UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Michigan Attorney General; ALEX AZAR, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

STATE DEFENDANTS' RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Plaintiffs' request for injunctive relief must be denied because they cannot establish a likelihood of success on the merits, they have suffered no irreparable injury, and the interests of the public and the Michigan Department of Health and Human Services would suffer if such relief were granted.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority: *Fulton v. City of Philadelphia*, 320 F.Supp.3d 661, 703-04 (E.D. Pa. 2018), aff'd 922 F.3d 140, 165 (3d Cir. 2019).

INTRODUCTION

Plaintiffs St. Vincent Catholic Charities (SVCC), Chad and Melissa Buck, and Shamber Flore request the extraordinary remedy of preliminary injunctive relief, claiming that they will suffer "irreparable" harm absent such relief. In so doing, they challenge a consent decree entered by Judge Borman in another court in *Dumont v. Gordon*, Case No. 2:17-cv-13080 (E.D. Mich.). Plaintiffs intervened in *Dumont*, asserting they needed to protect the rights they now assert in the instant case and retain the right to appeal any settlement. But Plaintiffs asserted no claims and failed to appeal the consent decree. Instead, they filed a new lawsuit in a new forum. They paint long-standing contract provisions, to which SVCC agreed, as a "new" policy and distort the Department of Health and Human Services' process of contracting, licensing and enforcement beyond all recognition. Their belated claims and request for a preliminary injunction lack merit.

Their claim for injunctive relief must fail. Not only will Plaintiffs suffer no irreparable injury, the relief they request is expressly prohibited by Michigan and federal law. And they fail to state claims against Attorney General Dana Nessel, who was not a party to and played no direct role in *Dumont*. Moreover, Plaintiffs cherry pick out-of-context quotations from Attorney General Nessel that make no mention of religion, let alone Catholicism, and twist them in order to conjure up a baseless claim of anti-Catholic animus. Plaintiffs' claims lack any merit.

Nor can the Bucks or Ms. Flores establish standing. Plaintiffs cannot show a likelihood of success on the merits. Similarly situated plaintiffs challenged Philadelphia's non-discrimination policy, making nearly identical claims in *Fulton*

v. City of Philadelphia, 320 F.Supp.3d 661, 703-04 (E.D. Pa. 2018), *aff'd* 922 F.3d 140, 165 (3d Cir. 2019). Both the district court and the Third Circuit wisely rejected those claims, which sought to transform the First Amendment from a shield to protect religious exercise and speech into a sword to strike down facially neutral government policies.

Finally, the public interest and that of the Michigan Department of Health and Human Services (Department) strongly favor upholding state and federal law, the enforcement of contracts, and preventing discrimination. Accordingly, injunctive relief is unwarranted and contrary to law.

STATEMENT OF FACTS

As detailed in State Defendants' Brief in Support of Motion to Dismiss, 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.31-5, PageID.721-30.) Pursuant to Fed. R. Civ. P. 10(c), the Statement of Facts from that Brief is incorporated by reference.

The Department's role in foster care and adoption services, contracting and enforcement.

The Department administers Michigan's foster care and adoption services programs that provide placement and supervision of children when a court finds they have been abused or neglected and cannot safely remain in their family homes. Services focus on resolving the problems that necessitated removal, with the goal of reunification. Approximately 13,500 children are in foster care, about 2,000 of whom are available for adoption. Care is provided in foster-family homes, child-care institutions, and relative homes. Mich. Comp. Laws § 712A.13a(1)(e). The Department holds 137 contracts with 57 private child placing agencies, or CPAs, to provide foster care or adoption services throughout Michigan, including SVCC. (Goad Aff., ¶¶4-6,Ex.A; Neitman Aff., ¶¶5-6,Ex.B.) The Department is aware of no evidence that faith-based or religiously affiliated CPAs are more effective than other CPAs. (Hoover Aff., at¶12;Ex.D.)

The Department reviews a CPA's recommendation for foster care licensing and adoption after a CPA performs a home study and assessment. The partnership between the Department and private CPAs allows the Department to better meet its commitments to serve children through timely foster care placements and

adoptions. Contrary to Plaintiffs' assertions, the Department does not require SVCC or any other CPA to endorse or approve of a specific relationship or type of relationship when recommending a family for licensure or adoption. The contracts merely require CPAs to provide foster care and adoption services pursuant to Act 116 of 1973, Mich. Comp. Laws § 722.111 *et seq*., administrative rules, Mich. Admin. Code R. 400.12101 *et seq*., contracts, and Department policy, as found in the Department's Children's Foster Care Policy Manual[1] and the Adoption Services Policy Manual.[2] (Goad Aff., ¶¶7-9; Neitman Aff., ¶¶7, 9, 12-13; Bladen Aff., ¶¶12-13,Ex.C.)

Pursuant to contract, CPAs recruit prospective foster and adoptive applicants, complete home studies and assess whether the person or family meets the Department's licensing requirements, as set forth in Act 116 and administrative rules. The Department does not ask or require CPAs providing foster care or adoption services under a contract to endorse or approve of any relationship, including same-sex marriages. Nor does the Department ask or require CPAs to speak in favor of any relationship, including same-sex marriages. The Department's contracts only require the CPA to determine whether the foster applicant meets the minimum licensing requirements mandated by law. CPAs must be licensed in order to provide foster care and adoption services, and only the

[1]http://www.mfia.state.mi.us/OLMWeb/ex/FO/Public/FOM/000.pdf#pagemode=bookmarks. Last accessed May 29, 2019.

[2]http://www.mfia.state.mi.us/OLMWeb/ex/AD/Public/ADM/000.pdf#pagemode=bookmarks. Last accessed May 29, 2019.

Department can certify a foster home applicant by issuing a license or approving an adoption. (Goad Aff., ¶¶10-11; Neitman Aff., ¶¶8, 12-13.)

