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

MAG. DAVID R. GRAND

DEFENDANTS' RESPONSE TO PLAINTIFF CATHOLIC CHARITIES WEST MICHIGAN'S MOTION FOR PRELIMINARY INJUNCTION (DOC. 11)

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Dated: July 24, 2019

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

CONCISE STATEMENT OF ISSUES PRESENTED

Plaintiff Catholic Charities West Michigan's (Plaintiff or CCWM) request for injunctive relief must be denied because it cannot establish a likelihood of success on the merits, it has suffered no irreparable injury, and the interests of the public and both the public interest and the Michigan Department of Health and Human Services (MDHHS) would suffer if such relief were granted.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Mich. Comp. Laws § 722.124e

Mich. Comp. Laws § 722.124f

Fulton v. City of Philadelphia,
320 F. Supp. 3d 661 (E.D. Pa. 2018), aff'd 922 F.3d 140 (3d Cir. 2019)

New Hope Family Servs. v. Poole,
No. 5:18-cv-1419, 2019 U.S. Dist. LEXIS 82461 (N.D.N.Y. May 16, 2019)

Obergefell v. Hodges,
135 S.Ct. 2584 (2015)

Pavan v. Smith,
137 S.Ct. 2075 (2017)

Teen Ranch, Inc. v. Udow,
479 F.3d 403 (6th Cir. 2007)

Roberts v. United States Jaycees,
468 U.S. 609 (1984)

People v. DeJonge,
501 N.W.2d 127 (Mich. 1993)

Reed v. Kenowa Hills,
261 Mich. App. 17, 680 N.W.2d 62 (Mich. Ct. App. 2004)

INTRODUCTION

A preliminary injunction is always an extraordinary remedy, but Plaintiff's request is even more startling. It seeks an order requiring Michigan Department of Health and Human Services (MDHHS) to alter, or ignore, the terms of the standard contract it provides to all Child Placing Agencies (CPAs), whether faith-based or secular, to allow discrimination in services provided to children.

Neither federal nor state law authorize this. Plaintiff's Free Exercise and Freedom of Speech claims have been rejected by several federal courts in recent decisions. *Fulton v. City of Philadelphia,* 320 F. Supp. 3d 661 (E.D. Pa. 2018), aff'd 922 F.3d 140 (3d Cir. 2019); *New Hope Family Servs. v. Poole,* No. 5:18-cv-1419, 2019 U.S. Dist. LEXIS 82461 (N.D.N.Y. May 16, 2019). A requirement imposed on a contract entered voluntarily is not a burden of constitutional significance under the state constitution. And, the legislature expressly excluded services provided under the contracts at issue – foster care case management and adoption contracts—from activities for which a CPA can exercise an objection based on its sincerely held religious beliefs. Mich. Comp. Laws § 722.124e(7)(b).

MDHHS's policy is non-discrimination and it expects CPAs with which it contracts to provide foster care and adoption services to act consistent with this policy when carrying out contractual duties. This was true long before Defendant

Attorney General Nessel took office and the *Dumont* litigation settled. Federal and state law support this policy. Plaintiff's motion must be denied.

BACKGROUND

As detailed in Defendants' Response to Plaintiff's Motion to Change Venue (Doc. 16), the present case arises out of *Dumont v. Gordon*, Case No. 2:17-cv-13080 (E.D. Mich.), and the Consent Decree ending it (Doc. 82, 83). The facts set forth therein are incorporated herein pursuant to Fed. R. Civ. P. 10(c).

A. MDHHS's role in foster care and adoption services contracts.

Defendant MDHHS administers Michigan's foster care and adoption services program, in large part, through 137 contracts with 57 private CPAs who are licensed by MDHHS. (Goad Aff., ¶¶ 6-8, Ex. A.) CCWM is one CPA. (Goad Aff., ¶ 12.) MDHHS is aware of no evidence that religiously affiliated CPAs are more effective than other CPAs. (Hoover Aff., ¶ 13, Ex. B.) All CPAs sign the same master contract for foster care and adoption services. (Goad Aff., ¶ 7.)

The decision to certify a foster parent or approve an adoption rests on MDHHS. Pursuant to contract and statute, the CPA's role is to complete a home study, assess and make a recommendation to MDHHS as to whether a prospective foster or adoptive parent(s) ("Applicant") meets state requirements. (Neitman Aff., ¶ 12, Ex. C.) Criteria assessed during the home study include factors relevant to determining if, and to what extent, the Applicant can meet a child's needs and

whether a child may be a good fit for a particular family. (Neitman Aff., ¶¶ 10-11.)

