. PUB. L. 475, 484-85 (2008) (identifying these accommodations including the Church Amendment, 42 U.S.C. § 300a-7 et seq). Just as courts have upheld these accommodations, this court should do the same here. *Id*.

scrutiny. Only those that adversely impact "a suspect class" or invade "a fundamental right" do; all other classifications receive rational basis review. *Mt. Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 406 (6th Cir. 1999).

Here, Plaintiffs cannot identify how P.A. 53 implicates a fundamental right or any suspect classification. That alone forces rational basis review. Even then, Plaintiffs cannot pinpoint any unequal treatment by the state. Michigan treats every potential foster family alike, according to the same neutral criteria. Families can adopt or foster children regardless of their sexual orientation. At most, Plaintiffs object to DHHS accommodating religious placement agencies in a way that does not affect Plaintiffs. That hardly constitutes unequal treatment of Plaintiffs.

Regardless, Michigan's actions satisfy rational basis review, which is satisfied "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *E. Brooks Books, Inc. v. Shelby Cty.*, 588 F.3d 360, 364 (6th Cir. 2009) (citation omitted). And that holds true "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Id*.

P.A. 53 and its implementation satisfy this very low bar because having a "broad spectrum of organizations and groups, some of which are faith based and some of which are not faith based," increases the likelihood that as many Michigan children as possible will find their "forever home." Mich. Comp. Laws §

722.124e(1)(d). Moreover, Michigan has an interest in not violating the free exercise rights of fostered and adopted children in the custody of the state or of the child placement agencies themselves. Mich. Comp. Laws § 722.124e(1)(e).

D. This Court should avoid a ruling that clashes with the federal or state Free Exercise Clauses.

Setting aside that P.A. 53 creates no constitutional problem, this Court should dismiss Plaintiffs' lawsuit to avoid creating a constitutional conflict—violating others free exercise rights. *See Michigan v. Doran*, 439 U.S. 282, 294 n.5 (1978) (noting that "when a potential conflict between the Extradition Clause and some other constitutional provision has been recognized, this Court long ago suggested that the Clause be interpreted so as to avoid the conflict.").

In terms of federal free exercise rights, Defendant-Intervenors discuss how Plaintiffs' requested relief would create First Amendment concerns, including the fact that faith-based agencies may not be excluded because of their religious identity. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017) ("[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified … is odious to our Constitution all the same, and cannot stand."); Def.-Intervenors' Mot. to Dismiss 14-24, ECF No. 19. Amicus would add that Plaintiffs' requested relief would also likely contradict the Michigan Free Exercise Clause, which provides more protection than the federal Free Exercise Clause. *See Country Mill Farms, LLC v. City of E. Lansing*, No. 1:17-CV-487, 2017 WL

5514818, at *16 (W.D. Mich. Nov. 16, 2017) (concluding that Michigan Free Exercise Clause requires burdens on religious beliefs to satisfy "the compelling state interest test").

Of course, any federal constitutional requirement would trump a state constitutional provision. But federalism and constitutional avoidance concerns favor interpreting the federal Establishment Clause in a way that avoids *unnecessary* conflict with the Michigan constitution. *Cf. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (concluding in preemption context that Court is reluctant to adopt interpretation overriding state law). This Court should likewise avoid the unnecessary and artificial conflict Plaintiffs try to create between the Establishment Clause and the free exercise rights of Michigan citizens.

CONCLUSION

When it comes to adoption and fostering, children should be the top priority. Because P.A. 53 places children first and tries to maximize their chance to receive the love and care they deserve, Amici respectfully ask this Court to dismiss Plaintiffs' lawsuit against this common-sense legislation.

Respectfully submitted this 30th day of January, 2018.

/s/ Jeremy D. Tedesco

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**Pending admission*

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, I electronically filed the foregoing document with the Clerk of Court using the ECF system which will provide electronic copies to counsel of record.

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ATTACHMENT 1

ATTACHMENT 1

COMPLETE LIST OF AMICI CURIAE

A. Michigan State Senators

Darwin Booher
Jack Brandenburg
Tom Casperson
Patrick Colbeck
Judy Emmons
Ken Horn
Peter MacGregor
Arlan Meekhof
Mike Nofs
Phil Pavlov
John Proos
David Robertson
Tonya Schuitmaker

B. Michigan State Representatives

Julie Alexander
Tom Barrett
Joseph Bellino
John Bizon
Julie Calley
Ed Canfield
Triston Cole
Laura Cox
Kathy Crawford
Diana Farrington
Ben Frederick
Gary Glenn
Joseph Graves
Shane Hernandez
Holly Hughes
Pamela Hornberger
Gary Howell
Larry Inman
Steven Johnson
Bronna Kahle
Tim Kelly
Kenneth Kurtz*
Dan Lauwers
Beau LaFave
Eric Leutheuser
Peter Lucido
Steve Marino
Aaron Miller
Jeff Noble
John Reilly
Daire Rendon
Jim Runestad
Jason Sheppard
Jim Tedder
Lana Theis
Curt Vanderwall
Hank Vaupel
Rob Verheulen
Roger Victory
Michael Webber

**Former Representative*

EXHIBIT E

No. 18-2574

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SHARONELL FULTON, CECELIA PAUL, TONI LYNN SIMMS-BUSCH, AND CATHOLIC SOCIAL SERVICES,

Plaintiffs-Appellants,

v.

CITY OF PHILADELPHIA, PHILADELPHIA DEPARTMENT OF HUMAN RESOURCES, AND PHILADELPHIA COMMISSION ON HUMAN RELATIONS,

Defendants-Appellees,

and

PHILADELPHIA FAMILY PRIDE and SUPPORT CENTER FOR CHILD ADVOCATES,

Intervenor Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Honorable Petrese B. Tucker
Case No. 2-18-cv-02075

BRIEF FOR ALLIANCE DEFENDING FREEDOM, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FAMILY RESEARCH COUNCIL, AND FOCUS ON THE FAMILY AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici* certify that (1) *amici* do not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amici*.

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici Alliance Defending Freedom, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, Family Research Council, and Focus on the Family are non-profit organizations that work with foster-care and adoption-service providers, families, birth moms, and children to ensure the health, safety, and welfare of our nation's children by maximizing the number of providers recruiting families to provide loving homes for children who need them. Amici The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics.

Amici have produced research and articles highlighting the effectiveness of faith-based child welfare providers at serving children who require foster care or adoption services as a result of maltreatment, abuse, and neglect. They have participated in educational seminars highlighting the stories of children, birth moms,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2) & (c)(5), amici state that all parties have consented to the filing of this brief, no counsel for any party authored this brief in whole or in part, and no person or entity other than amici and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

and families who lives have been forever changed by faith-based providers' compassionate care.

Amici are also dedicated to preserving our First Amendment freedoms, including the free exercise of religion. These freedoms are directly implicated by the City of Philadelphia's efforts to banish faith-based providers simply because they are unwilling to compromise their beliefs as they serve their communities.

INTRODUCTION

Religious organizations like Catholic Social Services are key players in the American child-welfare system and have been for centuries. They are highly successful in recruiting and training foster families and provide thousands of loving homes each year for vulnerable children. In a time of urgent need and scarce resources, the City of Philadelphia requires their help more now than ever. But the City has instead chosen to kick Catholic Social Services out of the foster-care system, punishing it and the children and families it serves because of the organization's religious beliefs about marriage.

No less than 29 providers in Philadelphia actively recruit and accredit same-sex couples. Yet the City now insists on implementing a religious test for participating in the foster-care system. *Cf.* U.S. Const. art. VI, cl. 3. Those who affirm same-sex unions may enter; those who do not are excluded. This action will not help a single child in need find a loving home. Instead, the City's actions will

remove effective providers from the system, depriving vulnerable children of foster and adoptive families.

Anyone who cares about children should be deeply concerned by the City's religious discrimination. It has placed the culture wars over children's best interests and, in so doing, violated the free-exercise protections that make a diverse and pluralistic society work. Driving high-performing religious charities out of the public sphere over disagreements about religious beliefs will cause real-world harm to children who have suffered too much already. This Court should rule that all people, including those motivated by faith, are welcome in American society and worthy of helping our country's most vulnerable children.

BACKGROUND

The Archdiocese of Philadelphia and Catholic Social Services have cared for vulnerable children in the City of Philadelphia for over 100 years. For at least the last 20 years, that arrangement has been formalized in a contract between Catholic Social Services and the City. Because the City controls all foster-care placements in Philadelphia, that contract is the only way that Catholic Social Services and affiliated families can help serve the more than 100 children in Catholic Social Services' care on any given day. About 40% of those foster children find a permanent home each year either by returning to their birth families or through foster-family adoption. The City of Philadelphia has recognized this record of

success, ranking Catholic Social Services highly. Catholic Social Services' effectiveness has also been attested to by social workers like Ms. Simms-Busch, a foster parent who formerly interacted with foster-care providers on a daily basis and saw Catholic Social Services' quality firsthand.

In March 2018, the longstanding partnership between the City and Catholic Social Services abruptly came to an end. The reason was not a lack of high standards or loving care. Nor was it a complaint. It was merely a newspaper article in the Philadelphia Inquirer that faulted Catholic Social Services and another religious nonprofit for referring same-sex couples to dozens of other foster-care providers in the city that are happy to endorse them. Julia Terruso, *Two foster agencies in Philly won't pace kids with LGBTQ people*, Philadelphia Inquirer (Mar. 13, 2018), https://bit.ly/2PJwNZs. What the article failed to note is that Philadelphia child-welfare providers make referrals to other providers all the time, for a great many reasons, including geographical convenience, capacity, and personality. The City has chosen to single out just one kind of referral—those made for religious reasons.

The Catholic Church believes marriage is defined as the union of one man and one woman, and that such family units are the best environment to raise a child. *See, e.g.*, United States Conference of Catholic Bishops, *Made For Each Other: A Catechetical and Educational Aid on Sexual Difference and Complementarity* (2010), available at https://bit.ly/2otlYOp. So the Philadelphia Inquirer story hardly

broke news. But it provided an opening for the City to further an aggressive political agenda by swiftly condemning and punishing Catholic Social Services for its beliefs. Two days after the article's publication, the City Council called for an investigation of religious foster-care providers. That very same day, news reports informed Catholic Social Services that the City of Philadelphia had banned it—without any discussion or notice—from receiving any new foster-care referrals. The City's mayor, Jim Kenney, added to this official pile-on by criticizing groups like Catholic Social Services in the press, while the Philadelphia Human Relations Commission began an official investigation of Catholic Social Services' policies and practices, though not a single same-sex couple had requested its assistance or filed a complaint.

Tellingly, this is not the first time that Mayor Kenney has tried to publicly tar and feather the Catholic Church. In a wide variety of anti-Catholic tweets, he has (1) said he "could care less about the people at the Archdiocese" of Philadelphia,[2] (2) declared that the Archdiocese "don't [sic] care about people" and that its time for Pope Francis "to kick some *ss here,"[3] (3) accused the Church of losing its

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[2] Jim Kenney (@JimFKenney), TWITTER (June 25, 2012, 6:44 AM), https://bit.ly/2N20s1m.

[3] Jim Kenney (@JimFKenney), TWITTER (Nov. 14, 2014, 6:06 AM), https://bit.ly/2oroxAC.

