
No. 19-2185

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees,

v.

ROBERT GORDON, in his official capacity as Director of the Michigan
Department of Health and Human Services; JOO YEUN CHANG, in
her official capacity as the Executive Director of the Michigan
Children's Service Agency; DANA NESSEL, in her official capacity as
Attorney General of Michigan,

Defendants-Appellants.

Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Robert J. Jonker

**STATE DEFENDANTS-APPELLANTS' REPLY TO PLAINTIFF-
APPELLEE'S RESPONSE TO EMERGENCY MOTION FOR STAY
PENDING APPEAL**

I. MDHHS does not mandate that SVCC close for refusing to comply with the Policy in its State contracts.

SVCC re-casts this case as one in which the Court must decide whether SVCC remains open or closes its doors. Not so. That is *SVCC's choice*. Like all CPAs offered a State contract, SVCC must choose whether to sign an agreement with MDHHS to provide foster and adoption services (Services) for state-supervised children—knowing it must abide by the nondiscrimination provisions (Policy). And like all CPAs, before any state-supervised child is entrusted to SVCC for prompt placement with a foster or adoptive home, SVCC again must choose whether to accept the MDHHS-referral to provide all necessary Services to that child – including assessing prospective foster or adoptive parents, contractual duties for which all CPAs are paid by MDHHS. Goad Aff., R. 16-3, Page ID ## 4-5.¹

Having chosen to enter into the contracts after 2015 Public Act 53 was enacted and incorporated in these agreements, SVCC—like all contracted CPAs—committed to complying with the contract terms,

¹ Citations to the Record (“R.”) are to the Sixth Circuit docket numbers.

including the Policy.² And like all contracted CPAs, each time SVCC chooses to accept an MDHHS referral of a child needing the State’s services, its commitment applies to every child accepted. But even if SVCC refused to contract with MDHHS or rejects an MDHHS referral of a child, SVCC remains licensed to provide private adoption services. Mich. Comp. Laws § 722.124e(1)(i). And it is these private services—not state-contracted Services—that Michigan law permits every CPA, including SVCC, to decline to provide based on its religious beliefs. *Id.* at §§ 722.124e(2), (7)(b). Where SVCC declines to provide these private services, Michigan law requires SVCC to refer the family to another agency. *Id.* But SVCC’s license to provide private adoption services are not at issue here. Instead, the issue before this Court is whether the State can enforce the Policy against SVCC for denying state-contracted services to children, in violation of the Policy—something the State could not do in performing these same Services to children directly. Goad Aff., R. 16-13, Page ID ## 4-6. *See Obergefell v. Hodges*, 135 S.Ct.

² In fact, SVCC makes clear that it never had any intention of complying with the nondiscrimination provisions when contracting with MDHHS. But it nevertheless agreed to the Policy again by signing a new contract on September 26, 2019.

2584, 2604-05 (2015) (holding that same-sex couples may not be deprived of the rights and liberties afforded to opposite-sex couples).

MDHHS's Policy is the same neutral and generally applicable policy that all CPAs agree to when providing the critical State function of finding foster and adoptive families for children. But SVCC claims that it is permitted to do what neither MDHHS nor any state-contracted secular agency can do—invoke its religious beliefs to discriminate in providing Services to state-supervised children by refusing to assess unmarried couples and LGBTQ families as prospective foster and adoptive parents. SVCC claims it can tell these families that they can and must find another agency “willing” to determine whether they meet the same state-established criteria that SVCC must consider, *which does not include consideration of whether a family is LGBTQ*.

SVCC concedes that MDHHS's home study criteria includes assessing the strength of a couple's relationship, level of satisfaction and stability of the relationship, as well as history, none of which can be assessed lower *because* a family is LGBTQ or a couple is unmarried. (Response, R. 21-1, Page ID #10.) But SVCC never even gets to these

factors because it turns away unmarried couples and LGBTQ families at the door. In essence, before considering state-mandated criteria, SVCC first considers *whether* the family shares SVCC's religious beliefs by determining whether the couple is married or the family is LGBTQ. This is a religious test and discrimination based on marital status, sexual orientation, and gender identity, which are expressly prohibited by MDHHS's Policy.