A CPA's assessment does not constitute an endorsement or approval of any relationship or religious belief. (Neitman Aff., ¶ 12.) CPAs expressly agree not to discriminate against an Applicant on the basis of sexual orientation or marital status. (Hoover Aff., ¶¶ 21-22; Goad Aff., ¶¶ 18-19.) MDHHS asks CPAs to assess whether an Applicant meets legal licensing requirements, not to endorse any relationship, including same-sex marriage, or speak in favor of it. (Goad Aff., ¶ 11; Neitman Aff., ¶ 12.) CPAs receive an administrative rate and/or contracted rate for all services performed under these contracts, including home studies and other activities related to licensing foster families or assessing prospective adoptive families. (Goad Aff., ¶¶ 15-16; Hoover Aff., ¶¶ 10,12.)

MDHHS monitors CPAs' compliance with adoption and foster care contracts via audits and investigating allegations of noncompliance. (Neitman Aff., ¶¶ 14, 19). Alleged noncompliance with licensing rules, statutes, or contract requirements does not typically result in immediate contract termination. (Neitman Aff., ¶¶ 16-17.) Pursuant to contract and state law,[1] when an allegation of noncompliance is received, it is referred to a licensing consultant, who conducts an

[1] Mich. Comp. Laws §§ 722.113(1) and 722.120(1), the PAFC Master Contract, p. 21, § 2.21; the DCWL Policy and Procedure Manual, Chapter 6 Special Investigation, p. 46. (Ex. C, ¶ 19.)

investigation, meets with the CPA's administrators, and completes an investigation report. (Neitman Aff., ¶¶ 14-15.) The CPA can submit a corrective action plan (CAP) to address any noncompliance. Its failure to do so could result in a recommendation for disciplinary action, revocation of a license, or termination of the contract, which the CPA can appeal. (Neitman Aff., ¶¶ 16-18.)

B. MDHHS's long-standing policy of nondiscrimination is evidenced by its contracts and prior conduct.

MDHHS has always enforced the CPA contracts' non-discrimination clause. The *Dumont* settlement did not result in a "new" policy, but merely reaffirmed MDHHS's long-standing practice. (Bladen Aff., ¶ 25, Ex. D.)

Plaintiff is aware of this. For several years, its Private Agency Foster Care (PAFC) and Adoption Contracts included the following nondiscrimination clause:

> c. The Contractor shall comply with the MDHHS non-discrimination statement:
>
> Michigan Department of Health and Human Services (MDHHS) 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.
>
> The above statement applies to all applications filed for adoption of MDHHS supervised children, including MDHHS supervised children assigned to the contracted agency. [Bladen Aff., ¶¶ 15-16.]

Plaintiff was investigated twice for noncompliance because of sexual orientation discrimination. A January 2017 investigation led MDHHS to establish violations based on Plaintiff's refusal to complete a child's adoption by a same-sex

couple. And, in March 2018, Plaintiff failed to place siblings together because one sibling resided with a same-sex couple. Plaintiff submitted CAPs that MDHHS accepted to remedy noncompliance. (Neitman Aff., ¶¶ 20-22; Bladden Aff., ¶ 24.)

C. Michigan law and MDHHS policy do not authorize discrimination in services provided under foster care and adoption contracts.

MDHHS's adoption and foster care contracts are consistent with Public Acts 53, 54, and 55, which amended Michigan's Adoption Code (Mich. Comp. Laws §§ 710.1, *et. seq*.), Michigan's Child Care Organization Act (Mich. Comp. Laws §§ 722.111, *et seq.*), and Michigan's Social Welfare Act (Mich. Comp. Laws §§ 400.1, *et. seq*.).

Michigan law grants a CPA discretion to "decide not to accept the referral" of a child or individual in need of foster care or adoption services if "the services would conflict with the [CPA's] sincerely held religious beliefs…." Mich. Comp. Laws § 722.124f(1). A "referral" is MDHHS's offering of a child or individual's case to a CPA under contract with MDHHS to provide foster care case management or adoption services. (Bladen Aff., ¶ 4.) This is evident from the PAFC and Adoption Contracts. (PAFC, Doc. 1-2, Page ID #85; Goad Aff., ¶ 12.)

In practice, CPAs generally accept a "referral" by signing a 3600 Agreement with MDHHS (Bladen Aff., ¶ 4); however, a CPA may also accept a referral by engaging in activity that obligates MDHHS to pay for services related to it. Mich. Comp. Laws § 722.124f(1). (PAFC, Doc. 1-2, Page ID #85.) Before the CPA

accepts a referral, it has "sole discretion to decide whether to engage in activities or perform services related to that referral." Mich. Comp. Laws § 722.124f(1).