"moral authority,"[4] and (4) opined that the "sisters" (presumably Catholic Nuns) "will be the only ones who save the Catholic Church."[5] Mayor Kenney has left no doubt which side he will support when conflicts arise between supporters of same-sex marriage and people of faith who believe that marriage is between one man and one woman: "We're still working hard to keep our Number 1 rating for LGBT equality!"[6] And the Mayor has even disparaged Philadelphia Archbishop Chaput as "not Christian," as part of a Twitter war over the circumstances in which Jesus Christ would or would not deny receipt of Holy Communion to a communicant.[7]

Meanwhile, Catholic Social Services sought to do what it has always done—provide homes for as many needy children as possible. It never stands in the way of same-sex couples serving as foster or adoptive parents, nor does it have such extraordinary power. As a private religious non-profit, Catholic Social Services simply refers same-sex couples to dozens of other capable providers. For this "crime," the City banned anyone affiliated with Catholic Social Services from

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[4] Jim Kenney (@JimFKenney), TWITTER (July 29, 2013, 6:11 PM), https://bit.ly/2C64x0i.

[5] Jim Kenney (@JimFKenney), TWITTER (Apr. 23, 2012, 7:33 AM), https://bit.ly/2wEdAzE.

[6] Jim Kenney (@JimFKenney), TWITTER (Dec. 17, 2015, 3:27 PM), https://bit.ly/2C5nIr7.

[7] Jim Kenney (@JimFKenney), TWITTER (July 6, 2016, 2:47 PM), https://bit.ly/2opzqTv.

receiving new foster children, even when no other home-placements are available and a group-home placement is required. This general ban applies when a child already knows and trusts a particular foster parent, or when a foster family already cares for a child's siblings. But the City is prepared to split up families and sibling groups to push its political agenda. And because the City refuses to discuss any possible religious accommodation, it is now poised to remove *all* of the children in Philadelphia that Catholic Social Services has placed in loving foster homes.

Below, the district court refused to grant Catholic Social Services and its foster parents a preliminary injunction that would enable them to serve children in Philadelphia during a time of severe foster-parent shortage. The court accepted uncritically the City's novel interpretation of its longstanding contract with Catholic Social Services and ruled predominantly on that menial basis. What the court did not do is answer why the City would diminish its own foster-care system by excluding religious foster parents and child-welfare providers or offer any serious analysis of the First Amendment questions presented in this case.

ARGUMENT[8]

I. Religious families and nonprofits play an essential role in American life and are among the best the foster-care system has to offer.

People of faith do not like to sing their own praises. But it is impossible to

[8] Where online reports or articles lack pagination, the pinpoint citations in this brief are to the page on which text appears after the document was saved as a PDF.

appreciate the significance of what the City of Philadelphia has done without a basic understanding of the essential role that religious people and organizations play in the American social-safety net. When the government calls for foster-parents or other aid, it is religious communities that answer. Millions of believers volunteer their time and their money to improve their fellow citizens' lives. They are particularly dedicated to helping vulnerable children in times of crisis and serve both them and the foster-care and adoption system well. No rational basis exists for the City's decision to turn them away.

A. Religious charities like Catholic Social Services play an essential role in the American social-safety net.

In some countries, the government provides nearly all educational, health, and social services. Our nation chose a different path. Religious nonprofits make enormous contributions to the American healthcare, education, and social-services network and—in some places—serve as its main providers. Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 INTERDISC. J. OF RES. ON RELIGION Article 3 at 28 (2016), https://bit.ly/2dPJyR8. Americans generally prize faith-based providers because they galvanize religious volunteers, which reduces costs and provides recipients with a human touch that government and for-profit providers simply cannot match. Scott Shackford, *Is This Where Libertarians and the Gay Community Part Ways?*, Reason.com at 7 (July 1, 2015), https://bit.ly/2BQgsis; Melissa Buck, *Catholic*

adoption agencies: A private-public adoption system that works, The Hill at 2 (Mar. 6, 2018), https://bit.ly/2MOTkW0.

For centuries, religious organizations served as a cornerstone of the child-welfare system both here and abroad. Natalie Goodnow, *The Role of Faith-Based Agencies in Child Welfare*, The Heritage Foundation at 2 (May 22, 2018), https://herit.ag/2ojc56d. Rather than losing their efficiency and know-how, the American government chose to work hand-in-hand with religious nonprofits to provide a sizeable portion of children's social-safety net. Thomas C. Berg, *Symposium: Religious Liberty and the Free Society: Celebrating the 50th Anniversary of Dignitatis Humanae*, 91 Notre Dame L. Rev. 1341, 1353 (2016). Our nation benefits from the altruism and drive of millions of volunteers from roughly 345,000 religious congregations spread across the country's vast urban, suburban, and rural landscape. Grim & Grim, *supra*, at 28.

So there is nothing unusual about a religious nonprofit like Catholic Social Services providing foster care and adoption services in Philadelphia. In America, that is how things work. Over 1,000 private foster care and adoption providers are spread across the United States, and many of them are religious. Ryan Anderson and Sarah Torre, *Adoption, Foster Care, and Conscience Protection*, The Heritage Foundation at 4 (Jan. 15, 2014), https://herit.ag/2Lrh8dM. States and localities rely heavily on these faith-based providers to connect children with families, stretch

every public dollar, and supplement them with a variety of private aid. Goodnow, *supra*, at 2, 4.

In fact, at least 32 states have some recruiting effort specifically targeted to increase the number of religious adoptive or foster parents. Michael Howell-Moroney, *The Empirical Ties between Religious Motivation and Altruism in Foster Parents: Implications for Faith-Based Initiatives in Foster Care and Adoption*, Religions Vol. 5, Issue 3, 720, 721 (2014), https://bit.ly/2MC2NRn. Those efforts are significantly aided by strong working relationships between government and religious charities because people of faith want to work with providers that reflect their values and often would not serve as foster or adoptive parents without them. Monica Burke, *Philadelphia Sabotages Its Own Adoption and Foster-Care System*, The Heritage Foundation at 2 (Apr. 6, 2018), https://herit.ag/2wpHYgT; Kathryn Jean Lopez, *Foster Children in Philadelphia Deserve Better than Unnecessary Limbo as Religious-Liberty Dispute Lingers*, National Review at 4 (June 12, 2018), https://bit.ly/2LMdbkk, Anderson & Torre, *supra*, at 8.

B. The American foster system is in dire need, and people of faith have answered the call.

Approximately 437,500 children are in the American foster-care system today. Press Release, U.S. Dep't of Health and Human Services, Admin. for Children and Families, Number of children in foster care continues to increase (Nov. 30, 2017), https://bit.ly/2B07SN1. This national tragedy is partly fueled by the

opioid crisis. Goodnow, *supra*, at 3, 6. In 2015, for instance, more than half of the 16,000 Pennsylvania children in foster care were there because of a parent's or guardian's drug abuse. Burke, *supra*, at 3. Finding relatives to care for these displaced children is difficult because opioid abuse often runs in families. Goodnow, *supra*, at 6. Moreover, the power of drug addiction is strong, and children who enter into foster care for this reason often stay in the system longer and present more challenging issues. *Id.* at 14.

Foster parents today thus face a particularly difficult task. They are more likely than ever to care for children who are medically fragile, emotionally disturbed, or have special needs. Kathleen M. Kirby, *Foster Parent Demographics: A Research Note*, 24 J. OF SOCIOLOGY & SOC. WELFARE 135 (1997), https://bit.ly/2MSvtVr. One study showed that 75% of foster parents cared for physical-abused children, 66% cared for children who were sexually abused, and 61% had emotionally-disturbed children in their homes. *Id.* at 138. States and localities need all the help they can get finding compassionate and high-quality foster homes for thousands of traumatized kids. *Id.* at 7.

The City of Philadelphia recognized as much when it put out an urgent call for 300 new foster families right before the City suspended its relationship with Catholic Social Services. Burke, *supra*, at 2. Philadelphia had not orchestrated such a large-scale recruitment effort in a decade. Goodnow, *supra*, at 11. Yet the City

chose to stop making new placements with Catholic Social Services-affiliated families even though the struggle to recruit new foster families and maintain existing ones is perpetual and well known. Howell-Moroney, *supra*, at 721. This effort to single out Catholic Social Charities for punishment is truly remarkable because the City knows full well that recruitment and retention of foster families is crucial to helping vulnerable kids. Burke, *supra*, at 2. Foster families are a critical resource that is always in short supply. Howell-Moroney, *supra*, at 721. Yet the City made its precipitous decision without so much as a conversation with its long-time religious partner.

Harm to children is certain to result. Unsurprisingly, studies prove that many foster parents in the United States are religious. Jill Schreiber, *The Role of Religion in Foster Care*, Presentation at the N. Am. Ass'n of Christians in Social Work Convention at 10 (2010), https://bit.ly/2Mvkfqx. In fact, foster parents attend religious services more regularly than the general population and consider faith to be a key factor in successful fostering. *Id.* at 10-11. People of faith are more likely not only to consider becoming foster parents but also to go one step further and ultimately adopt a child in foster care. Burke, *supra*, at 2. And it is basic common sense that having more and diverse agencies in the recruiting mix will result in more families for children who need homes. Goodnow, *supra*, at 14.

C. Religious families and providers are highly dedicated to children's welfare and no reason exists for turning them away.

Faith-based nonprofits like Catholic Social Services mobilize religious families to serve as foster parents, and they do so in a particularly effective way. Anderson & Torre, *supra*, at 6. Countless families do not take even the first step towards fostering a child because they fear red tape, an inefficient bureaucracy, and outrageous intrusions into their daily lives. *Id.* at 3. Religious foster-care providers are particularly good at assuaging these concerns and providing emotional and spiritual support that government agencies simply cannot offer. *Id.* at 4. Some religious nonprofits even supplement the money that foster parents receive to help with costs associated with children's school events, clothing, and athletics that the government does not cover. Goodnow, *supra*, at 2, 4.

Keeping foster parents in the system is a serious issues. Many burn out after the first year. Goodnow, *supra*, at 11. But once religious foster families enter the system, groups like Catholic Social Services excel at keeping them there. As one foster mother testified:

> Staff answered our late night worried phone calls, assuaged the biological parents when they became hostile, and accompanied us on countless doctor visits to treat our children's numerous medical issues. The staff at St. Vincent didn't just save the lives of my children; they accompanied us in the joy of giving them new ones.

Buck, *supra*, at 2. Support from people who share their faith and values encourages religious foster parents to persevere. *Id.* This matters because recruiting and training

foster families is costly and time consuming, and expends precious resources that could be used elsewhere. Howell-Moroney, *supra*, at 721.

Religious providers also often equip foster parents with special training and encouragement to welcome children who are the most difficult to place. Goodnow, *supra*, at 4. For example, Catholic Charities does not just place a significant number of special needs children in foster homes each year, it also serves a high percentage of large sibling groups and teens that many foster parents deem undesirable. Anderson & Torre, *supra*, at 5; Goodnow, *supra*, at 5. Religious foster parents' and providers' willingness to take the "hard cases" is unmatched.

The assistance that Catholic Social Services and other religious providers offer is vital because foster parents with altruistic motives are best, and that is often who they serve. Howell-Moroney, *supra*, at 722. Evidence shows that religiously-motivated foster parents are more altruistic than their secular peers. *Id.* at 733. In fact, one study showed that religious foster parents were 14% more likely to be motivated by keeping children out of government institutions and over 30% more likely to serve as foster parents based on a desire to help their community or society at large. *Id.* at 725.

Such altruistic motives have real-world effects. People of faith are more likely to have a high level of commitment to helping children in foster care. *Id.* at 729. Practicing Christians are, for example, 50% more likely to become foster parents.

Goodnow, *supra*, at 13. Indeed, people of faith are not just more likely to have one foster child in their homes, but also to have a greater number of foster children as well. Howell-Moroney, *supra*, at 732. As a result, foster parents with religious and altruistic motivations serve more children. *Id.*

In sum, religious foster parents and providers are among the best of the best. No rational basis exists for the City of Philadelphia's decision to turn them away in the face of a critical foster-parent shortage. Some children in the foster-care system are devout, want to be part of a religious community, and take advantage of the unique coping strategies that faith provides. Schreiber, *supra*, at 9, 14; Shackford, *supra*, at 7. Government should be maximizing the potential that they—along with all other vulnerable children—can find a foster home where they will thrive. Shackford, *supra*, at 7. Instead, the City of Philadelphia has told these children and other people of faith "you are not welcome here." This exclusionary practice may further the City's political agenda, but it does not serve any child's best interests or improve the foster-care system as a whole.