CPAs are required by contract and administrative rules to perform a home study on prospective foster or adoptive families, including an on-site inspection of prospective foster homes. (Neitman Aff. at ¶9; DHS-3130 Home Study, Attachment 1.) Completion of a home study merely requires the CPA to check the "yes" or "no" box indicating whether the family meets objective criteria set by statute, rules, and policy. (DHS-3130, p. 9.) The criteria for home studies include a review of several factors, including the "[s]trengths and weaknesses" of the parents and the "[s]trengths of the relationship" between the couple, including "level of satisfaction" and stability of the relationship and their relationship history. Other factors to assess include marital and family status and history, including current and past level of family functioning and relationships, parenting skills and childrearing techniques, values and the role of religion in the family. The Department requires assessment of these criteria by all CPAs, including the Department itself. (Neitman Aff., ¶¶9-10.)

These criteria are used to determine whether and to what extent foster applicants or adoptive families are able to meet the needs of children served by the agency and whether a child may be a good fit for a particular family. A CPA's assessment of these factors does not constitute an endorsement, recommendation or approval of a specific relationship or a type of relationship. Nor does a CPA's assessment of these factors constitute an endorsement of any particular religious

faith or the absence of a religious faith. These factors cannot be used as a means of discriminating against prospective foster parents or adoptive families on the basis of their sexual preference or same-sex marital status. Instead, a CPA must assess these factors and determine compliance or noncompliance with administrative licensing rules and statute. (Neitman Aff., ¶¶11-12.)

Under the contracts, the Department pays CPAs for the services they render, including assisting with the licensing of foster families. Other services undertaken by CPAs include: placement and supervision of children who are experiencing or have experienced out of home care; reunification and other permanency planning efforts as appropriate; assessment of needs and progress for children and parents; service referral; and documentation of all case management services. The administrative rate paid to CPAs for foster care and adoption services provides compensation for all services performed under the respective contracts. (Goad Aff., ¶¶10, 12-13; Neitman Aff., ¶9; Hoover Aff., ¶¶6-11.)

When allegations of noncompliance with licensing rules, statute, or contract requirements are made, the Division of Child Welfare Licensing (DCWL) will initiate an investigation. A licensing consultant investigates the allegations to determine compliance with applicable rules, statute, or contract requirements. At the conclusion of the investigation, the licensing consultant conducts an exit meeting with the agency's administrators to discuss preliminary findings. The licensing consultant completes an investigation report, which is reviewed by the consultant's manager. The report details the allegations, investigative activities,

findings of compliance or noncompliance, and includes a recommendation regarding the status of the license and contract. (Neitman Aff., ¶¶14-15.)

If there are findings of noncompliance, a corrective action plan (CAP) to address the noncompliance will be required. Failure to submit an acceptable CAP will result in a recommendation for disciplinary action, which may include revocation of the license and termination of the contract. If a recommendation for disciplinary action on the contract is made, the licensee/contractor can appeal. Unless and until an investigation is complete, the Department does not know whether a statute, rule, policy or contract provision has been violated. (Neitman Aff., ¶¶16-18.)

In the present case, the Department was unaware that SVCC did not follow the non-discrimination clause until the *Dumont v. Lyon* lawsuit was filed. The *Dumont* plaintiffs alleged that they had been denied the opportunity to serve as foster or adoptive parents by SVCC, Bethany Christian Services of Madison Heights and Bethany Christian Services of East Lansing. When that lawsuit was filed, the Department investigated the allegations in the same manner as it investigates other complaints. It opened investigations of SVCC, Bethany Madison Heights and Bethany East Lansing. The Department was required to open these investigations under 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. (Neitman Aff., ¶¶19-21; Bladen Aff., ¶¶4-5.)

The Department has always enforced an agency contract's non-discrimination clause; the *Dumont* settlement did not result in a "new" policy. It merely reaffirmed the Department's long-standing practice. (Bladen Aff., ¶8.) For instance, in January 2017 and May 2018, the Department opened two investigations of Catholic Charities of West Michigan. In the first case, the Department established violations based on the agency's refusal to complete a child's adoption by a same-sex couple as the placement that the agency determined met the child's best interest. In the second case, the agency failed to place siblings together because the one sibling resided with a same-sex couple. A CAP was submitted by the agency and accepted by the Department. (Neitman Aff., ¶¶22-24; Bladen Aff., ¶7.)

Due to the then-pending *Dumont* lawsuit, the Department did not finalize its investigations of SVCC, Bethany Madison Heights and Bethany East Lansing. Since the *Dumont* case has ended, Bethany Christian Services has agreed that it will comply with its contract requirements, including the non-discrimination clause. (Neitman Aff., ¶¶25-26, Bladen Aff., ¶9.)

Because of the present lawsuit, the Department has not been able to finalize its investigation of SVCC. Should that investigation be completed and a violation found, SVCC would have the opportunity to complete a CAP demonstrating how it would achieve compliance. If SVCC chooses not to comply with the provisions of its contracts with the Department, including the non-discrimination clauses, the Department could take licensing and/or contract action. And if SVCC chooses to cease providing foster care and/or adoption services, the

Department has a process for finding new placements for the children SVCC serves without sacrificing the quality of care received by those children. (Neitman Aff., ¶¶27-30.)

The foster care and adoption contracts

The Department holds contracts with SVCC, a licensed CPA, to provide foster care and adoption services; CPAs must be licensed to provide those services. (Goad Aff. ¶6; Neitman Aff., ¶8.) The Department's foster care and adoption contracts with CPAs include non-discrimination clauses. The Private Agency Foster Care (PAFC) Contract, at § 2.9(b), and the Adoption Contract Section, at § 2.9(c) both state:

> The Contractor shall comply with the MDHHS non-discrimination statement:
>
> The Michigan Department of Health and Human Services (MDHHS) shall 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 MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.