It is undisputed that Plaintiff has accepted referrals from MDHHS. Having accepted these referrals, Michigan law does not allow Plaintiff to refuse services to these children based on sincerely held religious beliefs, including turning away an Applicant based on sexual orientation or gender identity. The discretion provided to CPAs in Mich. Comp. Laws § 722.124f to refuse a referral from MDHHS does not authorize a CPA to turn away an Applicant. MDHHS does not direct Applicants to a particular CPA, unless the Applicant is a relative of a child for whom a CPA has already accepted a referral. (Bladen Aff., ¶ 5; Goad Aff., ¶¶ 9-10.) If an Applicant calls MDHHS with a question, s/he is directed to a Foster Care Navigator, an experienced foster parent, who assists Applicants through the licensing process and who provides information on CPAs in the Applicant's geographic area. Applicants are encouraged to explore multiple CPAs to determine which is the right fit for them. (Bladen Aff., ¶ 5; Hoover Aff., ¶ 17.)

Once the CPA accepts a referral it may ***not*** discriminate in providing "foster care case management and adoption services provided under contract with [MDHHS]." Mich. Comp. Laws § 722.124e(7)(b). The definition of "services" for purposes of the 2015 amendments expressly excludes these services from those for which the CPA can exercise its religious objection. *Id.*; *see also* Mich. Comp.

Laws §§ 710.23g, 400.5a (incorporating Mich. Comp. Laws § 722.124e). Home studies, orientations, and other activities necessary to license or approve an Applicant are services provided to children accepted as referrals under the PFAC or Adoption Contract. (Hoover Aff., ¶¶ 6-8.) Such services are provided to children in connection with the "paramount goal" of securing the child's placement. Mich. Comp. Laws § 722.124e(1)(a).

ARGUMENT

I. Neither federal nor state law supports Plaintiff's claim that MDHHS violates the law by mandating compliance with the nondiscrimination clause in foster care case management and adoption contracts.

A preliminary injunction is an "extraordinary remedy, involving the exercise of a very far reaching power." *Leary v. Daeschner*, 228 F.3d 729, 739-40 (6th Cir. 2000) (internal quotations and citations omitted). Plaintiff bears a weightier burden of proof here than would be required on a motion for summary judgment. *Id.*; *Overstreet v. Lexington-Fayette Urban County Gov't,* 305 F.3d 566, 573 (6th Cir. 2002). Plaintiff falls far short of meeting its burden.[2]

A. Plaintiff is unlikely to succeed on the merits.

The first factor, and the factor most often determinative in a case like this involving alleged constitutional violations, is the likelihood of success on the

[2] The factors for preliminary injunctive relief are well-established. See *Leary*, 228 F.3d at 736 (quoting *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997)).

merits. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 689 (6th Cir. 2014) (internal quotations omitted). Plaintiff must show more than a "mere 'possibility'" of success, but rather, a "strong or substantial *likelihood* or *probability* of success on the merits." *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261n.4 (6th Cir. 1977) (emphasis in original). It has not made such a showing here.

1. Neither Michigan law nor MDHHS policy allow discrimination in services provided under these contracts.

Plaintiff cannot establish a likelihood of success that MDHHS's actions and contract terms violate Michigan law. Nor can Plaintiff demonstrate that MDHHS's settlement in *Dumont* constitutes a new policy. MDHHS's policy of prohibiting discrimination in the provision of foster care case management and adoption services to children for whom Plaintiff has accepted a referral remains unchanged.

The "paramount goal" of Public Act 53 is to place a child "in a safe, loving, and supportive home." Mich. Comp. Laws § 722.124e(1)(a). It is not to protect any family structure, as Plaintiff suggests. (Pl.'s Mot., Doc. 11, Page ID #609.)

To that end, MDHHS "makes a referral" to a CPA of a child or individual in need of foster care or adoption services.[3] Mich. Comp. Laws § 722.124f(1).

[3] A "referral" for purposes of these foster care case management and adoption contracts denotes MDHHS's offering of a child or individual's case to a CPA under contract with MDHHS to provide foster care case management and adoption services. (Ex. D, ¶ 4.) It does not denote the direction of an Applicant to a CPA. While this term is not defined in the statute, this understanding is evident from

Michigan law and MDHHS policy allow a CPA to refuse this referral for any reason, including if providing services to this referral would conflict with the CPA's sincerely held religious beliefs. *Id.*

However, once a CPA has accepted a referral, neither Michigan law nor MDHHS policy allow a CPA to discriminate when providing "foster care case management and adoption services provided under contract with [MDHHS]." Mich. Comp. Laws § 722.124e(7)(b). The Legislature expressly excluded these services from those that a CPA may decline based on religious beliefs. *Id.* Plaintiff has accepted referrals of children and individuals from MDHHS. Therefore, Applicant recruitment and activities necessary to advise MDHHS whether an Applicant meets objective criteria for licensing, placement, and adoption of a particular child accepted as a referral (including training, orientation, home studies, etc.) are "foster care case management and adoption services provided under contract with the state." (Hoover Aff., ¶¶ 8, 12.) No CPA can claim a religious exception to the nondiscrimination clause in its contract for the provision of these services to children accepted through referrals from MDHHS.