II. Allowing the City to exclude religious foster parents and providers will have a devastating impact on vulnerable children and give same-sex couples no discernable benefit.

The City of Philadelphia's solemn duty is to act in foster children's best interests. But instead of putting kids first, the City has prohibited religious foster parents and child-welfare providers from helping them find homes. The City did so

not based on a lack of quality care: evidence shows that religious foster-parents and providers like Catholic Social Services are among the best. Rather, the City acted based on disagreement with these providers' religious beliefs about same-sex unions. But shutting down religious charities does not help LGBT couples foster or adopt kids. All it does is worsen the foster-parent shortage and leave children without the supportive family environment they need to have a bright and successful future.

A. Religious foster families and providers serve children well and excluding them from the social welfare system harms kids.

People of faith serve both vulnerable children and the foster system well. *See supra* Part I.C. In fact, the City of Philadelphia honored Mrs. Paul as one of its Foster Parents of the Year. But the City no longer prioritizes such real-world results. Mrs. Paul's award-winning foster home stands empty, and the City plans to keep it that way. All this based on the City's fear of the hypothetical possibility—never actually realized—that a same-sex couple would disregard well-known Catholic teaching, request Catholic Social Services' assistance, and be compassionately referred to over two dozen other child-welfare providers that are happy to endorse them.

Instead, the City demands that Catholic Social Services and other religious nonprofits certify and place children in violation of their deepest religious convictions about what is best for the children—or else. The City does not explain

why this newfound absolutism is necessary because it cannot. Catholic Social Service is just one private provider among many and holds no monopoly power. Regardless, the City would rather *actually* lose high-quality religious foster parents and providers than *potentially* have same-sex couples encounter moral disagreement that in no way prevents them from serving as foster parents.

This calculus does not add up, and it ignores that Catholic Social Services' superior performance is a direct result of—not in spite of—its religious principles and identity. Berg, *supra*, at 1343, 1364. Faith-based charities in our country have long provided social services consistently with their beliefs. *Id.* at 1343; Anderson & Torre, *supra*, at 7. American government nearly always accommodated them because it knew that religious charities cannot sacrifice their sincerely-held beliefs to preserve their charitable works. Berg, *supra*, at 1354.

The City of Philadelphia has long been aware of Catholic Social Services' religious beliefs, and it embraced (or at least tolerated) that religious charity until the political winds shifted. Then the City suspended all work with Catholic Social Services out of hand. Instead of talking to its long-time partner and potentially considering a religious accommodation, the City wounded its own foster-care system—in a time of severe foster-parent shortage—by reducing the number of families and private providers working to remove children from group homes and make them part of a family. Burke, *supra*, at 3. Approximately 250 children in

Philadelphia are eligible to live in private rather than group homes. Goodnow, *supra*, at 10. But the City placed politics above their welfare and instigated a campaign against families and charities that hold certain religious views.

So rather than working alongside Catholic Social Services and other religious groups to place vulnerable children with foster families, the City has stigmatized their religious beliefs and excluded them from the foster system. This religious animus harms children and the foster-care system at large. Anderson & Torre, *supra*, at 7. Money that could be used to help traumatized kids is being used instead to fund litigation aimed at stopping religious people from caring for them. Elizabeth Kirk, *Forcing Faith-Based Organizations Out of foster Care and Adoption Hurts Children*, The Public Discourse (Oct. 3, 2017), https://bit.ly/2yIKbDz. The only possible explanation is that spending precious resources on opposing Catholic Social Services' religious beliefs is more important to the City than finding and keeping children in high-quality foster homes. *Id.* at 3.

Such needless hostility is deeply concerning because children's best interests are not served by forcing religious foster-care and adoption providers to shut down. Lopez, *supra*, at 5. Nothing required the City to take sides on a hotly-debated question of sexual morality: it did so voluntarily and could approve a religious exemption at any time. Shackford, *supra*, at 7. Private child-welfare providers rightly target different populations in recruiting and supporting foster and adoptive

homes. Goodnow, *supra*, at 13. Their ideological diversity maximizes the number of families in the foster system and the opportunity for each child to find a loving home. Burke, *supra*, at 3. No one in society benefits from shutting religious providers like Catholic Social Services down. Anderson & Torre, *supra*, at 7. It simply results in children without families, remaining foster parents being overrun, and an already vulnerable foster-care system spiraling deeper into crisis.

Importantly, Catholic Charities provided roughly 10,500 children with either foster-care or adoption services in 2016 alone. Goodnow, *supra*, at 5. Forcing the Catholic Church and other religious providers out of the public realm will deprive thousands of American children of families and send the national foster-care apparatus into a tailspin. Anderson & Torre, *supra*, at 7. When Illinois forced Catholic Charities to end its foster-care and adoption programs, somewhere between 2,000-3,000 children had their lives thrown into uncertainty and turmoil. Goodnow, *supra*, at 3. Particularly relevant here is Boston's experience after the city forced Catholic Charities, which had found homes for tens of thousands of children, to exit the foster system. Massachusetts is now so low on foster families that in the last 12 months it issued 50% more "overcapacity waivers" to pack more troubled children into overcrowded homes where they get less individualized attention. *Id.* at 10.

Seemingly, no price is too high to punish those who maintain a traditional religious view of marriage. But that is not the government's place. The City's only

legitimate interest here is in maximizing the population of potential foster and adoptive parents. Goodnow, *supra*, at 7. Because many foster parents take only children of a specific age, sex, or medical condition in their homes, recruiting the most foster families possible is essential. *Id.* at 11. Excluding religious people and institutions from the foster system may serve the City's ideological agenda, but it does not help children find homes. Anderson & Torre, *supra,* at 2. If the facts make anything clear, it is that the City has abrogated its duty to put children's best interests first. *Id.* at 9-10.

B. Protecting Catholic Social Services' free-exercise rights will not harm same-sex couples but it will help children find homes.

Over two dozen social services providers in Philadelphia stood ready to accredit and place children with same-sex couples when this case began. They remain happy to do so today. Nothing prohibited same-sex couples from serving as foster or adoptive parents then or now. Berg, *supra,* at 1372. The City of Philadelphia—the only government actor involved in this case—is an active proponent of LGBT causes and an avowed opponent of religious charities.

All of the state's power is currently brought to bear against Catholic Social Services and those who share its religious beliefs. The City controls all foster-care placements in Philadelphia and prohibited Catholic Social Services-affiliated families from serving new children even when their homes are sitting empty and they have a pre-established relationship with a foster child. The City Council called

for an investigation of religious child-welfare providers, and the City Human Relations Commission answered that call by opening an investigation of Catholic Social Services. Meanwhile, the City's Mayor criticized Catholic Social Services in the press. The City's steadfast refusal to talk with Catholic Social Services and even consider a religious accommodation resulted in this lawsuit.

Such a bare-knuckled campaign telegraphs the City's disagreement with Catholic Social Service's theology and excludes those who share its religious beliefs from serving children. But it does not help same-sex couples foster or adopt. Roughly 93% of the child-welfare providers in Philadelphia did that already. Catholic Social Services has never stood in their way and is ready and willing to refer same-sex couples to them. All Catholic Social Services declined to do was endorse a view of marriage inconsistent with Church teachings by itself placing children with same-sex couples. Terruso, *supra*, at 6. Never in two decades had the City interpreted its contract with Catholic Social Services to require that. Why should it? A wide variety of government and other private providers actively recruit same-sex couples in Philadelphia who can readily access the same pool of foster children through them. Shackford, *supra*, at 6.

Yet the City now insists that every private child-welfare provider perform every type of foster-care or adoption service. Anderson & Torre, *supra*, at 2. That absolutist policy sounds good in theory until one considers its real-world effects.

Catholic Social Services traditionally strives to place children with family members. When that is not possible, it seeks out a married foster father and mother or alternatively places children with single foster parents as long as they are not cohabitating with another adult. In none of these contexts does Catholic Social Services inquire about sexual orientation. Goodnow, *supra*, at 9. There is nothing bigoted or mean-spirited about Catholic Social Services' work. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned"). Catholic Social Services merely serves children in keeping with Catholic religious beliefs. Elizabeth Kirk, *The ACLU Fights a Michigan Law Protecting Faith-Based Adoption Agencies*, National Review at 3 (Mar. 10, 2018), https://bit.ly/2LsbHeI. Because Catholic Social Services will not compromise those well-known beliefs, the City wants to shut it down.

But forcing Catholic Social Services to close its doors will not help same-sex couples foster or adopt. In fact, it will not help *anyone* foster or adopt because the child-welfare aid that Catholic Social Services provides in the City of Philadelphia will cease to exist. The net effect of the City's policy is not adding private providers that will help same-sex couples, but subtracting private providers that specialize in serving religious families—a group particularly dedicated to foster care. Goodnow,

supra, at 2, 4, 7; *supra* Part I.C. In other words, the City's absolutist policy will not increase the number of LGBT foster homes, but it will decrease the number of foster parents and private child-welfare providers working to help children. Burke, *supra*, at 3; *Goodnow*, *supra*, at 13. Kids will needlessly suffer as a result, even though the City can allow all private providers—including those inspired by faith—to serve all children at any time. Burke, *supra*, at 4.

III. The City's expulsion of Catholic Social Services fails as a matter of rational child-welfare policy and constitutional law.

Many Catholic and Protestant evangelical groups devote millions of dollars and countless volunteer hours each year to serving the public good. Berg, *supra*, at 1352-53. They want to help society rather than withdrawing from it and advancing solely their own members' interests. *Id.* at 1354. What the City of Philadelphia is telling these religious charities is that is no longer possible to remain true to their faith and work as community organizations. *Id.* at 1348. Groups like Catholic Social Services that have served children in Pennsylvania for over a hundred years now must choose between serving their communities and fidelity to their beliefs.

If groups like Catholic Social Services are forced to pick between their faith and community outreach, faith wins. So what the City is actually doing is forcing religious charities to be insular. The law already allows religious nonprofits to employ, house, and educate only their own members, although few actually limit their ministries in this way. *Id.* at 1365. If Philadelphia conditions serving the

community at large on faith-based groups renouncing their deepest convictions, they will have no choice but to assist only church members in their efforts to become foster parents or adopt children. This means that non-members will get worse social-services overall. *Id.* Making as much room as possible for religious charities promotes the common good. *Id.* at 1360. But the City's course of action just handicaps vulnerable kids and those who wish to aid them. It is a senseless answer to a non-existent problem that fails to promote children's best interests. Burke, *supra*, at 3. As such, the City's actions fail even the rational-basis test.

Yet a more stringent constitutional standard applies because the City's campaign against certain religious charities and foster parents implicates their First Amendment rights. It does so in at least five ways.

1. Preference. Our Constitution teaches that government cannot officially prefer one religious denomination over another, *Larson v. Valente*, 456 U.S. 228, 246 (1982), or lend its power to one side of a religious controversy, *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). By allowing only religious denominations who approve same-sex unions to serve foster children, the City has done both. The City officially prefers religious denominations who approve same-sex unions and lends the government's weight to their moral teachings.

2. Coercion. The City coerces religious nonprofits to adopt a particular model of participation in public affairs, *i.e.*, religious beliefs should play no role in the

public services that faith-based groups provide. Berg, *supra*, at 1349. But the state cannot interfere with internal decision-making "that affects the faith and mission" of religious organizations. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012). The Constitution places such theologically-based decisions firmly outside of the government's control. *Id.* at 188.