(Goad Aff., ¶15-16; Neitman Aff., ¶13; Bladen Aff. ¶¶22-24; Doc.6-8,PageID.305; Doc.6-9,PageID.326.)

Since September 8, 2015, the Department's adoption contract with SVCC has included the non-discrimination clause. (SVCC Adoption Contract, at pp 1, 7,Ex.E; Goad Aff. at ¶18; Bladen Aff. at ¶8.) The Department's foster care contract

with SVCC has included the non-discrimination clause since July 8, 2016. (SVCC Foster Care Contract, at pp 1, 5,Ex.F; See also Goad Aff. at ¶19; Bladen Aff. at ¶8.)

ARGUMENT

I. Plaintiffs fail to establish a basis for injunctive relief

Injunctive relief is an extraordinary remedy in which the moving party "bears the burden of justifying such relief." *McNeilly v. Land*, 684 F.3d 611, 614-15 (6th Cir. 2012). The burden is on Plaintiffs to establish the necessity of this relief, while facing a more stringent burden of proof than what would be required to prevail on summary judgment. *Leary v. Daeschner,* 228 F.3d 729, 739-40 (6th Cir. 2000); *Overstreet v. Lexington-Fayette Urban County Gov't,* 305 F.3d 566, 573 (6th Cir. 2002).

Plaintiffs' request for a preliminary injunction must fail because they cannot establish the factors required for this extraordinary remedy under Fed. R. Civ. P. 65:

1) the likelihood of success on the merits;
2) whether an injunction will save plaintiffs from irreparable injury;
3) whether an injunction will harm others;
4) whether the public interest will be served.

United States v. Szoka, 260 F.3d 516, 523 (6th Cir. 2001) (*citing Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n,* 110 F.3d 318, 322 (6th Cir.1997). *See also*, *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.,* 119 F.3d 393, 400 (6th Cir.1997).

A. Plaintiffs are not likely to succeed on the merits.

Plaintiffs 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). Plaintiffs have not met this burden here and cannot establish the necessary elements for injunctive relief under Fed. R. Civ. P. 65.

1. Because Plaintiffs challenge a consent decree entered by Judge Borman, any remedy lies in that Court.

Plaintiffs cannot demonstrate any likelihood—much less a *substantial* likelihood–of success on the merits here because they filed this case in the wrong forum. This litigation follows the *Dumont* case, in which two same-sex couples sued Department officials on grounds that the Department was not enforcing its non-discrimination clause in the standard CPA contract. On March 22, 2019, Judge Borman entered an order dismissing *Dumont* "with prejudice pursuant to the terms of the Settlement Agreement[]" and stated that the "Court retain[ed] jurisdiction over the enforcement of the Settlement Agreement in the Action." (Doc.31-6, PageID.745-47.)

Judge Borman's Order constitutes a Consent Decree. He expressly referenced the *Dumont* parties' "voluntary settlement agreement" which "memorializes the bargained for position of the parties," and included a "final judicial order" that "compels" the issuing court to retain jurisdiction to protect the integrity of the decree by governing requests for enforcement or modification. *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

The present litigation constitutes a direct challenge to this Consent Decree. From the very beginning of their brief, Plaintiffs claim the Department's successful partnership with faith-based agencies and its work to "accommodate them." Until, according to Plaintiffs, "[t]hree weeks" before this motion was filed, "that all changed." (Doc.6, PageID.171.) The *Dumont* Consent Decree was filed on March 22, 2019, one year after Plaintiffs were granted intervenor status in the case and approximately three weeks before the motion for a preliminary injunction was filed on April 16, 2019.

This Court cannot award the injunctive relief Plaintiffs seek without requiring the Department to violate the Consent Decree. Plaintiffs request this Court maintain a purported "status quo" by ordering the Department to continue its contract with SVCC despite knowledge that SVCC will not provide services to same-sex couples under its CPA contract but will, instead, refer them to another agency. (Doc.6, PageID.186-87.) But the Consent Decree mandates maintaining and enforcing the existing non-discrimination provision in the Department's existing contracts with CPAs, which prohibits referring an otherwise potentially qualified LGBTQ individual or same-sex couple to another agency instead of providing contracted-for services to the child. (Doc.31-5, PageID.721-30.) Thus, Plaintiffs' claims challenging the Consent Decree must be heard by Judge Borman in the Court that retained jurisdiction to enforce the Consent Decree.

2. This Court lacks jurisdiction because the Individual Plaintiffs lack standing and Defendant Nessel is immune from suit.

a. Plaintiffs fail to satisfy the requirements of Article III standing.

SVCC and the Individual Plaintiffs, Chad and Melissa Buck and SVCC volunteer and former foster child Ms. Flore, cannot satisfy the requirements of Article III standing. (Doc.1, ¶¶2-3, 10-12, 21, 70-71, 81, 118-120, 158, PageID.2-3, 6-7, 10, 26-27, 29-30, 41, 49-50.) Nor do they have standing to assert the rights of foster children. (Doc.1, ¶¶4, 22, PageID.4, 10-11.)

Standing is a threshold requirement for invoking federal-court jurisdiction. *Binno v. American Bar Assoc.*, 826 F.3d 338, 344 (6th Cir. 2016). A plaintiff's personal interest in the litigation must exist both at the commencement of the suit and throughout the suit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 189 (2000). For standing to exist, a plaintiff must show: (1) a "concrete, particularized, and actual or imminent" injury; (2) that is "fairly traceable" to the defendant's alleged conduct; and (3) that the court could redress by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

i. The individual Plaintiffs fail to show an actual or imminent injury.