Mich. Comp. Laws § 722.124f(1), which describe the process by which a CPA accepts a "referral," and Mich. Comp. Laws § 722.124e(1)(h), which recognizes that a CPA does not receive public funding "with respect to a particular child…referred by [MDHHS] unless the agency affirmatively accepts the referral. The contracts Plaintiff entered with MDHHS also make this clear. (*See* PFAC, Doc. 1-2, Page ID #85, ¶ 1.2; Adoption Contract, Doc. 1-2, Page ID #141, ¶ 1.2.)

In its claim that Defendants violate Michigan law and changed policy, Plaintiff conflates its statutory right to reject a referral *from* MDHHS with the prohibited practice of turning away and refusing to evaluate Applicants for children accepted through referrals and sending the Applicant to other CPAs. The latter constitutes discrimination in the provision of services to such children and is prohibited under the contract, law and policy.

2. Enforcing the nondiscrimination clause does not violate the Free Exercise Clause of the First Amendment.

Nor can Plaintiff demonstrate a substantial likelihood of success on its Free Exercise Clause claim. "The free exercise of religion means, first and foremost, the right to believe and profess whatever doctrine one desires[]" and, also, to engage in activities like assembling for worship and participating in the sacraments without State interference. *Mount Elliott Cemetery Ass'n v. City of Troy,* 171 F.3d 398, 403 (6th Cir. 1999) (quoting *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990)).

It does ***not*** require MDHHS to alter its standard contract or policy, or ignore noncompliance in order to accommodate Plaintiff's religious beliefs. MDHHS's enforcement of the nondiscrimination provision is not a "new policy" embedded in the *Dumont* settlement agreement and the April 2019 Communication Issuance. Rather, these documents simply confirm that which MDHHS already does, to wit, maintain and enforce a nondiscrimination provision that has been in MDHHS's

standard contract for several years and with which Plaintiff agreed to comply. (Compl., Doc. 1-2, Page ID #46-47, ¶¶ 129-32; PFAC, Doc. 1-2, Page ID #88; Adoption Contract, Doc. 1-2, Page ID #144; Bladen Aff., ¶ 27.)

a. The nondiscrimination clause is neutral, generally applicable, and presumed valid.

When a neutral and generally applicable provision like MDHHS's nondiscrimination clause is at issue, "a free exercise challenge is presumably precluded." *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 932 (6th Cir. 1991). Plaintiff cites no case that warrants disregarding this presumption here.

i. Ministerial Exception does not apply.

Plaintiff's reliance on *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm.*, 138 S.Ct. 1719 (2018) is misplaced. Neither have any relevance here.

Plaintiff asserts a ministerial exception to anti-discrimination laws. In *Hosanna-Tabor*, the Supreme Court held that a "ministerial exception" "ensures that the authority to select and control who will minister to the faithful is the church's alone" and bars an employment discrimination claim by a minister against a church and associated parochial school. 565 U.S. at 179-80, 194-95. Similarly, Plaintiff characterizes *Masterpiece* as suggesting that a similar exception applies if "a member of the clergy" did not perform a same-sex wedding. 138 S.Ct. at 1727.

Plaintiff is neither a minister nor clergy in the context of providing foster care case management and adoption services. It performs this function under contract with MDHHS in exchange for taxpayer funds. No ecumenical duty or religious teaching or training is required. To the contrary, CPAs assess an Applicant and perform home studies to determine if s/he meets the state criteria for licensing or adoption, without regard to religion, sexual orientation, or other protected criteria. (Neitman Aff., ¶¶ 9-13; Goad Aff., ¶ 14.)