3. Hostility. The City's suspension of all new foster-care placements with Catholic Social Services during a foster-parent shortage without so much as a conversation with a decades-old partner shows that it acted with "a clear and impermissible hostility toward" certain religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018). Without so much as considering a religious accommodation, the City declared that certain "religious beliefs and persons are less than fully welcome" in Philadelphia's foster-care community. *Id.* All of the City Council's, Mayor's, Commission on Human Relation's and Department of Human Resources' actions and statements condemning Catholic Social Services confirm this fact, including many of the Mayor's pre-termination comments exhibiting his personal hostility toward the Catholic Church generally and the Archdiocese of Philadelphia in particular. Yet the Free Exercise Clause bars even "subtle departures from neutrality" and bars government actions that raise "even slight suspicion" of religious hostility. *Id.* at 1731. Catholic Social Services has demonstrated far more than a suspicion of

religious hostility here.

4. Stigmatization. The City stigmatized Catholic Social Service's religious beliefs and made all who share them outsiders—not full members—of the political community, whereas it made all who oppose them political insiders worthy of participation in city life. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2026 (2017) (explaining that the First Amendment "guarantees the free *exercise* of religion, not just the right to inward belief (or status)"). This creates social balkanization of the worst sort. Berg, *supra*, at 1365. Our Constitution forbids the religious divisiveness and social conflict the City intentionally courted by preventing an entire class of religious foster-parents and providers from helping children in need. *Santa Fe*, 530 U.S. at 311.

5. Selective enforcement. The Free Exercise Clause means that the government may not "in a selective manner impose burdens only on conduct motivated by religious belief." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993). This prohibition "protects religious observers against unequal treatment." *Trinity Lutheran*, 137 S. Ct. at 2019 (cleaned up). Here, the City has selectively imposed burdens in precisely this prohibited way. As things stand, an adoption agency can refer a potential foster or adoptive couple to other agencies for any reason (*e.g.*, geographical convenience, too busy, poor fit, etc.) save

one—the agency's religious beliefs about marriage. The Free Exercise Clause prohibits this.

The district court failed to meaningfully address any of these grave violations of religious freedom or apply strict-scrutiny review. Nor did it properly hold the City to its burden of proving the constitutionality of its startling actions. *Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017). For these reasons, and others raised by Catholic Social Services, this Court should reverse and remand with instructions for the district court to preliminary enjoin the City from excluding religious families and providers from the foster-care system.

CONCLUSION

The City's intolerance for religious views that disagree with those of City officials puts politics above children's best interests and violates our nation's fundamental law. Driving faith-based agencies like Catholic Social Services out of the adoption and foster-care service market will mean fewer families recruited, fewer services offered, and fewer children finding permanent, loving homes. This Court should reverse the district court's judgment.

Respectfully submitted this 4th day of September, 2018.

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Rule 28.3(d), I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit and that Kristen K. Waggoner, John J. Bursch, David A. Cortman, and J. Matthew Sharp are also members of the bar of this Court.

Dated: September 4, 2018

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CERTIFICATE OF COMPLIANCE

1. This *amici* brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) & 32(a)(7)(B), because this brief contains 6,357 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

3. This brief complies with the requirements of Local Rule 31.1(c) because the text of the brief electronically filed with the Court via CM/ECF is identical to the text of the paper copies filed with the Court. I further certify that a virus scan was run on the electronic version of this brief using Palo Alto Traps v. 4.2.0 and no viruses were detected.

Dated: September 4, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018, I electronically filed the foregoing *amici* brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

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EXHIBIT F

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.	Civil Action No.: **COMPLAINT**

INTRODUCTION

1. Plaintiffs bring this complaint to challenge Defendants' practice of permitting state-contracted and taxpayer-funded child placing agencies to use religious criteria to screen prospective foster and adoptive parents for children in the foster care system and to turn away qualified families on the basis of sexual orientation. This practice harms vulnerable children by denying them access to loving families that they desperately need and violates the Establishment and Equal Protection Clauses of the United States Constitution. This action does not in any way challenge the right of any private child placing agency to practice its religion, but when the State of Michigan (the "State") hires private child placing agencies to provide child welfare services for children

in state custody, it must ensure that those services are provided based on the needs of the children and in accordance with the United States Constitution.

2. The Michigan Department of Health and Human Services ("DHHS") is responsible for the approximately 13,000 children who are in the State's foster care system because they have been removed from their families by the State due to abuse or neglect or otherwise became wards of the State. Among the State's responsibilities to these children is finding appropriate foster and adoptive families to care for them.

3. DHHS has chosen to contract out public adoption and foster care services to private agencies and pays these agencies with taxpayer funds to perform this government function. Some of these agencies refuse to accept prospective families headed by same-sex couples or to place children with same-sex parent families due to the agencies' religious objections to such families. DHHS is aware that these agencies are turning away these potentially qualified families solely for religious reasons but DHHS has not stopped them from engaging in this conduct.

4. By statute, the State is responsible for the care of the children who are in Michigan's foster care system, and the State can neither categorically turn away gay and lesbian prospective parents nor use religious criteria in making decisions related to child welfare. When the State delegates its statutory child-welfare responsibilities to private agencies, those private agencies must execute their state-contracted responsibilities subject to the same requirements applicable to the State.

5. Plaintiffs Kristy and Dana Dumont and Erin and Rebecca Busk-Sutton are two prospective 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. These couples are ready, willing, and able to provide a "forever family" to children in the foster care system.

6. Plaintiff Jennifer Ludolph was in the Michigan foster care system when she was a teenager. As a taxpayer, she objects to her taxpayer dollars funding child-placing agencies that make it even harder for foster children to find families by turning away loving and qualified families simply because of the agencies' religious objections to those families.

7. All Plaintiffs are Michigan taxpayers who object to their taxpayer dollars being used to pay for public child welfare services that are provided based on religious standards rather than professional child welfare standards. And all Plaintiffs object to the use of taxpayer funds to underwrite and endorse religious beliefs to which they do not subscribe.

8. This action concerns only the State's provision of taxpayer-funded government services based on religious and discriminatory criteria. It does not challenge any private agency's provision of private adoption services or use of non-public funds.

9. DHHS itself could not deny children in the foster care system access to qualified prospective foster and adoptive parents based on religious criteria. For example, DHHS could not reject applicants on the basis of a religious objection to placing children with non-Christian, single-parent or same-sex parent families. Nor could DHHS refuse to accept prospective foster and adoptive parents on the basis of sexual orientation. The same is true when the State delegates this government function to

private agencies and pays them with taxpayer dollars. In other words, private agencies performing a public function with taxpayer dollars and under contract with the State cannot perform actions that would be unconstitutional if performed directly by the State.

10. The Establishment Clause of the First Amendment bars the State from providing or refusing to provide government services, such as the care of children in the foster care system, based on religious criteria. The Establishment Clause also prohibits the State from delegating a government function to religious organizations and then allowing those organizations to perform that government function pursuant to religious criteria.

11. The State's practice of funding and contracting with private religious organizations that use religious criteria to screen potential foster and adoption applicants is not a permissible accommodation of religion because it fails to take adequate account of the burdens imposed on children—specifically, the children whom the State hires these agencies to serve. The State's practice of allowing religious-based exclusions of prospective foster and adoptive parents reduces placement options for the most vulnerable children. As a result, some children may be placed with families that are less well-suited to meet their needs, some children may be separated from siblings and some children may age out of foster care without ever becoming part of a family.

12. Moreover, the Equal Protection Clause of the Fourteenth Amendment prohibits the State from discriminating on the basis of sexual orientation through instrumentalities of the State.

13. Accordingly, Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 and seek declaratory and injunctive relief directing officials of DHHS and its sub-agency, the Children's Services Agency ("CSA"), to ensure that private child placing agencies that are contracted by the State and funded with tax dollars to provide adoption and foster care services to children, do not turn away same-sex couples or other potentially qualified families based on religious eligibility criteria.

JURISDICTION AND VENUE

14. This is an action for declaratory and injunctive relief to enforce the constitutional rights of Plaintiffs under the First and Fourteenth Amendments of the United States Constitution.

15. This Court has subject matter jurisdiction over Plaintiffs' claims arising under the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983 pursuant to 28 U.S.C. § 1331 (general federal question jurisdiction) and § 1343 (civil rights actions).

16. This Court has personal jurisdiction over Defendants because all Defendants are located, domiciled or incorporated in, or otherwise are present and conducting a continuous and systematic part of their general business within, the State.

17. This Court has jurisdiction to render the declaratory relief requested under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

18. Venue is proper in this district under 28 U.S.C. § 1391(b) because Plaintiffs Erin and Rebecca Busk-Sutton and Jennifer Ludolph reside in this district, DHHS

operates branch offices in this district, and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

PARTIES

19. Plaintiffs Kristy and Dana Dumont are married and reside in Dimondale, Michigan. They desire to adopt children from the public foster care system and have been turned away by taxpayer-funded child placing agencies working under contract with the State due to religious objections to working with same-sex couples. At all relevant times, Kristy and Dana Dumont have been, and continue to be, taxpayers of the State of Michigan.

20. Plaintiffs Erin and Rebecca Busk-Sutton are married and reside in Detroit, Michigan. They also desire to adopt children from the public foster care system and have been turned away by taxpayer-funded child placing agencies working under contract with the State due to those agencies' religious objections to working with same-sex couples. At all relevant times, Erin and Rebecca Busk-Sutton have been, and continue to be, taxpayers of the State of Michigan.

21. Plaintiff Jennifer Ludolph is a resident of Detroit, Michigan. She has been, and continues to be, a taxpayer of the State of Michigan.

22. Defendant Nick Lyon is the Director of DHHS, the State agency responsible for foster care and adoption services for children in state custody. DHHS contracts with private child placing agencies, such as Bethany Christian Services ("Bethany") and Catholic Charities, to provide public foster care and adoption services.

DHHS has its central offices in Lansing, Michigan, and operates branch offices in each of Michigan's 83 counties.

23. Defendant Herman McCall is the Executive Director of CSA, a sub-agency of DHHS that, in addition to having oversight over the work of taxpayer-funded state-contracted child placing agencies, is mandated by law to "[r]eview, investigate, evaluate, and assess all programs within [DHHS] related to services and programs for children," including by advising on policy related to "children's services and programs including, but not limited to, services for foster children, juvenile justice, and homeless youth." Mich. Comp. L. § 400.227.

FACTS GIVING RISE TO THIS ACTION

A. Michigan's Child Welfare System

24. DHHS is responsible for all children in the Michigan foster care system. A child's case with DHHS typically starts after Child Protective Services removes the child from his or her family for abuse or neglect and a court orders that the child be placed into foster care. If a child ultimately cannot be reunited with his or her parents despite the provision of services to the parents and the parents' parental rights are terminated, DHHS seeks to find a permanent family for the child, typically through adoption. DHHS's responsibilities for children who come into its care include recruiting and identifying appropriate families to care for these children either temporarily as foster parents until the children can be reunited with their families or permanently as with adoptive families.

25. DHHS performs this public function in part by contracting with private agencies that are licensed by DHHS's Division of Child Welfare Licensing ("DCWL") as

"child placing agencies" to recruit, screen, train and license prospective foster and adoptive parents and to place children in appropriate foster or adoptive homes, as authorized by Michigan statute. *See* Mich. Comp. L. §§ 722.11(1)(c), 722.115(3), 722.922. Although DHHS retains ultimate supervisory responsibility in all cases, much of the on-the-ground foster care and adoption work is performed by taxpayer-funded child placing agencies.