The Individual Plaintiffs have not demonstrated an invasion of any legally protected interest. *Lujan*, 504 U.S. at 560–61. Plaintiffs assert that the "policies" of State Defendants prevent them from being foster parents or volunteering for a CPA if SVCC is not a state-contracted child placing agency. (Doc.1, ¶¶118-119,

PageID.41.) But, there are numerous other state-contracted agencies throughout Michigan, and there is no right to be a foster care parent. *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 844-47 (1977); *Renfro v. Cuyahoga Cty Dep't of Human Servs*, 884 F.2d 943, 944 (6th Cir. 1989). And there is no right to volunteer at a CPA. In any case, the Bucks have not had a license since June 16, 2016. (Neitman Aff, at ¶31.) Nor does serving as a volunteer generally confer standing. *Medalie v. Bayer Corp.*, 510 F.3d 828, 830 (8th Cir. 2007); *Ass'n of Cmty. Org. for Reform Now v. Fowler*, 178 F.3d 350, 367 (5th Cir. 1999).

The policies on which Plaintiffs premise their action are provisions in foster care and adoption contracts that SVCC agreed to follow nearly four years ago and the *Dumont* settlement. Michigan contract law applies to the Consent Decree and the foster care and adoption contracts. *Bamerilease Capital Corp. v. Nearburg*, 958 F.2d 150, 152 (6th Cir. 1992); *see also Meijer v. General Star Indemnity Co.*, 826 F.Supp.2d 241, 244 (W.D. Mich. 1993).

The individual Plaintiffs are not parties to the foster care or adoption contracts between the Department and SVCC. Accordingly, their only path to a cognizable right in enforcing them is as third-party beneficiaries, which they fail to even allege. Even had they made such allegations, however, the individual Plaintiffs–former foster parents and a volunteer–are not intended beneficiaries of the contracts.

Under Michigan law, a third party is not a beneficiary of a contract unless "the contract establishes that [it] has undertaken a promise directly to or for that

person." *Schmalfeldt v. North Pointe Ins. Co.*, 670 N.W.2d 651, 654-55 (Mich. 2003). In making this determination, "a court should look no further than the form and meaning of the contract itself." *Id.* at 428.

Neither the foster care contracts nor the adoption contracts specifically mention any promise undertaken for the benefit of the individual Plaintiffs or the category of foster parents and volunteers. Similarly, the Consent Decree contains no express creation of rights for the Individual Plaintiffs and certainly not for a party that wishes to violate the non-discrimination clauses of the contracts. The Individual Plaintiffs cannot show any actual or imminent injury as a result of the alleged breach of those contracts and they lack standing to challenge them.

ii. The Individual Plaintiffs fail to allege injuries that are fairly traceable to State Defendants' conduct.

The injuries alleged by the Individual Plaintiffs are not "fairly traceable" to State Defendants' alleged conduct. *Lujan*, 504 U.S. 560-61. The individual Plaintiffs base their claims on contract provisions agreed to by SVCC and the *Dumont* defendants' authority and obligation to maintain and enforce them, including under the settlement agreement. But the Individual Plaintiffs are not parties to the agency contract or the Consent Decree, and they have not otherwise challenged these agreements. (Doc.1, ¶¶89-90, PageID.32.) Thus, their alleged injuries are not "fairly traceable" to State Defendants. To the extent they have suffered any cognizable injury, it is "fairly traceable" to SVCC's voluntary assent to

the non-discrimination clause in its foster care and adoption contracts with the Department.

The Individual Plaintiffs' alleged injuries have other sources. For the Bucks, they no longer have a foster license. (Neitman Aff., ¶31.) For Ms. Flore, nothing prevents her from volunteering at another CPA. Further, to the extent the Bucks' claimed injury is an inability to adopt the sibling of one of their other children, Doc.1, ¶118, PageID.41, their claim has no merit because they have admitted that they can adopt any child in the state through MARE, Hoover Aff., ¶¶26-27, a fact which they admit. (Doc.1, ¶31, PageID.14.) This would necessarily include a sibling of one of their adopted children. (Hoover Aff., ¶¶26-27.)

iii. The injuries asserted by the Individual Plaintiffs cannot be redressed by a favorable ruling.

An injury is only redressable if a court order can provide "substantial and meaningful relief" to the plaintiff. *Parsons v U.S. D.O.J.*, 801 F.3d 701, 715 (2015). To demonstrate redressability, a plaintiff must show that "a favorable decision will relieve a discrete injury[.]" *Id.* Redressability is difficult to establish "where the prospective benefit to the plaintiff depends on the actions of independent actors." *Id.*

Here, Individual Plaintiffs request declaratory and injunctive relief, but their Complaint offers only speculation that their proposed remedy will redress their alleged injuries. *Lujan*, 504 U.S. 560-61. For instance, the Bucks will still lack a foster license. In any case, should they desire to foster in the future, any CPA can

license them, providing they meet MDHHS' standards. Similarly, even if SVCC decides to cease providing foster and adoption services, Ms. Flore would still be able to volunteer at another CPA or with SVCC's other services.

iv. Plaintiffs lack standing to assert the claims of foster children.

Plaintiffs claim that the Department's actions "[h]arm . . . the [c]hildren of Michigan." (Doc.1, ¶114, PageID.39.) Essentially, Plaintiffs assert the purported rights of foster children. But none of the named Plaintiffs are foster children. And, they cannot assert the alleged rights of other individuals.[3] *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *Warth v. Seldin*, 422 U.S. 490, 499-502 (1975); *Smith v. Jefferson County Bd. of School Comm'rs*, 641 F.3d 197, 206 (6th Cir. 2011).

b. Attorney General Nessel is immune from Plaintiffs claims.