MDHHS's requirement that Plaintiff not discriminate in the performance of this contracted function is consistent with the Supreme Court's repeated admonition that state-sponsored discrimination against same-sex couples violates the Constitution. *Obergefell v. Hodges,* 135 S.Ct. 2584 (2015); *Pavan v. Smith,* 137 S.Ct. 2075 (2017). The Supreme Court did not retreat from this in *Masterpiece*. In fact, the excerpt Plaintiff relies on its brief – when read in full– characterizes a clergy's objection to performing a wedding ceremony as an "exception" that if not confined, would result in a "long list of persons" refusing to provide goods and services to gay persons, "thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws . . . ." 138 S.Ct. at 1727. *Masterpiece* does not authorize an expansion of the ministerial exception to encompass a private agency's duties in a state contract. Thus, Plaintiff cannot show a likelihood of success on its Free Exercise claim.

ii. Plaintiff has not been categorically excluded from a public benefit because of its religious affiliation.

Plaintiff's reliance on *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017), is equally misplaced. In *Trinity*, the state offered a grant to nonprofits that installed playground surfaces, but held a "strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity." *Id.* at 2017. This exclusion of a "public benefit" to a nonprofit "solely because of [its] religious character" violated the Free Exercise Clause. *Id.* at 2024. Here, Plaintiff voluntarily contracted with MDHHS to perform a governmental function. This is not a public benefit. *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409-11 (6th Cir. 2007). In addition, MDHHS does not categorically exclude faith-based CPAs but, rather, works with both faith-based and secular CPAs on equal terms. (Hoover Aff., ¶ 5.) Plaintiff's Free Exercise claim fails on the merits.

b. No hostility toward religion exists.

The nondiscrimination clause in MDHHS contracts and policy reflects MDHHS's commitment to nondiscrimination against Applicants on a variety of factors, including race, religion, gender identity, and sexual orientation, without reference to the Catholic faith or any religious belief or practice. (Goad Aff., ¶¶ 17-18; Neitman Aff., ¶ 13; Bladen Aff., ¶¶ 17, 20-21; Hoover Aff., ¶ 5.) It

appears in contracts with every CPA – whether faith-based or secular – and compliance is enforced uniformly. (Goad Aff., ¶¶ 17-18; Bladen Aff., ¶ 17; Hoover Aff., ¶ 5.) Its comprehensive language and neutral application easily distinguish it from regulations found unconstitutional by the Supreme Court in *Church of Lukumi Babalu Aye*, where "almost the only conduct subject to [the regulatory language] [was] the religious exercise of the Santeria church members." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535-36 (1993).

MDHHS's widespread inclusion in the contracts and prior enforcement of the nondiscrimination provision also easily distinguish this case from another case cited by Plaintiff. In *Ward v. Polite*, the Sixth Circuit allowed a Free Exercise claim to go to the jury because the defendant could not point to any written policy barring the plaintiff from her activity that led to expulsion from a graduate program. 667 F.3d 727, 738 (6th Cir. 2012). In fact, the governing code of ethics suggested the plaintiff's action was permissible. *Id.* at 739.

Here, the inclusion of sexual orientation in MDHHS contracts and policy is reflective of the widespread recognition that discrimination on this basis constitutes a social harm. *Obergefell*, 135 S.Ct at 2604; *Romer v. Evans*, 517 U.S. 620, 635-36 (1996). Plaintiff cannot demonstrate a substantial likelihood of success with respect to its Free Exercise claim.

c. Rational basis review applies.

This neutral, generally applicable clause survives rational basis review. [4] "Rational basis review is extremely deferential," requiring the provision be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Bowman v. United States*, 564 F.3d 765, 775-76 (6th Cir. 2008) (internal quotations and citations omitted). The nondiscrimination clause reflects federal requirements, MDHHS's goal of nondiscrimination in the context of foster care and adoption services, and the best interest of children. *See* 45 C.F.R. § 75.300(c). It should be upheld. *Fulton*, 320 F. Supp. 3d at 703-04, 922 F.3d at 165. Plaintiff has not shown a likelihood of success on the merits on this issue, and its motion must be denied.

3. The nondiscrimination requirement in contracts and policy does not violate Article I, § 4 of the Michigan Constitution.

Plaintiff's claim that MDHHS's nondiscrimination requirement violates Michigan's Constitution is unavailing and cannot support the relief sought.

[4] The nondiscrimination clause also survives strict scrutiny because ending invidious discrimination in government contracts is, in itself, a compelling state interest. *Roberts v. United States Jaycees,* 468 U.S. 609, 628-29 (1984). And, requiring compliance with a neutral, generally applicable contract is the least restrictive way to accomplish this compelling interest. *Fulton*, 922 F.3d at 163 (internal citations and quotations omitted).

a. The nondiscrimination requirement does not burden Plaintiff's religious beliefs or conduct.