26. Through rulemaking authorized by statute, DHHS has conferred authority on private child placing agencies to make decisions regarding licensing foster parents and certifying adoptive parents, as well as the placement of children into foster and adoptive homes. *See* Mich. Admin. Code R. 400.12301(1), 400.12701. With this authority comes the obligation of child placing agencies to maintain ongoing recruitment programs "to ensure an adequate number of suitable and qualified homes" to meet the needs of children served by the agency. *Id.* R. 400.12304(1), 400.12706. The rules also give the agencies substantial discretion in evaluating applicants for foster homes or adoptive parents, *id.* R. 400.12310, 400.12605, as well as selecting an appropriate placement for a child into a foster or adoptive home, *id.* R. 400.12404, 400.12709.

27. After an agency accepts a child's case from DHHS, it immediately begins receiving per diem compensation from the State. For example, some agencies receive at least $40 per day from the State for each adoption case that they handle. These per diem payments cease after a certain amount of time or when the child is permanently placed. The agencies also receive a lump-sum payment after placement, depending upon the outcome of the case.

28. To fund the state's child welfare system, the Michigan legislature annually makes appropriations for adoption and foster care services. With these appropriated funds, DHHS pays private child placing agencies under contract with the State to provide foster care and adoptive services.

29. DHHS has entered into adoption and foster care service contracts with more than 100 private child placing agencies statewide, and many of these agencies operate in multiple counties.

30. Many of the private child placing agencies under contract with the State are religiously affiliated.

31. The contracts entered into between DHHS and child placing agencies require the contracting agencies to comply with DHHS's non-discrimination statement, which mandates that agencies "will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs or disability." This requirement "applies to all applications filed for adoption of [DHHS] supervised children, including [DHHS] supervised children assigned to a contracted agency."

32. The contracts entered into between DHHS and child placing agencies also require each contracting agency to "develop and implement a plan for adoptive home recruitment, retention, and support consistent with" DHHS's licensing standards applicable to the agency's license.

33. Families interested in fostering or adopting a child out of the foster care system must submit an application for a foster care license or to be certified to adopt.

34. Upon 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.

35. The eligibility requirements for families interested in adopting children from the foster care system are provided in the DHHS Adoption Program Statement, also known as Publication 255. According to the Adoption Program Statement, DHHS "will not discriminate against any individual or group because of race, religion, age, national origin, color, height, weight, marital status, sex, sexual orientation, gender identity or expression, political beliefs or disability." The Adoption Program Statement also states that "[t]he eligibility criteria for adoption of [DHHS]-supervised wards must not be more restrictive than the criteria in DHS Publication 255 when a contracted adoption agency is providing DHS adoption services."

36. DHHS is contractually entitled to terminate its agreement with a child placing agency if the agency "[e]ngages in any conduct that may expose [DHHS] to liability" or "fails to cure a breach" of the agreement after receiving notice. The contracts also provide DHHS the right to "immediately terminate this Agreement in whole or in part without penalty and for any reason."

37. Nonetheless, although it is aware of certain child placing agencies' refusal to accept same-sex couples to foster or adopt children in the child welfare system, upon information and belief, DHHS has not taken any remedial action under its contracts against any private child placing agency for failure to comply with the DHHS non-discrimination statement, DHHS Publication 255, or the United States Constitution.

B. 2015 Michigan House Bills Nos. 4188, 4189, and 4190

38. For years, some private agencies providing foster care and adoption services under contract with the State have refused to accept same-sex couples as foster or adoptive parents because of the agencies' religious beliefs.

39. Starting as early as 2013, members of the Michigan legislature attempted to introduce legislation that would codify and authorize the practice of permitting agencies to turn away same-sex couples on the basis of the agencies' religious objection. The purpose of this legislation was clear. At that time, marriage for same-sex couples had been legalized in many states and some state governments, over the objection of some religiously affiliated child placing agencies, had introduced rules requiring taxpayer-funded and state-contracted agencies providing public foster care and adoption services to accept adoption and foster care applications from same-sex couples on equal terms as different-sex couples.

40. In 2013, the Families, Children and Seniors Committee of the Michigan House of Representatives considered a package of three bills, House Bills 4927, 4928, and 4991, which would preclude any state or local agency from taking "adverse action against a child placing agency on the basis that the child placing agency has declined or will decline to provide services that conflict with the child placing agency's sincerely held religious beliefs."

41. In discussions before the Michigan House Families, Children and Seniors Committee, the lead sponsor of the package reportedly stated that the goal of these bills

was to codify DHHS's practices related to entering into contracts for foster care and adoption case management services with private child placing agencies.

42. Those bills did not pass, but the effort to encode State policy and practices delegating decision-making power over child welfare services to organizations acting pursuant to religious criteria and providing protection to private agencies discriminating on the basis of sexual orientation was reprised in the 2015-2016 legislative session with Michigan House Bills 4188, 4189, and 4190.

43. During a hearing before the House on the bills on February 18, 2015, the director of clinical services at St. Vincent Catholic Charities confirmed that the organization would not work with gay and lesbian prospective parents, explaining that when prospective parents to whom they were religiously opposed approached them: "If they let us know that they're unmarried, or they're gay or lesbian, we immediately recommend, make a referral to another agency."

44. The Michigan House of Representatives passed the bills in March 2015.

45. In support of the bills, some religiously affiliated child placing agencies communicated with Michigan Governor Rick Snyder. A letter from the President of Bethany asserted that to require Bethany to adhere to principles of non-discrimination would present them with "an untenable choice" of "choos[ing] between their desire to help children and families and their fidelity to their religious principles." He stated further that "House Bills 4188–4190 are necessary" to "codify into state law what has been in practice," and threatened that "if statewide policy changes in a way that would

force Catholic agencies to choose between violating strongly held religious beliefs or ceasing cooperation with the state, the agencies will cease to cooperate."

46. The President and CEO of the Michigan Catholic Conference also weighed in by letter to the Governor. He stated that Catholic agencies "handl[e] approximately twenty percent of the active foster care and adoption cases in Michigan," and then went on to say that, "with profound concern and a sense of urgency," he was concerned that there were objections to "the religious manner by which faith-based child placement agencies operate."

47. On June 10, 2015, the Michigan Senate passed the bills, and the following morning, Governor Snyder signed the bills into law as 2015 Public Acts 53, 54, and 55, codified in Michigan Compiled Laws 400.5a, 722.124e, 722.124f, and 710.23g.

48. The statutes provide in relevant part that, "[t]o the fullest extent permitted by state and federal law, a child placing agency shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs." Mich. Comp. L. § 722.124e(2). Additionally, the statutes provide that, "[t]o the fullest extent permitted by state and federal law, the state or a local unit of government shall not take an adverse action against a child placing agency on the basis that the child placing agency has declined or will decline to provide any services that conflict with, or provide any services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs." *Id.* § 722.124e(3). Under the statute, "services" are defined to "include[] any

service that a child placing agency provides, except foster care case management and adoption services provided under a contract with [DHHS]." *Id.* § 722.124e(7)(b).

49. Some child placing agencies, including Bethany and Catholic Charities, appear to interpret these statutes as permitting taxpayer-funded state-contracted child placing agencies to turn away prospective families for children in foster care based on religious criteria.

50. In a July 2016 letter to the Michigan Attorney General's office, counsel for Plaintiffs explained that they had received reports that some religiously affiliated taxpayer-funded state-contracted child placing agencies refused to accept same-sex couples who contacted them inquiring about adopting a child from foster care. Counsel for Plaintiffs requested a meeting to clarify the State's position with respect to such practices. However, the Attorney General's office refused to meet, and it did not disclaim the practice.

C. Defendants' Authorization of Religious-Based Exclusions by Child Placing Agencies Harms Children.

51. There is a shortage of foster and adoptive families in Michigan.

52. As a result of that shortage, some children in State custody have and may continue to have multiple temporary placements before a suitable permanent home is found; other children have been and may continue to be separated from their siblings or placed in foster homes far from their school and community; some other children have been and may continue to be placed in group homes; and still other children have been

and may continue to be unable to be adopted at all and have and will instead reach the age of majority without ever being placed with a permanent family.

53. Each time a prospective parent who is able to provide a loving and caring family for a child is turned away by a child placing agency because of a religious objection to their sexual orientation (or any other religious objection), the pool of families available for the children in the child welfare system diminishes, reducing children's options for an appropriate placement, or any placement at all.

54. Every major professional organization dedicated to children's welfare, including the Child Welfare League of America, the National Association of Social Workers, the National Adoption Center, the American Psychological Association, the American Psychiatric Association, the American Academy of Family Physicians, the American Academy of Pediatrics, and the American Medical Association, affirmatively states that gay and lesbian parents are as likely as heterosexual parents to provide supportive and healthy environments for their children and opposes any discrimination based on sexual orientation in matters of adoption and foster care.

55. The loss of potentially qualified families exacerbates this shortage and means some children will remain in foster care longer than necessary before being adopted into the security of a "forever family" and the State will spend more taxpayer dollars to care for them.

56. Even if there were an abundance of families willing and able to care for children in the foster care system, the religious-based exclusion of capable families means some children may be denied the family that is best matched to meet their

individual needs. Placing children is not a one-size-fits-all endeavor, as every child has unique needs and every family brings different qualities. Unsuitable matches are less likely to be successful, and can lead to children being subjected to the instability of multiple placements.

D. Plaintiffs' Interest in Challenging DHHS's Practices

Kristy and Dana Dumont

57. Plaintiffs Kristy and Dana Dumont have been together as a committed couple for 11 years. They married in 2011.

58. Kristy works at Michigan State University in the College of Education advising students. She is also working on her Ph.D. in Higher Adult and Lifelong Education. Dana works in the Michigan Department of Natural Resources.

59. Kristy and Dana would like to adopt a child from the foster care system. The reason they are pursuing adoption through foster care is that they want to give a permanent home to a child who needs one.

60. Kristy and Dana hope to adopt a child in foster care who may have difficulty finding a family. Kristy and Dana recently moved to the village of Dimondale because of its high-quality school district; there, they live in a home with a yard and extra bedrooms in the anticipation of children.

61. In July 2016, Kristy called St. Vincent's Catholic Charities in Lansing and said that she and her wife were interested adopting a child from foster care. She was told that the agency does not work with same-sex couples.

62. Kristy tried calling St. Vincent's Catholic Charities again in March 2017. She told the person who answered the phone that she was calling to inquire about adopting a child from foster care and was transferred to the voicemail of someone in the child welfare department. Kristy left a detailed message explaining that she had previously been told that the agency did not work with same-sex couples, and asking if that was still the case. She did not get a return call.

63. Also in March 2017, Kristy called Bethany in Lansing and said that she and her wife were interested in adopting a child from the foster care system. The Bethany representative told Kristy that Bethany does not work with same-sex couples.

64. Kristy and Dana are Michigan taxpayers who object to the use of taxpayer funds to underwrite and endorse religious beliefs to which they do not subscribe.

Erin and Rebecca Busk-Sutton

65. Plaintiffs Erin and Rebecca Busk-Sutton have been together as a committed couple for eight years. They married in 2014.

66. Erin works with children helping them study and prepare for standardized tests and Rebecca is a resident physician in internal medicine.

67. Erin and Rebecca would like to adopt a child from the foster care system. They are especially interested in adopting an older child or LGBT young person who may have difficulty finding a supportive family. Erin wants to use her skills as an educator to potentially assist a foster youth who may have gaps in his or her education.

68. On May 5, 2017, Erin called Bethany in Madison Heights and told the representative that she and her wife were interested in adopting a child from the foster

care system. The Bethany representative told Erin that same-sex couples "aren't our area of expertise" and offered to recommend a different child placing agency in Sterling Heights or Ann Arbor. Erin told the Bethany representative that those locations were far away and asked if Bethany would be willing to work with them. The Bethany representative responded again that "same-sex couples aren't our area of expertise" and that she "didn't think they would have a good experience with [Bethany]."