Plaintiffs' claims against Attorney General Nessel fail as a matter of law because state attorneys general have absolute immunity as legal advocates for their states. *Brown v. Tennessee Dep't of Labor and Workforce Dev.*, 64 Fed. Appx. 425, 426 (6th Cir. 2003), Doc.31-10, PageID.760-62; *Skinner v. Govorchin*, 463 F.3d 518, 525 (6th Cir. 2006). Attorney General Nessel also has qualified immunity. *Palmer*

[3] Even if Plaintiffs did have standing to assert the claims of foster children, the Department has a process for finding new placements for the children SVCC serves without any sacrifice in the quality of care received by those children. (Neitman Aff., ¶¶27-30.)

v. Schuette, __ Fed. Appx. __; 2019 WL 1503803 at *3 (6th Cir. 2019), Doc.31-11, PageID.763-69 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

3. Plaintiffs fail to state a RFRA claim against State Defendants and fail to state any claim against Attorney General Nessel.

a. Plaintiffs fail to state a RFRA claim against State Defendants.

Plaintiffs allege that State Defendants violated the RFRA. (Doc.1, ¶¶169-173, PageID.50-51.) But the RFRA cannot be applied to State Defendants because it is unconstitutional "as applied to the states." *Tree of Life Christian Sch. v. City of Upper Arlington*, 823 F.3d 365, 369 (6th Cir. 2016) (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).) Although the RFRA applies to federal agencies, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 (2014), State Defendants are plainly not federal agencies. Accordingly, Plaintiffs have failed to state an RFRA claim against State Defendants.

b. Plaintiffs fail to state claims upon which relief may be granted against Attorney General Nessel.

Plaintiffs base their claims against Attorney General Nessel on two equally flawed premises: (1) statements made by Attorney General Nessel as a private citizen, a candidate for office, or while Attorney General; and (2) that Attorney General Nessel forced the *Dumont* State Defendants into approving the Consent Decree, which Plaintiffs erroneously allege to be a "new" policy. (Doc.1, ¶¶91, 102, PageID.33, 36.) As stated previously, Attorney General Nessel has absolute

immunity for her actions as an advocate for the State of Michigan, its subdivisions and officers. *Brown*, 64 Fed. Appx. at 426; *Skinner*, 463 F.3d at 525.

In addition, Plaintiffs' allegations fail to state actionable claims against Attorney General Nessel because her statements do not even reference, let alone disparage, religious beliefs generally or Catholic beliefs specifically. Those statements are not actionable, have no bearing on policy issues, and her alleged actions fall outside the scope of her powers as Attorney General. The Attorney General serves as the Department's legal counsel. (Bladen Aff., ¶32.). Although she may advise the Department and its staff, she cannot "force" them to settle a case. Indeed, the Department—and only the Department—has the capacity to make decisions in such matters. (*Id.*)

a. Plaintiffs' misapply *Masterpiece Cakeshop* and misconstrue Attorney General Nessel's statements.

Plaintiffs misapply *Masterpiece Cakeshop, Limited v. Colorado Civil Rights Commission*, __ U.S. __; 138 S.Ct. 1917 (2018). At the outset, *Masterpiece* "has little bearing on this case." *Fulton*, 320 F.Supp.3d at 686. *Masterpiece* involved an adjudication by the Colorado Civil Rights Commission, during which a commissioner disparaged the plaintiff's religion, stating, "'religion has been used to justify all kinds of discrimination throughout history, [including] slavery [and] the holocaust,'" referring to this as "'despicable.'" 138 S.Ct. at 1729. The Court found these statements "inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law."

Id. The Court concluded that the statements "cast doubt on the fairness and impartiality of the Commission's adjudication" of the plaintiff's case. *Id*. at 1730.

Unlike *Masterpiece*, the present case involved no adjudication. Nor do Attorney General Nessel's statements disparage Plaintiffs' faith or that of anyone else. Indeed, those statements make no mention of religion and nearly all of them were made while she was a private citizen. (Doc.6, PageID.194-96, 206-07.) Only two statements were made while Attorney General Nessel has been in office. The first concerned letting go of her former outside counsel and has no alleged anti-religious content; the second was merely a description of the Consent Decree in a press release. *Id*. It made no mention of religion. If anything, the statements cited by Plaintiffs show Attorney General Nessel's commitment to equal rights for all.

The Third Circuit's decision in *Fulton* is instructive. The Court rejected the contention that mentioning the plaintiffs' religion created an inference of anti-religious animus, particularly where one of the speakers, the Mayor of Philadelphia, did not play "a direct role, or even a significant one." *Fulton*, 922 F.3d at 156-58. The same result should follow here. Attorney General Nessel was not a party to *Dumont*. She did not play any role in the drafting or implementation of the non-discrimination clause. Nor could she have because that clause was added three to four years before she became Attorney General. Contrary to Plaintiff's arguments, Attorney General Nessel was not "in charge of decisionmaking [sic] on these issues" Doc.6, PageID.207, and this Court should reject their strained *Masterpiece* argument.

b. Attorney General Nessel's statements are not actionable.

In any case, Attorney General Nessel's statements, regardless of when made, have no bearing on this action. *Trump v. Hawai'i*, __ U.S. __, 138 S.Ct. 2392, 2416-17 (2018). Courts must determine the legality of a facially neutral policy, "not whether to denounce the statements." *Id*. at 2418. *See also McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005)(Courts should review policy "without any judicial psychoanalysis of a drafter's heart of hearts.") In *Trump v. Hawai'i*, because the policy directive was within the scope of the President's executive authority, the Court gave no probative value to the President's statements and paid them no further heed in affirming the policy. 138 S.Ct. 2418-2423. See also *Fulton*, 320 F.Supp.3d at 689.