Given the discretion Plaintiff has to reject referrals under these foster care case management and adoption contracts, it can hardly be heard to argue that the nondiscrimination policy "coerced" it to violate its religious beliefs, or denies Plaintiff its share in the "rights, benefits, and privileges enjoyed by other citizens" due to its religious beliefs. *People v. DeJonge*, 501 N.W.2d 127, 136 (Mich. 1993) (internal quotations omitted). Plaintiff cannot meet these threshold requirements to establish a violation of Michigan's Free Exercise Clause in this case.

First, a government-funded contract for foster care or adoption services is not a public benefit. *Teen Ranch, Inc.*, 479 F.3d at 410-11. Second, Plaintiff is not required to renounce its religious beliefs on marriage or otherwise in order to participate in the contract. (Neitman Aff., ¶ 12; Goad Aff. ¶ 11.) Home studies and other licensing-related activities require an assessment of whether an Applicant meets the state criteria, not an endorsement or approval of any relationship on religious grounds. (Neitman Aff., ¶¶ 10-12.)

Third, Plaintiff's participation is voluntary. No state sanction or criminal penalty applies if Plaintiff chooses not to contract with MDHHS. Even after entering the contracts, Plaintiff may decline a referral of a child or individual in need of foster care and adoption services for any reason, including its religious beliefs. Mich. Comp. Laws § 722.124f(1). Only after voluntarily accepting the

referral does Plaintiff become obligated to comply with MDHHS's contract and policy prohibiting discrimination in the provision of services provided under contract. A state requirement necessary for participation in a voluntary program does not impose a constitutionally significant burden under Michigan law. See *Reed v. Kenowa Hills*, 680 N.W.2d 62, 69-70 (Mich. Ct. App. 2004) (state regulation requiring enrollment in public school to participate in athletics found not to violate homeschooled students' freedom of religion because participation in athletics is voluntary and, therefore, did not impose a constitutionally significant burden on religious exercise). Plaintiff's claim under Article I, Section 4 fails.

b. Compelling state interests justify any burden.

Even if Plaintiff could demonstrate that the nondiscrimination policy imposes a burden of constitutional significance on its religious beliefs, several compelling state interests justify this. One such compelling interest is ending invidious discrimination in government contracts, including discrimination on the basis of sexual orientation. *Obergefell*, 135 S.Ct at 2604; *Roberts v. United States Jaycees*, 468 U.S. 609, 628-29 (1984).

A second, equally compelling interest is promoting the best interests of Michigan's children. "The care and protection of children has long been a matter of utmost state concern." *Fisher v. Fisher*, 324 N.W.2d 582, 584 (Mich. Ct. App. 1982). Even in the 2015 amendments, the Legislature recognized that its

"paramount goal" is to "place the child in a safe, loving, and supportive home." Mich. Comp. Laws § 722.124e(1)(a). This goal is advanced by maximizing the number of qualified foster and adoptive *parents* available for children in care, and in working with CPAs that comply with the law and their contracts. (Bladen Aff., ¶ 7.) This includes the contractual provision prohibiting discrimination.

Michigan law requires judicial placement decisions be made with a "constitutionally mandated neutrality with respect to the merits of the religious beliefs of the parties[]" because the best interests of the children takes precedence over either parent's right to freely exercise his/her religion. *Fisher*, 324 N.W.2d 585-86. The "best interests of the child" is defined according to statute, and religion affiliation is not a factor to be considered. See, e.g., Mich. Comp. Laws § 710.22. MDHHS expects the same of the CPAs with which it contracts. This serves a compelling state interest.

c. No less intrusive way to satisfy state interest.

No less intrusive means of satisfying the state's compelling interest exists. Compliance with a neutral, generally applicable contract provision, like the non-discrimination clause, is the least restrictive way to accomplish a compelling state interest of eradicating discrimination. *Equal Employment Opportunity Comm'n v. R.G.*, 884 F.3d 560, 593-97 (6th Cir. 2018); see also *Fulton*, 922 F.3d at 163. Including the non-discrimination provision in the standard contract, and enforcing

it in accordance with long-standing policy, helps MDHHS maximize the number of licensed foster homes and adoptive families available for children serviced under foster care and case management contracts, and ensure CPAs uniformly consider the "best interest" of the child by evaluating the factors set forth in Michigan law. (Bladen Aff., ¶¶ 7, 9.)

4. The CPA contracts do not provide a forum for or necessitate protected speech.

Plaintiff's claim that the nondiscrimination clause "compels speech" fails because MDHHS's contract with CPAs does not create a forum for protected speech. *Teen Ranch*, F. Supp. 2d at 839-40; *Fulton*, 320 F. Supp. 3d at 696-97.