Ironically, a ruling in SVCC's favor would require MDHHS to apply different rules to different agencies based on their religious beliefs—precisely the conduct SVCC claims MDHHS is doing and cannot do. And SVCC does not deny that the genesis of hostility or intolerance against the LGBTQ community is not limited to religious views on marriage, but rather exists among secular and non-secular individuals and organizations alike. MDHHS is not required to enforce its Policy against secular CPAs that refuse to assess LGBTQ families based on personal views but ignore the same conduct so long as it has some tie to a religious belief. *Teen Ranch v. Udow*, 389 F.Supp.2d 827, 838–39 (W.D. Mich. 2005), *aff'd* 479 F.3d 403, 408–09 (6th Cir. 2007).

Allowing MDHHS to maintain the status quo, i.e., to enforce the Policy, prohibits every state-contracted agency from discriminating when providing Services to state-supervised children, whether the intolerance is grounded in religion or personal views. Maintaining the status quo also ensures that children promptly receive the full complement of Services to which they are entitled in the State's care, including assessments of all prospective families seeking to foster or adopt. And neither the children and their families nor the State should be expected to accept anything less.

II. SVCC relies on the district court’s erroneous factual findings, which conflict with the unrefuted evidence submitted by MDHHS.

In its Response, SVCC contorts the law and evidentiary record and relies on the district court’s erroneous factual findings, which conflict with the unrefuted evidentiary record submitted by MDHHS.³

For example, SVCC claims “there is no factual dispute over what state law says[.]” (Response, R. 21-1, Page ID # 21.) To the contrary, the parties fundamentally disagree on the activities prohibited or permitted under PA 53. SVCC interprets PA 53 as permitting it to refuse children any state-contracted foster and adoption “services” that conflict with its religious beliefs and to refer away families in that instance. The law, however, expressly excludes these services from the definition of “services” that a CPA may refuse to provide based on such beliefs. MCL 722.124e. In other words, SVCC may refuse to provide *private adoption services* based on its beliefs. And where it refuses to provide private services, it must direct the family to another agency.

³ The district court announced that it made no factual findings and declined an evidentiary hearing. Opinion, R. 16-4, Page ID # 5.

Id. MDHHS cannot and does not take adverse action on SVCC’s private adoption license as a result. *Id.*

But Michigan law does not permit SVCC to refuse state-contracted services for children accepted through a referral from MDHHS, including where the Services conflict with SVCC’s religious beliefs. Because SVCC cannot refuse Services, it cannot direct prospective families seeking to foster or adopt state-supervised children to another agency.

But before SVCC commits to providing state-contracted services, SVCC has a *choice*—the choice to accept or reject an MDHHS referral of a child needing these Services. When presented with a referral, PA 53 permits SVCC—and all other secular and non-secular agencies—to reject that referral for any reason, including because the Services needed by the child conflict with the agency’s religious beliefs. By accepting the referral, the agency is contractually bound, and paid, to provide these Services, including family assessments, to the child *without discrimination*. Just as MDHHS cannot discriminate, MDHHS makes no exception for any agency to discriminate, in providing these Services. Bladen Aff., R. 16-9, Page ID ## 8-10.

This is the status quo that has been in effect since PA 53 was enacted. The district court misinterpreted Michigan law and issued an injunction that overturned the status quo and now leaves children with the prospect of delay in placement rather than the maximum number of families available for placement.

III. MDHHS's Policy and enforcement remain unchanged.

SVCC contends that MDHHS changed its Policy and practice during the *Dumont* litigation, and did so at Nessel's direction. Not true. The unrefuted evidence belies SVCC's claims.