69. Erin and Rebecca are also Michigan taxpayers who object to the use of taxpayer funds to underwrite and endorse religious beliefs to which they do not subscribe.

Jennifer Ludolph

70. Jennifer Ludolph is 33 years old and lives in Detroit. She works as a pharmacy technician at the University of Michigan's hospital in Ann Arbor.

71. At the age of 13, Jennifer and her siblings were removed from their parents' care and placed into the Michigan foster care system. After four years of instability, at age 17 she was placed with a loving couple that provided a stable home for her and three of her siblings. She feels lucky that she and her siblings landed in such a devoted and nurturing family that enabled them to thrive.

72. Jennifer now has children of her own and has also served as a foster parent.

73. Jennifer is strongly opposed to the State allowing taxpayer-funded child placing agencies hired by the state to care for children in foster care to turn away prospective foster and adoption families based on religious criteria. She believes that such practices could have prevented her from finding her family because her foster father is an atheist. She cares about the children currently in the foster care system who might

not be placed with a loving family because suitable prospective parents are turned away for religious reasons.

74. Jennifer is a Michigan taxpayer and objects to the use of taxpayer funds to underwrite and endorse religious beliefs to which she does not subscribe.

CLAIMS FOR RELIEF

COUNT I
First Amendment to the United States Constitution

75. Plaintiffs reincorporate the allegations in paragraphs 1 to 74 as if fully set forth herein.

76. DHHS has delegated to religious organizations the public function of managing foster care and adoption cases for children in Michigan's foster care system, which includes the responsibilities of recruiting and screening foster and adoptive parents and making family placements for the children the State assigns into their care.

77. DHHS pays these religious organizations with public funds for the adoption and foster care work they perform.

78. DHHS permits these taxpayer-funded and state-contracted religious organizations to use religious eligibility criteria when screening prospective foster and adoptive families and making placement decisions for children and DHHS is aware that some of these agencies are turning away prospective families headed by same-sex couples because of religious objections.

79. DHHS's actions harm children in the foster care system by denying them access to needed families and result in discrimination against same-sex couples like

Plaintiffs Kristy and Dana Dumont and Erin and Rebecca Busk-Sutton. Plaintiffs collectively are harmed by the use of taxpayer funds to underwrite and endorse religious beliefs to which they do not subscribe.

80. DHHS's conduct described above has deprived and continues to deprive Plaintiffs of their rights protected by the Establishment Clause of the First Amendment to the United States Constitution and made actionable by 42 U.S.C. § 1983.

81. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm.

COUNT II
Fourteenth Amendment to the United States Constitution

82. Plaintiffs reincorporate the allegations in paragraphs 1 to 74 as if fully set forth herein.

83. Some private child placing agencies working under contract with the State treat gay and lesbian couples unequally to heterosexual couples by categorically excluding same-sex couples from applying for and being considered to be foster or adoptive parents.

84. DHHS, through private child placing agencies that provide adoption and foster care services to children under contract with the State, is turning away same-sex couples seeking to adopt out of the foster care system, such as the Dumonts and the Busk-Suttons, because of their sexual orientation.

85. DHHS, through agencies with which it contracts, is turning away same-sex couples based on religious objections to placing children with such families.

86. There is no legitimate government interest served by denying children access to potentially qualified families based on a religious exclusion.

87. Defendants, acting under color of state law, have violated and continue to violate the Equal Protection Clause of the United States Constitution by contracting with and funding private agencies that, in providing public adoption and foster care services, discriminate against same-sex couples seeking to become foster or adoptive parents.

88. Defendants are liable under 42 U.S.C. § 1983 for the violation of Plaintiffs' rights.

89. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause irreparable harm.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and:

A. Declare, pursuant to 28 U.S.C. § 2201, that 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 violates the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983;

B. Enter an order enjoining Defendants, in their official capacities, from contracting with or providing taxpayer funding to private child placing agencies that exclude same-sex couples from consideration as foster or adoptive parents or otherwise employ religious criteria in decisions regarding the screening of prospective foster and

adoptive parents and, other than accommodating a particular child's religious traditions or preferences, the placement of children into foster and adoptive homes;

C. Enter an order directing Defendants, in their official capacities, to ensure that lesbian and gay individuals and couples are treated the same as heterosexual individuals and couples by state-contracted child placing agencies;

D. Award Plaintiffs the costs and fees and expenses for this action, including, *inter alia*, attorneys' fees and costs incurred in connection with this action, pursuant to 42 U.S.C. § 1988;

Award such other relief as this Court deems just and proper.

/s/ Jay D. Kaplan

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DATED: September 20, 2017

EXHIBIT G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and JENNIFER WRAYNO, in her official capacity as the Acting 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

ORDER ON STIPULATION OF DISMISSAL

After considering the Stipulation of Voluntary Dismissal with Prejudice and the Settlement Agreement, attached thereto, provided by Plaintiffs Kristy Dumont, Dana Dumont, Erin Busk-Sutton, and Rebecca Busk-Sutton (collectively,

"Plaintiffs") and Defendants Robert Gordon and Jennifer Wrayno,[1] it is hereby ORDERED that Plaintiffs' claims in the above-captioned action (the "Action") are dismissed with prejudice pursuant to the terms of the Settlement Agreement.

The Court retains jurisdiction over the enforcement of the Settlement Agreement in the Action. *See Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) ("If the parties wish to provide for the court's enforcement of a dismissal-producing settlement agreement, they can seek to do so."); *RE/MAX Int'l, Inc.* v. *Realty One, Inc.*, 271 F.3d 633, 641 (6th Cir. 2001) ("[A] district court [has] the authority to dismiss pending claims while retaining jurisdiction over the future enforcement of a settlement agreement.").

All costs and attorneys' fees are the responsibility of the party incurring same.

Dated: MAR 22 2019

PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this order reflects the substitution of Herman McCall, a party in his official capacity who has ceased to hold office during the pendency of the Action, for Jennifer Wrayno, who is "automatically substituted as a party."

EXHIBIT

H

SETTLEMENT AGREEMENT

Dumont et al. v. Gordon et al.
USDC EDMI Case No. 2:17-cv-13080-PDB-EAS

This Settlement Agreement (the "Agreement") between Kristy Dumont, Dana Dumont, Erin Busk-Sutton and Rebecca Busk-Sutton (collectively, the "Plaintiffs"), and Robert Gordon, in his official capacity as the Director of the Michigan Department of Health and Human Services ("MDHHS"), and Jennifer Wrayno, in her official capacity as the Acting Executive Director of the Michigan Children's Services Agency ("MCSA") (Gordon, Wrayno, MDHHS and MCSA collectively referred to herein as the "Department"), resolves Plaintiffs' claims against the Department in the case captioned *Dumont et al. v. Gordon et al.*, Case No. 2:17-cv-13080-PDB-EAS, pending in the United States District Court for the Eastern District of Michigan (the "Litigation"), as stated herein. Throughout this Agreement, Plaintiffs and the Department may be referred to as a "Party" or collectively referred to as "Parties."

WHEREAS, the Department contracts with licensed child placing agencies ("CPAs") to provide adoption-related services for permanent wards placed with the Department for care, supervision, and adoption ("Adoption Services Contracts").

WHEREAS, the Department contracts with licensed CPAs to provide foster care case management related services for children placed with the Department for care, supervision, and foster care placement ("PAFC Services Contracts"). Throughout this Agreement, the Adoption Services Contracts and the PAFC Services Contracts are collectively referred to as "Contracts."

WHEREAS, the Department may contract with one or more licensed CPAs ("Contractors") to subcontract with other licensed CPAs to provide adoption related services, in substantial compliance with the terms of the Adoption Services Contract, for permanent wards placed with the Department for care, supervision, and adoption ("Adoption Services Subcontracts").

WHEREAS, the Department may contract with one or more Contractors to subcontract with other licensed CPAs to provide foster care case management related services, in substantial compliance with the terms of the PAFC Services Contracts, for children placed with the Department for care, supervision, and foster care placement ("PAFC Services Subcontracts"). Throughout this Agreement, Adoption Services Subcontracts and PAFC Services Subcontracts are collectively referred to as "Subcontracts."

WHEREAS, the Contracts and the Subcontracts include a non-discrimination provision mandating that contracted CPAs comply with the Department's non-discrimination statement prohibiting discrimination "against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability" in the provision of services under contract with the Department (the "Non-Discrimination Provision").

WHEREAS, on September 20, 2017, Plaintiffs filed a complaint asserting claims against the Department in the Litigation. Thereafter, St. Vincent Catholic Charities, Melissa Buck, Chad Buck, and Shamber Flore intervened as defendants (collectively, "Intervening Defendants") in the Litigation. Plaintiffs have asserted no claims, and have no current intention to assert any claims,

against Intervening Defendants in the Litigation. Likewise, the named Defendants have asserted no claims, and have no current intention to assert any claims, against Intervening Defendants in the Litigation. Intervening Defendants have not asserted any claims, counter-claims or cross-claims against Plaintiffs, Defendants, or any third party in the Litigation.

WHEREAS, Plaintiffs and the Department wish to resolve the Litigation; the Parties agree that they are entering into this Agreement for that purpose only and it is not to be construed as an admission of any liability or wrongdoing.

THEREFORE, in addition to the foregoing, and in the interest of resolving the Litigation, the Parties agree as follows:

Section 1. Unless prohibited by law or court order:

a. The Department shall continue including in Contracts, and shall continue requiring all Contractors to include in Subcontracts, the Non-Discrimination Provision, or a materially and substantially similar provision ("Similar Provision").

b. For the avoidance of doubt, policies and practices prohibited under the Non-Discrimination Provision include, without limitation,

i. turning away or referring to another contracted CPA an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract;

ii. refusing to provide orientation or training to an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract;

iii. refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract; and

iv. refusing to place a child accepted by the CPA for services under a Contract or a Subcontract with an otherwise qualified LGBTQ individual or same-sex couple suitable as a foster or adoptive family for the child;

in each case, without regard to whether such individual or couple has identified any particular child for foster placement or adoption.

c. The Department shall enforce the Non-Discrimination Provision or Similar Provision against a CPA that the Department determines is in violation of, or is unwilling to comply with, such provisions (collectively, a "Contract

Violation"), up to and including termination of the Contracts in accordance with the termination provisions therein, including without limitation:

i. In the event a CPA refuses to comply with the Non-Discrimination Provision or Similar Provision within a reasonable time after notification by the Department of a Contract Violation, the Department will terminate the CPA's Contracts.

ii. The Department will initiate an investigation when made aware of an alleged Contract Violation. In the event the Department determines that a CPA has committed a Contract Violation, the Department will provide the CPA with notice and a reasonable opportunity to implement a Department-approved corrective action plan mandating immediate, regular, and continuous provision of foster care case management services or adoption services, as applicable, in compliance with the Non-Discrimination Provision or Similar Provision; where the CPA fails to demonstrate compliance after a reasonable opportunity to implement the approved corrective action plan, the Department will terminate the CPA's Contracts.

d. The Department shall require all Contractors to enforce the Non-Discrimination Provision or Similar Provision against a CPA that the Contractor or the Department determines is in violation of, or is unwilling to comply with, such provisions (collectively, a "Subcontract Violation"), up to and including termination of the Subcontracts in accordance with the termination provisions therein, including without limitation:

i. In the event a CPA refuses to comply with the Non-Discrimination Provision or Similar Provision within a reasonable time after notification by the Contractor or the Department of a Subcontract Violation, the Department will require the Contractor to terminate the CPA's Subcontracts.