Nor does the nondiscrimination clause compel speech. The Northern District of New York recently evaluated, and rejected, claims similar to Plaintiff's here. *New Hope Family Servs. v. Poole*, No. 5:18-cv-1419, 2019 U.S. Dist. LEXIS 82461 (N.D.N.Y. May 16, 2019), Ex. E. The court appropriately recognized that the private agency's contract authorized it to perform a governmental function as an extension of the agency and, thus, any speech made pursuant to contract was "governmental speech." Moreover, like the nondiscrimination clause here, the challenged regulation "simply prohibits discrimination against potential adoptive parents on the basis of marital status and sexual orientation[,]" and"[i]n approving an unmarried or same-sex couple for adoption, the only message that would be

conveyed is that, applying the regulatory criteria . . . placement with such couple is in the child's best interest." *Id.* at 42-43.

This analysis applies with equal force. CPAs, including Plaintiff, voluntarily contract with MDHHS to perform the governmental function of foster care and adoption services. Plaintiff is not required to sanction any Applicant's sexual practices on religious grounds. (Goad Aff., ¶ 14; Neitman Aff., ¶¶ 12-13; Bladen Aff., ¶ 17.) The assessments referenced in Plaintiff's brief must be evaluated based on the Department's licensing guidelines and without moral judgment or religious opinion. (Goad Aff., ¶ 14; Neitman Aff., ¶¶ 7, 9, 12-13; Bladen Aff., ¶ 17.) Consequently, Plaintiff cannot demonstrate a likelihood of success here.

5. Plaintiff cannot show a substantial likelihood of success on claims against Defendant Nessel.[5]

Plaintiff's complaint challenges contractual language and MDHHS's long-standing policy of requiring nondiscrimination in providing services to children

[5] Defendant Nessel is not the only defendant against whom Plaintiff fails to state a claim as a matter of law or to which immunity applies. No defendant is a "person" as is required for Plaintiff to continue with its claims for money damages under 42 U.S.C. § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). In addition, MDHHS is entitled to both 11th Amendment and sovereign immunity. *Alabama v. Pugh*, 438 U.S. 781, 782 (1978). Finally, the individual Defendants sued in their official capacity are entitled to 11th Amendment immunity with respect to money damages. *Edelman v. Jordan*, 415 U.S. 651, 676 (1974). Contrary to Plaintiff's earlier assertions, removal to federal court did not constitute a waiver of immunity on the federal law claims. See, e.g., *Agrawal v. Montemagno*, No. 13-4313, 574 Fed. Appx. 570 (6thth Cir. July 23, 2014) (Ex. F);

under foster care case management and adoption contracts. Defendant Attorney General Nessel's only role in the *Dumont* litigation was to serve as legal advocate for her clients. (Bladen Aff., ¶¶ 25, 28.); *see also* Mich. Comp. Laws § 14.28, *et. seq*. (defining duties of the Attorney General). Contrary to Plaintiff's unfounded allegations, she could not – and did not – force settlement of the *Dumont* litigation, nor did she "drive" a "new policy." (Bladen Aff., ¶¶ 25, 28.) She is entitled to absolute immunity here. *Brown v. Tennessee Dep't of Labor and Workforce Dev.*, 64 Fed. Appx. 425, 426 (6th Cir. 2003), unpublished, Ex. I.

In addition, Plaintiff's claim against the Attorney General is based on misconstrued statements, most of which were made before she took office, and are insufficient to state a claim against her as a matter of law.

First, statements by a government official are not in-and-of-themselves actionable. *Trump v. Hawai'i*, 138 S.Ct. 2392, 2416-18 (2018). As the Supreme Court explained, courts must determine the legality of a facially neutral policy, "not whether to denounce the statements." *Id*. at 2418; s*ee also McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 125 S.Ct. 2722 (2005) (Courts should review policy "without any judicial psychoanalysis of a drafter's heart of hearts.").

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see also *Miller v. Mich. Dep't of Corr.*, No. 1:11-cv-1278, 2012 U.S. Dist. LEXIS 6777 (W.D. Mich. 2012)(Ex. G); *Burke v. Ky. State Police*, No. 14-cv-00024, 2016 U.S. Dist. LEXIS 9889 (E.D. Ky. 2016) (Ex. H).