Before and during the *Dumont* litigation, MDHHS maintained the position that CPAs cannot violate the Policy. Response, R. 21-1, Page ID # 25. In MDHHS's Answer to the *Dumont* complaint, MDHHS acknowledged that some CPAs believe that assessing LGBTQ families conflicts with that CPA's religious beliefs, and that these beliefs are protected by PA 53. Answer, *Dumont*, 2:17-cv-13080, E.D. Mich. Dec. 15, 2017, Doc. 52 at Page ID # 1189. As explained above, CPAs can refuse to provide "private adoption services or reject MDHHS referrals based on their religious beliefs. However, they cannot violate the Policy when providing Services under state contracts.

That is why MDHHS has taken remedial action against CPAs for failure to comply with the Policy. *Id.* It is also why, upon learning of alleged Policy violations in the *Dumont* complaint in 2017, MDHHS immediately opened investigations of three CPAs, including SVCC, for refusing to assess same-sex couples seeking to foster or adopt state-

supervised children needing State services. Bladen Aff., R. 16-9, Page ID # 3.

Nessel, elected more than a year later, did not and could not have directed or influenced MDHHS's decision to enforce the Policy. And Nessel *provided legal advice* as counsel for MDHHS during settlement negotiations in *Dumont*.⁴ The settlement terms to which the *Dumont* parties—not Nessel—agreed, insure that MDHHS will continue to maintain and enforce its Policy in accordance with Michigan law. And the unrefuted record establishes that Nessel neither directed MDHHS to settle nor dictated settlement terms, and she has not dictated MDHHS policy. Bladen Aff., R. 16-9, Page ID # 12.

The law, the contracts, the *Dumont* pleadings, and the *Dumont* settlement agreement dovetail to one conclusion: that while CPAs may reject a referral and can direct their private services as they please, consistent with licensure requirements, they *must* adhere to the Policy when providing state-contracted services.

⁴ As explained in Appellants' motion, Nessel has not and does not decry religion when expressing a view that PA 53 harms children and permits hostility or intolerance for *any* reason. Emergency Motion to Stay, R. 16-1, Page ID ## 19-21.

MDHHS hoped to continue working with SVCC if it would come into compliance. Accordingly, MDHHS offered to renew its contracts including the Policy requirement. SVCC can adhere to its beliefs and to these contracts and conceded as much by renewing them. Should SVCC *choose* to remain under contract and violate the Policy, it will be investigated. If the violation is substantiated, SVCC may choose to enter into and adhere to a corrective action plan, just like any other CPA.

This has long been the status quo, and it was upended by the preliminary injunction forcing MDHHS to permit a single CPA to discriminate with impunity when providing state-contracted services to state-supervised children.

IV. SVCC misapplies *Teen Ranch*, *Trump*, *Ward*, *Lukumi*, and *Masterpiece*.

In addition to misconstruing the facts, SVCC misapplies the law. None of the cases SVCC relies on hold that religious hostility may be attributed to a government agency from anti-discrimination statements, or that a neutral, generally applicable nondiscrimination policy warrants strict scrutiny under a free-exercise analysis. Response, R. 21-1, Page ID ## 16, 22-27.

For example, SVCC dismisses out of hand *Teen Ranch*, because prospective parents can choose among various agencies. SVCC's argument fails for at least two reasons. First, a parent's choice of agencies is irrelevant to a CPA's obligation to provide Services without discrimination. Like *Teen Ranch*, this case involves whether *the children* placed at the agency have true private choice. When placed with SVCC, they are not given a choice of whether they want SVCC to deny them Services by refusing to assess families and forcing them to go to other agencies, delaying the children's placement in foster or forever homes. *Teen Ranch* prohibits SVCC from imposing its religious beliefs

and practices on children needing State services by denying them a full panoply of available families and delaying placement.

Second, even if a prospective parent's choice of agencies is relevant, the concept of choice is an illusion for parents who do not have access to multiple agencies. If a parent's only accessible agency can refuse to assess them, the children needing Services and prospective parents lose out. Similarly, if the only accessible agency for the child is one that discriminates in providing Services by refusing to assess all families interested in fostering or adopting, what about the child's choice then? Again, the CPA is imposing its views on a child who certainly would not choose to wait longer to find a loving placement or forever home because the CPA that he or she did not choose turns away families at the door.