Plaintiffs' claims against Attorney General Nessel are even more tenuous. Unlike the President, Attorney General Nessel does not have the power to initiate or implement the policies at issue. Moreover, her statements have no bearing on her official actions as Attorney General. In fact, some of them are nearly four years old and were made in response to public acts that, as discussed below, Plaintiffs misinterpret. Moreover, her statements are in no way actionable and have no probative value on the issues presented in this case, particularly given the limited scope of her role as counsel for the Department and the limitations imposed on her by Michigan law.

The Attorney General of Michigan is a constitutional executive officer elected by the People of Michigan. Mich. Const. 1963, art V, § 21. The Attorney General's

powers and duties are set by statute, Mich. Comp. Laws § 14.28 *et seq*., and common law. *Muncy v. McDonald*, 185 N.W. 877, 880 (Mich. 1921); *Michigan State Chiropractic Ass'n v. Kelley*, 262 N.W.2d 676, 677 (Mich. App. 1977). The primary role of the Attorney General is to "prosecute and defend all suits relating to matters connected with" the State of Michigan and its departments. Mich. Comp. Laws § 14.29. The Attorney General may also "intervene in and appear for the people of [Michigan] in any other court or tribunal, in any case or matter, civil or criminal, in which the people of this state may be a party or interested." Mich. Comp. Laws § 14.28.

Attorney General Nessel was not a party in *Dumont*. The only role played by Attorney General Nessel was serving as legal counsel for those Defendants Gordon and Wrayno. In that capacity, however, she had no ability to "force" them to settle the case. Only Defendants Gordon and Wrayno could enter into the Consent Decree.

To the extent that Attorney General Nessel disagreed with the positions of Director Gordon and Executive Director Wrayno, she could have intervened in the case on her own behalf or on behalf of Michigan's citizens. Mich. Comp. Laws § 14.28. In so doing, she could have implemented an internal conflict wall and, with the consent of her clients, proceeded to represent both her legal position and that of Director Gordon and Executive Director Wrayno. See, e.g., *Attorney General v. Michigan Public Serv. Comm'n*, 625 N.W.2d 16, 34-35 (Mich. App. 2000). That she did not do this underscores the lack of merit in Plaintiffs' claims against her.

4. The Non-Discrimination Clause does not violate the Free Exercise Clause of the First Amendment.

The Free Exercise Clause protects "the right to believe and profess whatever religious doctrine one desires" and to perform or abstain from acts like assembling for worship or 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, 110 S.Ct. 1595 (1990)).

It does ***not*** require the Department to alter its standard contract for certain adoption and foster care services to accommodate Plaintiffs' religious beliefs. And it certainly does ***not*** require the Department to abandon its commitment to non-discrimination against prospective foster parents—a commitment recognized by the United States Constitution. *Obergefell v. Hodges,* 135 S.Ct. 2584, 2604-05 (2015); *Gay v. Cabinet for Health & Family Serv.,* No. 18-5285, 2019 WL 1338524 (E.D. Ky. Jan. 23, 2019),Ex.G. This is the relief that Plaintiffs request here, and they cannot make the requisite showing that they will succeed on the merits.

a. The Non-Discrimination Clause is neutral and generally applicable to faith-based and secular agencies alike.

The Department's requirement that child placing agencies, including SVCC, comply with the terms of its standard contract is not a violation of the Free Exercise Clause. It is well-settled that "free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes

(or proscribes).'" *Vandiver v. Hardin County Bd. of Educ.,* 925 F.2d 927, 932 (6th Cir. 1991)(quoting *Smith,* 110 S. Ct. at 1600); see also *Braunfeld v. Brown*, 366 U.S. 599, 606-09 (1961). Such laws and policies are presumed valid under the Free Exercise clause.

i. The Department's anti-discrimination clause is facially neutral and reflects a legitimate purpose of ending invidious discrimination in state-sponsored contracts.

The Department's anti-discrimination clause is neutral and generally applicable. Neutrality is evaluated, first, by considering the provision's plain language and, second, by evaluating if the provision's purpose, "whether overt or hidden, is to infringe upon or restrict practices because of their religious motivation." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533-34, 113 S.Ct. 2217 (1993); *Mt. Elliott Cemetery Ass'n,* 171 F.3d at 405. Allegations of an adverse impact on a religious practice does necessitate finding a constitutional violation. *Lukumi Babalu Aye,* 508 U.S. at 535. Rather, this two-pronged inquiry "protects against unequal treatment which results 'when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued ***only*** against conduct with a religious motivation.'" *Mt. Elliott Cemetery Ass'n,* 171 F.3d at 405 (emphasis added).

The non-discrimination clause's facial neutrality is undisputed. It prevents contracted agencies from discriminating against prospective foster and adoptive parents on a variety of grounds, including race, religion, gender identify, and sexual

orientation. The non-discrimination clause does not reference any religion, including the Catholic faith or any practice associated therewith, and it appears in every contract the Department enters with CPAs throughout the state, regardless of the CPAs religious affiliation or lack thereof. (Goad Aff., ¶¶15-16; Neitman Aff., ¶13; Bladen Aff. at ¶¶22-24.)

The non-discrimination clause's neutral object is equally beyond dispute. This provision reflects the Department's directive that agencies which voluntarily contract to provide services to prospective foster care and adoptive parents cannot discriminate against them based on a variety of factors, including sexual orientation. Unlike the ordinance in *Lukumi Babalu Aye*, which included language and exemptions that led the Supreme Court to the "necessary conclusion that almost the only conduct subject to [the Ordinances] [was] the religious exercise of the Santeria church members[,]" the non-discrimination clause here addresses multiple forms of invidious discrimination. 508 U.S. at 535-36. The fact that sexual orientation is included reflects an increasingly widespread recognition that discrimination on this basis constitutes a social harm. *Obergefell,* 135 S.Ct at 2604; *Romer v. Evans,* 517 U.S. 620, 635-636 (1996).

ii. The Department does not authorize "individualized and discretionary" exemptions to the non-discrimination clause.