ii. The Department will require a Contractor to initiate an investigation when made aware of an alleged Subcontract Violation. In the event the Contractor or the Department determines that a CPA has committed a Subcontract Violation, the Department will require the Contractor to provide the CPA with notice and a reasonable opportunity to implement a Contractor-approved corrective action plan mandating immediate, regular, and continuous provision of foster care case management services or adoption services, as applicable, in compliance with the Non-Discrimination Provision or Similar Provision; where the CPA fails to demonstrate compliance after a reasonable opportunity to implement the approved corrective action plan, the Department will require the Contractor to terminate the CPA's Subcontracts.

e. The Department shall provide ongoing training as part of the Department's existing training programs to Department employees, Contractors, and contracted CPAs with respect to:

i. the Litigation and the obligations under this Agreement;

ii. the obligations of, and reporting channels available to, the Department's employees and Contractors to report any Contract or Subcontract Violation or suspected Contract or Subcontract Violation by contracted CPAs, including, without limitation, to the Department's Division of Child Welfare Licensing via the "Online Complaint Form" accessible on the Department's website;

iii. the Department's obligations to investigate any Contract Violation or suspected Contract Violation reported verbally or in writing to the Department and to enforce the Non-Discrimination Provision or Similar Provision; and

iv. a Contractor's obligations to investigate any Subcontract Violation or suspected Subcontract Violation by contracted CPAs reported verbally or in writing to the Contractor, and to enforce the Subcontracts.

f. The Department shall publish and maintain a hyperlink to the Department's Division of Child Welfare Licensing "Online Complaint Form" in a prominent place on the landing page of the Department's website; and

g. The Department shall make a public announcement in substantially the following form:

> The Department's contracts with child placing agencies prohibit discrimination against any individual or group because of race, religion, age, national origin, color, height, weight, marital status, sex, sexual orientation, gender identity or expression, political beliefs or disability.
>
> Examples of prohibited discriminatory conduct include:
>
> - turning away or referring to another contracted CPA an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for contracted services;
>
> - refusing to provide orientation or training to an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for contracted services;

- refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for contracted services; and

- refusing to place a child accepted by the CPA for contracted services with an otherwise qualified LGBTQ individual or same-sex couple suitable as a foster or adoptive family for the child.

If you are aware of a violation or suspected violation of these nondiscrimination provisions, a complaint may be made via the Online Complaint Form accessible on the Department's website.

Section 2. For the avoidance of doubt, nothing in this Agreement shall require the Department to take adverse action against any CPA on the basis that such CPA has decided to accept or not accept a referral from the Department of a particular child for services under a contract with the Department.

Section 3. Subject to Section 1, nothing in this Agreement shall affect the Department's obligations, authority, or discretion to audit, train, diligently investigate, or vigorously enforce the terms of the Contracts or Subcontracts in accordance with applicable laws, rules, regulations, policies, court orders, and contract terms.

Section 4. Subject to Section 1, the Department retains sole authority and sole discretion on all matters pertaining to all Contracts and Subcontracts, including without limitation all training, all aspects of investigating an alleged Contract or Subcontract Violation, determining whether a Contract or Subcontract Violation occurred, and all enforcement measures.

Section 5. Subject to Section 1, nothing in this Agreement expands the Department's obligation to monitor CPA compliance with Contracts and Subcontracts beyond that which is required under applicable law, rules, regulations, and policies.

Section 6. This Agreement is intended for the direct benefit of the following individuals injured by a breach of this Agreement: (i) the Parties hereto, (ii) any LGBTQ individual or same-sex couple that seeks to foster a child accepted by a CPA for foster care case management services or adoption services under a Contract or Subcontract and the CPA is alleged to have committed a Contract Violation or Subcontract Violation directly involving the individual or couple, (iii) any LGBTQ individual or married same-sex couple that seeks to adopt a child accepted by a CPA for foster care case management services or adoption services under a Contract or Subcontract and the CPA is alleged to have committed a Contract Violation or Subcontract Violation directly involving the individual or couple, and (iv) any child accepted by a CPA for foster care case management services or adoption services under a Contract or Subcontract and the CPA is alleged to have committed a Contract Violation or Subcontract Violation directly involving the

child. Each person described in subclauses (ii), (iii) and (iv) of the immediately preceding sentence shall be a direct third-party beneficiary of, and may, to the extent of their injury and ability to satisfy standing requirements, independently enforce the terms of this Agreement as if it were a party hereto.

Section 7. In the event any Party or a third-party beneficiary asserts that another Party is not in compliance with one or more of its obligations in this Agreement, the Parties and any third-party beneficiaries shall address such alleged breach in good faith and act promptly in an attempt to resolve it. The asserting Party or third-party beneficiary shall provide the other Party with written notice of such assertion and a ninety (90) day opportunity to cure such noncompliance prior to taking legal action. Notice shall be made via certified mail, return receipt requested as follows:

Michigan Department of Health and Human Services
State of Michigan
Director, Bureau of Legal Affairs
333 South Grand Avenue
Lansing, MI 48909
517.241.0048

American Civil Liberties Union Fund of Michigan

Jay D. Kaplan / Michael J. Steinberg
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6823
jkaplan@aclumich.org
msteinberg@aclumich.org

Section 8. Specific performance shall be the sole and exclusive remedy available to each Party and each third-party beneficiary asserting any claim relating to the Department's failure to meet its obligations under this Agreement. Each Party and each third-party beneficiary asserting any claim relating to the Department's obligations under this Agreement waives all rights to recover any damage, loss, attorney fees, costs, or any other expense arising out of asserting such claims. The Parties also agree that, regardless of the failure of the sole and exclusive remedy, the Department will not be liable to any Party or third-party beneficiary asserting any claim relating to the Department's obligations under this Agreement for any incidental or consequential damages of whatsoever kind or nature. The Parties intend the exclusion of incidental and consequential damages as an independent agreement apart from the sole and exclusive remedy herein. The limitations of this Section 8 apply only to claims relating to the Department's obligations under this Agreement.

Section 9. Upon signing this Agreement, Plaintiffs shall file a Stipulation of Voluntary Dismissal with Prejudice substantially in the form attached to as Annex A and submit a Proposed Order on Stipulation of Dismissal substantially in the form attached hereto as Annex B. This Agreement becomes effective upon entry of the Proposed Order on Stipulation of Dismissal by the district court.

Section 10. The Parties shall bear their own attorneys' fees and costs associated with the Litigation.

Section 11. The Parties understand that this Agreement is a public record that may be disclosed in response to a proper request under Michigan's Freedom of Information Act.

Section 12. The Parties acknowledge and agree that this Agreement shall be governed by and construed in accordance with the laws of the State of Michigan without giving effect to conflict of laws, rules or statutes.

Section 13. The Parties acknowledge, understand, and agree that they are entering into this Agreement knowingly, voluntarily, and of their own free will and volition, without coercion or undue influence.

Section 14. Each Party has been represented by counsel and cooperated in the drafting and preparation of this Agreement. Hence, this Agreement shall not be construed against any Party on the basis that the Party was the drafter.

Section 15. This Agreement may be executed in any number of counterparts, and each such counterpart shall be deemed to be an original instrument, but all such counterparts shall constitute one Agreement.

Section 16. The undersigned represent that they are authorized to sign this Agreement.

Section 17. Each Party represents that they believe there is no state or federal law, rule, regulation, policy, contract term, or other obligation that prevents it from complying with its obligations under this Agreement; *provided*, that solely for purposes of this Section 17, the obligations in Section 1 shall be read without the introductory phrase "Unless prohibited by law or court order."

Section 18. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns. No Party may assign this Agreement or any rights or obligations hereunder without the prior written consent of each other Party hereto.

Section 19. No modification or waivers of any provision of this Agreement shall be valid or binding unless made in writing and signed by each Party or by a person authorized to sign on behalf of such Party.

[*Signature Page Follows*]

IN WITNESS WHEREOF, this Agreement is executed as of March 22, 2019.

PLAINTIFFS

Kristy Dumont

Dana Dumont

Erin Busk-Sutton

Rebecca Busk-Sutton

DEFENDANTS

Robert Gordon, in his official capacity as Director, Michigan Department of Health and Human Services

Jennifer Wrayno, in her official capacity as Acting Executive Director, Michigan Children's Services Agency

IN WITNESS WHEREOF, this Agreement is executed as of March 22, 2019.

PLAINTIFFS

Kristy Dumont

Dana Dumont

Erin Busk-Sutton

Rebecca Busk-Sutton

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Robert Gordon, in his official capacity as Director, Michigan Department of Health and Human Services

Jennifer Wrayno, in her official capacity as Acting Executive Director, Michigan Children's Services Agency

IN WITNESS WHEREOF, this Agreement is executed as of March 22, 2019.

PLAINTIFFS

Kristy Dumont

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Erin Busk-Sutton

Rebecca Busk-Sutton

DEFENDANTS

Robert Gordon, in his official capacity as Director, Michigan Department of Health and Human Services

Jennifer Wrayno, in her official capacity as Acting Executive Director, Michigan Children's Services Agency

Annex A

Stipulation of Voluntary Dismissal with Prejudice

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

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

Plaintiffs,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and JENNIFER WRAYNO, in her official capacity as the Acting 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

STIPULATION OF VOLUNTARY DISMISSAL WITH PREJUDICE

Plaintiffs Kristy Dumont, Dana Dumont, Erin Busk-Sutton, and Rebecca Busk-Sutton (collectively, "Plaintiffs") and Defendants Robert Gordon and

Jennifer Wrayno[1] (collectively, "State Defendants") file this stipulation of dismissal of the above-captioned action (the "Action") under Rule 41(a)(2) of the Federal Rules of Civil Procedure. Plaintiffs and State Defendants state as follows:

On September 20, 2017, Plaintiffs filed the complaint in the Action with the U.S. District Court for the Eastern District of Michigan against the State Defendants. (ECF No. 1.)

On December 18, 2017, St. Vincent Catholic Charities, Melissa and Chad Buck, and Shamber Flore ("Intervenor Defendants") moved to intervene in this case (ECF No. 18), which motion was granted on March 22, 2018. (ECF No. 34.)

On September 14, 2018, this Court denied in substantial part the motions to dismiss filed by State Defendants and Intervenor Defendants. (ECF No. 49 at 93.)

On September 17, 2018, the Court entered a schedule for discovery and briefing to "manage the progress of the case" (the "September 17 Scheduling Order"). (ECF No. 51 at 1.)

On October 31, 2018, all Parties jointly moved to modify the September 17 Scheduling Order. (ECF No. 61.) On November 2, 2018, this Court granted in part and denied in part that motion. (ECF No. 62.)

---

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this stipulation reflects the substitution of Herman McCall, a party in his official capacity who has ceased to hold office during the pendency of the Action, for Jennifer Wrayno, who is "automatically substituted as a party."

On November 13, 2018, this Court issued an Amended Scheduling Order. (ECF No. 63.)

The Parties have engaged in substantial discovery, including the exchange of written discovery and document production.

On January 23, 2019, Plaintiffs and State Defendants moved this Court to stay proceedings as Plaintiffs and State Defendants actively worked to reach a resolution. (ECF No. 74.) On that same day, Plaintiffs filed a Joint Motion for Immediate Consideration of the Motion to Stay Proceedings. (ECF No. 75.)

On January 24, 2019, this Court granted in part Plaintiffs' and State Defendants' Joint Motion to Stay Proceedings, entering a thirty (30) day stay of proceedings. (ECF No. 76.)

On February 22, 2019, State Defendants moved this Court to stay proceedings as Plaintiffs and State Defendants actively worked to reach a resolution. (ECF No. 79.) On that same day, State Defendants filed a Motion for Immediate Consideration of the Motion to Stay Proceedings (ECF No. 80) and this Court granted State Defendants' Motion to Stay Proceedings, entering a thirty (30) day stay of proceedings (ECF No. 81).

Plaintiffs and State Defendants have since entered into a Settlement Agreement, disposing of all claims asserted in the Action. An executed copy of the Settlement Agreement is attached hereto as Exhibit A. Intervenor Defendants,

who have asserted no claims and against whom no claims have been asserted, are not party to the Settlement Agreement.