SVCC's attempt to distinguish *Trump* is also unavailing. SVCC claims that, unlike in *Trump*, this case involves statements made after taking office.⁵ As explained in Appellants' motion, none of Nessel's

⁵ SVCC's baseless claim that Nessel attacked the district court's impartiality is as preposterous as its claim that her views on PA 53 constitute religious hostility. Nessel expressing anything but full agreement and satisfaction with legislation and court decisions is not tantamount to a personal attack, hostility, or animus. As the State's

statements constitute religious hostility, and the unrefuted facts show that—unlike the President—Nessel did not direct MDHHS to adopt its Policy or enter into settlement reiterating the Policy and enforcing Michigan law. If the President’s statements were insignificant to interpreting the Proclamation he *authorized*, Nessel’s statements—even as Attorney General and counsel for MDHHS—were of no consequence. The *Dumont* settlement *complies with the law*, and Nessel’s statements are not a basis to apply strict scrutiny and enjoinder enforcement of the Policy.

SVCC also misapplies *Ward* to this case. In *Ward*, a public university expelled a graduate student for refusing to counsel an LGBTQ student as part of the graduate program. The university had no policy prohibiting referrals and adhered to an ethics code that allowed values-based referrals. *Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012).

Here, MDHHS has had the same Policy in place and in its contracts since PA 53 was enacted in 2015, and SVCC has signed each

Chief Law Enforcement Officer, she is tasked with enforcing the law and has done so in *Dumont* and in this case.

contract agreeing to follow the Policy. MDHHS enforces law and Policy, allowing CPAs to decline private services and reject MDHHS referrals and requiring that Services be provided without discrimination. Bladen Aff., R. 16-9, Page ID ## 10-12. The Policy neither implicates nor violates SVCC's free exercise rights.

SVCC's reliance on *Lukumi* is also misplaced. MDHHS's Policy is easily distinguishable from the ordinance in *Lukumi*, where the Court inferred religious hostility based on council members asking "[w]hat can [they] do to prevent the Church from opening" and fashioning an ordinance negatively affecting only practitioners of the Santorini religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535, 541 (1993). MDHHS's Policy has none of these characteristics.

This case is also unlike *Masterpiece*. There, the Supreme Court found that the Commission's enforcement of a neutral, generally applicable nondiscrimination law violated the Free Exercise Clause because the Commission expressed "clear and impermissible" hostility toward the plaintiff and his religious beliefs and treated similar cases differently. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*,

138 S.Ct. 1719, 1729 (2018). By contrast, MDHHS did not express hostility toward SVCC and its religion when adopting and enforcing the Policy that follows PA 53. And SVCC has signed the State's contracts containing the Policy each time, and accepted taxpayer funds to perform these critical State functions without discrimination, just as MDHHS must do.

Unable to demonstrate hostility by MDHHS, SVCC—and the district court—improperly point the finger at Nessel. As explained above, Nessel's statements about PA 53 express no religious hostility, but rather denounce discrimination and harm to children. Moreover, both SVCC and the district court ignored the unrefuted evidentiary record establishing that Nessel played no part in developing MDHHS's Policy adopted long before she took office, and that she did not direct MDHHS to settle *Dumont*—a settlement that maintains the Policy and comports with the law. *Masterpiece* has no application here.

CONCLUSION AND RELIEF REQUESTED

As explained here and in Appellants' motion to stay, the preliminary injunction mandating that MDHHS permit SVCC to violate the Policy and breach its contracts should be stayed pending appeal because the Policy does not implicate SVCC's free exercise rights. Moreover, the balance of harms and the public interest weigh decidedly against ignoring SVCC's flagrant contractual violations, which harms MDHHS, the children committed to its care and their families, and the LGBTQ community, and singles out SVCC for special treatment different than all other CPAs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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I certify that on November 13, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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