Contrary to Plaintiffs' claims, the Department does not authorize a CPA to refuse to evaluate, license, or otherwise provide a contractual service to a potential foster or adoptive family based on subjective criteria, such as whether the agency

agrees with a family's personal beliefs, or approves of their sexual orientation, marital status or other characteristic encompassed in the non-discrimination clause. (Bladen Aff., ¶26.)

The Department's paramount concern is maximizing the number of qualified foster and adoptive *parents* available for children in care; it benefits from working with CPA's that comply with the law and their contracts. (Bladen Aff., ¶¶13-14.) The Department does not allow any CPA to refuse to evaluate, license or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation, gender identify, or marital status. This is true regardless of the CPA's religious affiliation (which the Department does not track or consider). (Bladen Aff., ¶25.) It is also true for CPA's that have a specialized focus. Plaintiffs' list of private organizations with which the Department allegedly works mischaracterizes the issues at hand. (Doc.6,PageID.203-04.)

While some CPAs may have a specialized focus, all have the same contractual and licensing requirements and all must comply with terms of the contract and license. CPAs performing such work under contract with the Department are prohibited from refusing to assess, recommend licensure, or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation, gender identity, or marital status. (Bladen Aff., ¶¶15-16.) The Department, as a state agency, cannot carve out an exception to allow discrimination based on sexual orientation. *Romer,* 517 U.S. at 627-28 (laws that classify homosexuals for unequal treatment are unconstitutional).

Plaintiffs list several institutions that they mistakenly claim do not follow the non-discrimination clauses. But Boys to Men Group Home and Ruth Ellis Center are child caring institutions, not CPAs. Similarly, MARE and AdoptUsKids are not CPAs. Others listed by Plaintiffs are CPAs: Sault Tribe Binogii Placement Agency;[4] Homes for Black Children; Wayne Center; Guiding Harbor. Each of these CPAs, however, must follow **the same contract, licensing rules, policies, and non-discrimination clause**. All CPAs are required to follow the non-discrimination clause of their contract with the Department. Accordingly, Plaintiffs' claim that the Department disregards the non-discrimination clause in its foster care and adoption contracts by "contract[ing] with private organizations that specialize in serving" certain children is simply false. (Bladen Aff., ¶¶19-20.)

Plaintiffs also mischaracterize state-contracted agencies' authority with regard to referrals. State law permits agencies to decline a Department referral for providing state-contracted foster care case management or adoption services based on their sincerely held religious beliefs. Mich. Comp. Laws § 722.124(f). However,

[4] Plaintiffs' reference to this CPA that, apparently, specializes in placing Native American children, presents an inapt comparison to SVCC. Both state and federal law mandate separate procedures and standards to be followed for Native American children in need of foster care or adoptive placements. *In re Williams*, 501 Mich. 289, 294-95 915 N.W.2d 328 (Mich. 2018). Among other things, the federal Indian Child Welfare Law Act's recognizes the Indian tribe's exclusive jurisdiction over decisions related to the custody of the child in many situations and, also, mandates that Native American families be preferred when considering foster care and adoptive placements for a Native American child. 25 USC §§ 1911, 1915; *see also Shelifoe v. Dakota,* No. 92-1086, 1992 US App. LEXIS 14670 (6th Cir. June 16, 1992),Ex.J (Indian tribe has exclusive jurisdiction over custody proceedings due to Indian Child Welfare Act.)

an agency cannot refuse to provide such services for children accepted into care simply because the services conflict with the agency's sincerely held religious beliefs. Mich. Comp. Laws § 722.124(e).

After accepting a referral, a CPA cannot refuse to evaluate, recommend for licensure or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation, gender identify, or marital status. Referrals to another agency are rare and do not allow CPAs to bypass the uniformly enforced non-discrimination clause. (Bladen Aff., ¶¶25-26.). Thus, although CPAs may decline to accept a referral to provide foster care case management or adoption services to a child, once accepted, the CPA must fulfill all of the terms of its contract when providing services to that child and cannot transfer the child's case to another agency absent exceptional circumstances requiring high-level department approval. (Bladen Aff., at ¶¶25, 29, 31.)

Plaintiffs claim that the Department grants individualized exceptions to its policy, pointing to an out-of-context quote: "upon the written approval of the

County Director, the Children's Services Agency Director, or the Deputy Director."[5] Plaintiffs fail to provide the full passage, at §1.1 of the foster care contract, the relevant part of which states:

> After acceptance of a foster care referral, the Contractor may not refer the case back to the Department except for the reasons outlined in the Children's Foster Care Manual (FOM) or upon the written approval of the County Director, the Children's Services Agency Director, or the Deputy Director.

(Ex.F,pp.3-4; Bladen Aff., at ¶28.) This does not allow CPAs to discriminate or object to continue serving a child whose case it already accepted. Instead, it allows for rare and unforeseen circumstances like a natural disaster, enabling the Department to assure that all children under its care and supervision receive services to which they are entitled.[6] It does not enable an agency to return a child's case to the Department so that it may discriminate or refuse to serve the child in accordance with the contract and applicable rules and policies. (Bladen Aff., ¶¶27-29.)

Plaintiffs also claim that "State law" has not "prevented same-sex couples from becoming foster parents." (Doc.6, PageID.213.) This is true—unfortunately, however, SVCC's practices have. Plaintiffs' discovery responses in *Dumont* provide

[5] Plaintiffs similarly twist an out-of-context 2015 statement by Steve Yager, former executive director of the Children's Services Agency. Mr. Yager's statement— "We do not compel agencies to accept referrals—never have"–pertained to an agency's decision to accept a referral to provide foster care case management or adoption services to a child. CPAs can refuse initial referrals but, once accepted, may not discriminate. (Bladen Aff., ¶11.)