Second, the statements were made well before she took office and express no animosity toward religion, much less the Catholic faith. Many express Defendant Nessel's opinions as a private citizen on pending legislation. For example, she opined that "***a proponent of this type of bill***" would "have to concede that [s/he] dislike[s] gay people more than [s/he] care[s] about the needs of foster care kids," or that, "***[t]hese types of laws*** are a victory for the hate monger but again a disaster for the children and the state." Rick Pluta, *Faith-based adoption bills head to House floor*, Michigan Radio NPR (2015), https://michiganradio.org /post/faith-based-adoption-bills- headed-house-floor (Emphasis added); Fox 2 Detroit, *Opponents say adoption bill discriminates against gays and lesbians*, http://www.fox2detroit.com/news/opponents-say-adoption-bill-discriminates-against-gays-and-lesbians (Emphasis added). These statements did not disparage any religious belief or practice, including the Catholic faith. This lack of expressed religious animosity, in addition to her role as legal advocate and not an adjudicator, distinguishes this case from *Masterpiece*, in which the Supreme Court found that statements by a commissioner expressly disparaged the plaintiff's religion and "cast doubt on the fairness and impartiality of the Commission's adjudication" of the case. *Id*. at 1729-30. Here, Plaintiff cannot demonstrate a substantial likelihood of success on its claims against Defendant Nessel.

II. Public policy and the Defendants' interest outweigh any alleged irreparable injury.

A. Plaintiff cannot show that it will suffer irreparable injury.

Plaintiff's allegations of irreparable injury are insufficient to warrant the extraordinary relief sought. Any loss of business opportunity would be a result of Plaintiff willfully breaching its contract with MDHHS, not the conduct of any Defendant. Such allegations are insufficient to constitute irreparable injury. *Shuttle Packaging Sys. v. Tsonakis*, No. 1:01-cv-691, 2001 U.S. Dist. LEXIS 21630 (W.D. Mich. Dec. 17, 2001), Ex. J; *S. Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 (6th Cir. 1991). Nor is a claim that some of Plaintiff's staff may lose employment or income necessarily sufficient to constitute irreparable injury.[6] *Essroc Cement Corp v. CPRIN, Inc.*, 593 F. Supp. 2d 962, 969 (W.D. Mich. 2008). Moreover, if Plaintiff decided to end its contracts, the Applicants with whom it works could continue with any contracted CPA. (Hoover Aff., ¶ 24.) Plaintiff's alleged injuries do not warrant a preliminary injunction.

B. Public interest and balance of equities weigh in Defendants' favor.

The public interest is served by enforcing voluntary contract obligations and discrimination-free contracting processes, especially for this state contract. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ran*, 67 F. Supp. 2d 764, 781 (E.D. Mich.

[6] Any claim on behalf of Plaintiff's staff or any prospective foster or adoptive parent, all of whom are non-parties, cannot be raised in the present case.

1999). Michigan's citizens deserve the benefit of their agency's bargain with regard to foster care and adoption services. *First Nat. Bank of Louisville v. J. W. Brewer Tire Co.*, 680 F.2d 1123, 1126 (6th Cir. 1982).

Moreover, there is a strong public interest in ending discrimination against LGBTQ individuals– especially when a private agency provides foster care and adoption services to children in MDHHS's care. *Obergefell*, 135 S.Ct at 2604;[7] *Fulton*, 320 F.Supp.3d at 704, n.35. Plaintiff's request that the Court rewrite the CPA contracts to allow CPAs to discriminate against LGBTQ persons improperly sends the "message . . . that they are outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist*. v. *Doe*, 530 U.S. 290, 309 (2000).

Plaintiff's claim that Michigan's foster children will be harmed if injunctive relief is not granted has no basis in law or fact. If Plaintiff chooses to cease providing foster care or adoption services, the foster families with whom it currently works would be able to work with any CPA with a foster care or adoption contract. (Hoover Aff., ¶ 24.) Accordingly, the interests of the public, Defendants,

[7] The recognition of this significant public interest is not limited to *Obergefell*. Federal courts throughout the nation have recognized this. *United States v. Windsor*, 570 U.S. 744, 775 (2013); *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003); *Romer*, 517 U.S. at 635-36; *Equal Employment Opportunity Comm'n*, 884 F.3d at 590; *Boyd County High School Gay Straight Alliance v. Bd. of Educ. of Boyd County, Kentucky*, 258 F. Supp. 2d 667, 692-93 (E.D. Ky. 2003); *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1150-51 (C.D. Cal. 2000).

and most importantly Michigan's children weigh strongly against Plaintiff's request for injunctive relief.

CONCLUSION AND RELIEF REQUESTED

Plaintiff fails to demonstrate a substantial likelihood of success on the merits the public interest, and MDHHS's interest in continuing the nondiscrimination policy in services provided pursuant to the foster care case management and adoption contracts outweigh the irreparable injury alleged. This Court should deny Plaintiff's motion for a preliminary injunction.

Respectfully submitted,

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Dated: July 24, 2019

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2019, I electronically filed **Defendants' Response to Plaintiff Catholic Charities West Michigan's Motion for Preliminary Injunction** with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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