Plaintiffs and State Defendants have agreed that all costs and attorneys' fees are the responsibility of the party incurring same. For the foregoing reasons, Plaintiffs and State Defendants respectfully request that the Court enter an order to dismiss all of Plaintiffs' claims in the Action.

Dated: , 2019

Jay Kaplan (P38197)
Michael J. Steinberg (P43085)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
Telephone: (313) 578-6823
jkaplan@aclumich.org
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American Civil Liberties Union
Foundation
915 15th Street NW
Washington, DC 20005
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Garrard R. Beeney
Ann-Elizabeth Ostrager
Jason W. Schnier
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004-2498
Telephone: (212) 558-4000
beeneyg@sullcrom.com
ostragerae@sullcrom.com
schnierj@sullcrom.com

Counsel for Plaintiffs

Joshua S. Smith (P63349)
Assistant Attorney General
Attorneys for State Defendants
Health, Education &
Family Services Division
P.O. Box 30758
Lansing, MI 48909
(517) 335-7603
Smithj46@michigan.gov

Counsel for State Defendants

EXHIBIT A

Settlement Agreement

CERTIFICATE OF SERVICE

I hereby certify that, on March 22, 2019, 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: , 2019

SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004-2498
Telephone: (212) 558-4000
ostragerae@sullcrom.com

Annex B

Proposed Order on Stipulation of Dismissal

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

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

Plaintiffs,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and JENNIFER WRAYNO, in her official capacity as the Acting 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

[PROPOSED] ORDER ON STIPULATION OF DISMISSAL

After considering the Stipulation of Voluntary Dismissal with Prejudice and the Settlement Agreement, attached thereto, provided by Plaintiffs Kristy Dumont, Dana Dumont, Erin Busk-Sutton, and Rebecca Busk-Sutton (collectively,

"Plaintiffs") and Defendants Robert Gordon and Jennifer Wrayno,[1] it is hereby ORDERED that Plaintiffs' claims in the above-captioned action (the "Action") are dismissed with prejudice pursuant to the terms of the Settlement Agreement.

The Court retains jurisdiction over the enforcement of the Settlement Agreement in the Action. *See Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) ("If the parties wish to provide for the court's enforcement of a dismissal-producing settlement agreement, they can seek to do so."); *RE/MAX Int'l, Inc.* v. *Realty One, Inc.*, 271 F.3d 633, 641 (6th Cir. 2001) ("[A] district court [has] the authority to dismiss pending claims while retaining jurisdiction over the future enforcement of a settlement agreement.").

All costs and attorneys' fees are the responsibility of the party incurring same.

_____
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: [*date*]

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this order reflects the substitution of Herman McCall, a party in his official capacity who has ceased to hold office during the pendency of the Action, for Jennifer Wrayno, who is "automatically substituted as a party."

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on [*date*].

_____
Case Manager

CERTIFICATE OF SERVICE

I hereby certify that, on March 22, 2019, 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: March 22, 2019

/s/ Ann-Elizabeth Ostrager

SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004-2498
Telephone: (212) 558-4000
ostragerae@sullcrom.com

EXHIBIT I

Contact

www.linkedin.com/in/appellate (LinkedIn)
en.wikipedia.org/wiki/John_J._Bursch (Other)
www.oyez.org/advocates/b/j/john_j_bursch (Other)

Top Skills

Appellate Litigation
Litigation
Courts

Languages

English

John Bursch

Supreme Court litigator & legal strategist; VP of Appellate Advocacy, Alliance Defending Freedom; Owner, Bursch Law PLLC
Greater Grand Rapids, Michigan Area

Summary

John Bursch represents Fortune 500 companies, foreign and domestic governments, top public officials, and industry associations in high-profile cases, primarily on appeal. John recently argued and won his 11th U.S. Supreme Court case since 2011 (Lee v. United States)—more than all but a handful of attorneys. And he has argued 26 Michigan Supreme Court cases, including multiple arguments in seven consecutive Terms, five in the 2016-17 Term alone. John has successfully litigated hundreds of matters around the country, including five with more than $1 billion at stake. Recent victories including halting the Michigan presidential-election recount initiated by the Green Party candidate for President, a favorable Eighth Circuit Court of Appeals opinion in an $80 million class-action dispute involving an insurance policy's pollution exclusion, and upholding the boundaries of Congressional District 23 on behalf of U.S. Congressman Will Hurd in the Texas redistricting litigation.

A recent study found that over the past four Terms, John was one of the most successful attorneys in the country at persuading the U.S. Supreme Court to grant petitions for certiorari. He has also compiled a Supreme Court merits record that the National Law Journal observed "even more veteran high court advocates would envy." John's cases have involved many of the most important public-policy issues of the past decade.

John has been widely recognized for his advocacy. He is one of only 7 Michigan lawyers inducted into the American Academy of Appellate Lawyers, and one of only 62 Michigan attorneys serving as a Member of the American Law Institute. Best Lawyers recognizes John in the areas of Appellate Litigation, Commercial Litigation, and Bet-the-Company Litigation, and Michigan Super Lawyers recently featured John on its cover (see http://digital.superlawyers.com/superlawyers/mislrs17?pg=1#pg1).

Experience

Alliance Defending Freedom
Vice President of Appellate Advocacy
July 2018 - Present
Caledonia, Michigan

Bursch Law PLLC
Owner
August 2016 - Present

John Bursch represents Fortune 500 companies, foreign and domestic governments, top public officials, and industry associations in high-profile cases, primarily on appeal.

Warner Norcross & Judd LLP
Co-Chair, Appellate Practice & Public-Affairs Litigation Groups
December 2013 - July 2016 (2 years 8 months)
Grand Rapids, Michigan

Go-to Michigan attorney for appellate, complex, and sensitive litigation matters. Has argued 9 cases in the U.S. Supreme Court and 21 cases in the Michigan Supreme Court and represented Amway Global, Auto-Owners Insurance, BorgWarner, Chicago Title Company, CMS Energy, Dow Chemical, DTE Energy, Fifth Third Bank, Farm Bureau Insurance, Farmers Insurance, Huntington National Bank, Innovation Ventures, Lafarge N.A., Michigan Farm Bureau, National Heritage Academies, Robert Bosch Corporation, Spartan Stores, Wells Fargo Financial Leasing, Whirlpool, industry associations, citizen groups, local governments,Michigan's Governor, Attorney General, Secretary of State, and Legislature, the State of Michigan, several additional states, and Canada.

State of Michigan
Solicitor General
March 2011 - December 2013 (2 years 10 months)
Lansing, Michigan

I manage all of Michigan's litigation, with a special emphasis on matters in the Michigan Supreme Court and the United States Supreme Court. Recent U.S. and Michigan Supreme Court matters include:

-Metrish v. Lancaster, 133 S. Ct. 1781 (2013) (merits)
-McQuiggin v. Perkins, 133 S. Ct. 1924 (2013) (merits)

-University of Texas Southwestern Medical Center v. Nassar, 133 S. Ct. 2517 (2013) (amicus)
-Nevada v. Jackson, 133 S. Ct. 1990 (2013) (amicus)
-State v. McQueen, 828 N.W. 644 (Mich. 2013) (merits)
-People v. Bylsma, 825 N.W. 543 (Mich. 2013) (merits)
-Protect Our Jobs v. Board of State Canvassers, 822 N.W.2d 534 (Mich. 2012) (merits)
-Stand Up for Democracy v. Secretary of State, 822 N.W.2d 159 (Mich. 2012) (merits)
-People v. Likine, 823 N.W.2d 50 (Mich. 2012) (merits)
-Howes v. Walker, 132 S. Ct. 2741 (2012) (merits)
-Blueford v. Arkansas, 132 S. Ct. 2044 (2012) (amicus)
-Florence v. Bd. of Chosen Freeholders of the County of Burlington, 132 S. Ct. 1510 (2012) (amicus)
-Lafler v. Cooper, 132 S.Ct. 1376 (2012) (merits)
-Howes v. Fields, 132 S. Ct. 1181 (2012) (merits)
-Douglas v. Independent Living Center, 132 S. Ct. 1204 (2012) (amicus)
-Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission, 132 S. Ct. 694 (2012) (amicus)
-Stovall v. Miller, 132 S. Ct. 573 (2011) (merits)
-In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38, 806 N.W.2d 683 (Mich. 2011) (merits)
-Talk America, Inc. v. Michigan Bell Tel. Co., 131 S. Ct. 2254 (2011) (merits)

Warner Norcross & Judd LLP
Chair of the Appellate Practice Group
September 1998 - March 2011 (12 years 7 months)
Michigan

Chair, Appellate Practice Group. Significant appellate matters included:

-Patchak v. Salazar, 632 F.3d 702 (D.C. Cir. 2011)
-Priority Health v. OFIR, 803 N.W.2d 132 (Mich. 2011)
-Burleson v. Department of Environmental Quality, 808 N.W.2d 792 (Mich. Ct. App. 2011)
-Bay City v. Bay County, 807 N.W.2d 892 (Mich. Ct. App. 2011)
-Copus v. MEEMIC Ins. Co., 805 N.W.2d 623 (Mich. Ct. App. 2011)
-National Wildlife Federation v. DNR, 2011 WL 1004525 (Mich. Ct. App. 2011)
-Magellan v. Sylvan Township, 2011 WL 1901805 (Mich. Ct. App. 2011)
-Woods v. JLG Indus., 2011 WL 2342719 (Mich. Ct. App. 2011)
-Edry v. Adelman, 486 N.W.2d 634 (Mich. 2010)

-Citizens for Envtl. Inquiry v. Dep't of Envtl. Quality, 2010 WL 446047 (Mich. Ct. App. 2010)
-Spartan Graphics, Inc. v. Entermarket Corp., 2010 WL 4628643 (Mich. Ct. App. 2010)
-Old Republic Nat'l Title Holding Co. v. First Metropolitan Title Co., 2010 WL 1056609 (Mich. Ct. App. 2010)
-United States v. Huntington Nat'l Bank, 574 F.3d 329 (6th Cir. 2009)
-Quixtar, Inc. v. Brady, 2009 WL 1160273 (6th Cir. 2009)
-Hubbard v. GeoStar Financial Servs. Corp., 2009 WL 3486653 (6th Cir. 2009)
-Stormans, Inc. v. Selecky, 586 F.3d 1109 (9th Cir. 2009)
-Oneida Charter Twp. v. Grand Ledge, 771 N.W.2d 785 (Mich. 2009)
-Schaendorf v. Consumers Energy II, 2009 WL 563904 (Mich. Ct. App. 2009)
-Wolverine Power Supply Coop., Inc. v. De't of Envtl. Quality, 777 N.W.2d 1 (Mich. Ct. App. 2009)
-McKay Consulting, Inc. v. St. John Health, 2009 WL 127664 (Mich. Ct. App. 2009)
-NSK Corp. v. Robert Bosch Corp., 2009 WL 454940 (Mich. Ct. App. 2009)
-Reed v. Shurlow, 2009 WL 4827827 (Mich. Ct. App. 2009)

[For additional matters, see http://en.wikipedia.org/wiki/John_J._Bursch]

United States Court of Appeals for the Eighth Circuit
Clerk for the Honorable James B. Loken
1997 - 1998 (2 years)
Minneapolis, MN

Drafted opinions; oral argument preparation

Faegre & Benson LLP
Summer Associate
May 1996 - August 1996 (4 months)
Minneapolis, MN

Business Litigation, Real Estate, Trusts & Estates, and Corporate group rotations

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Education

University of Minnesota Law School
J.D., Law · (1994 - 1997)

Western Michigan University

B.A., B.M., Mathematics and Music Performance · (1990 - 1994)