[6] It is in a child's best interest to maintain stability in care and receive continuity of foster care case management and adoption services. (Bladen Aff., ¶30.)

strong evidence that SVCC discriminated in the provision of services to children in its case by turning away Kristy and Dana Dumont on the basis of their sexual preference and same-sex marriage. The Department does not wish to end its relationship with SVCC, but SVCC must fulfill its agreed-upon contractual obligations to not discriminate in providing state-contracted services to children in care.[7] (Bladen Aff., ¶¶10, 33.)

Plaintiffs may believe and advocate that same-sex marriage violate their sincerely held religious beliefs. The Department does not prohibit this; it merely requires CPAs to comply with their contractual duties and applicable law, rules, and policy. Likewise, the Constitution and federal regulations do not permit state-sponsored discrimination on the basis of sexual orientation. *Obergefell,* 135 S.Ct. at 2607. Plaintiffs' claim that the Department selectively enforces the non-discrimination clause based on anti-Catholic animus lacks merit. The Department enforces it uniformly, as shown by its investigation of Bethany; it is uncontested that Bethany is not a Catholic CPA. (Bladen Aff., ¶¶9,25; Neitman Aff., ¶¶19-21.) Finally, the Department does not track the religious affiliation of the CPAs with which it contracts. (Bladen Aff., ¶25.)

Plaintiffs' reliance on *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), is misplaced. In *Ward*, a student was expelled from a graduate program because she requested that a client seeking counseling about his/her same sex relationship be

[7] Although State Defendants value their relationship with SVCC, Plaintiff's claims that SVCC is one of the best CPAs in Michigan lacks support. (Hoover Aff., at ¶¶ 13-19.). SVCC is a relatively small and unremarkable provider. *Id*.

referred to someone else. Unlike SVCC, which apparently refuses to work with same-sex couples at all in the context of foster care licensing, this student claimed that she had no problem counseling the client but, because of her religious beliefs, she could not affirm the person's sexual practices as the University required her to do. The Sixth Circuit found the claims sufficient to go forward because "values-based referrals" were authorized by the American Counseling Association Code of Ethics and a reasonable jury could find the university ejected her from the program "because of hostility toward her speech and faith." *Id.* at 730-31, 735-36.

The Department's non-discrimination policy is set forth in the contracts that SVCC signed as part of its agreement to voluntarily provide certain foster care and adoption services for children in care in exchange for public funds. There is no exception that allows agencies to violate the non-discrimination clause, nor is the Department required to provide one. By entering this contract, the Department is not asking SVCC to endorse or affirm same-sex relationships or any sexual practices on moral grounds but, rather, merely determine whether the person meets the State's objective criteria for a foster care license or adoption. (Goad Aff., ¶¶7-9; Neitman Aff., ¶¶12-13; Bladen Aff., ¶¶12-13.)

iii. Plaintiffs' own filings refute their claim(s) of religious hostility or religious targeting.

Plaintiffs' own allegations dispute their claim of religious targeting or hostility on religious beliefs. First, they cite to the Department's long history of contracting with both secular and faith-based private agencies for adoption and

foster care services in Michigan. (Doc.6-5, PageID.281.) SVCC describes itself as "one of the oldest and most effective adoption agencies in Michigan. . . serv[ing] children and families for over 70 years" and that the "State has long been aware of [SVCC's] religious beliefs and practices." (Doc.6, PageID.185, 187.)

Further, the Department's investigation into SVCC began in response to a complaint the Department received against not only SVCC, but also Bethany Madison Heights and East Lansing. (Neitman Aff., ¶¶19-20; Bladen Aff., ¶¶4-5.) The complaint reported that these CPAs violated the non-discrimination clause in their contract, and investigations were conducted. Because *Dumont* was pending and then the instant case was filed, the investigation against SVCC has not been finalized. (Neitman Aff., ¶27; Bladen Aff., ¶9.) Bethany has agreed to follow the non-discrimination clause. (Neitman Aff., ¶26.) The Department's investigation into alleged contract violations by SVCC and Bethany does not establish or even resemble religious targeting or animus.

Nor is there any basis to find that the Department discriminated against Plaintiffs because of their religious affiliation. The Department does not consider or track the religious affiliation of CPAs because an agency's religious affiliation is immaterial to their contract responsibilities. (Bladen Aff., ¶25.) SVCC's relationship with the Department is not as a recipient of a public benefit, nor has it been excluded from participation in these contracts solely on the basis of its religious beliefs. Both factors distinguish this case from *Trinity Lutheran Church of Columbia, Inc. v. Comer,* in which the Supreme Court declared that a state agency's

policy of offering grant money to fund the purchase of rubber playground surfaces to any nonprofit entity except that "owned or controlled by a church, sect, or other religious entity" violated the Free Exercise Clause. 137 S.Ct. 2012, 2017 (2017). The Court described the state's policy as "categorically disqualifying churches and other religious organizations" from such grant funds and, therefore, "expressly discriminated against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 2021-22.

In contrast, SVCC's contract with the Department is not a public benefit. *Teen Ranch v. Udow,* 389 F.Supp.2d 827 (W.D. Mich. 2005)*, aff'd* 479 F.3d 403 (6th Cir. 2007). The Department has not excluded SVCC, or any faith-based agency, from such contracts solely because of its religious beliefs or affiliation. As Plaintiffs acknowledge, the Department has a "long history" of contracting with SVCC while knowing of its religious affiliations. (Doc.6-5, PageID.286-87.) This lawsuit arose because SVCC, apparently, will not comply with the terms of the contract it previously entered with the Department and, instead demands that the Department amend such contract or carve out an exception to accommodate SVCC's religious beliefs, transforming the Establishment Clause from a shield into a sword to strike policies with which SVCC disagrees. This has no basis in law. Plaintiffs cannot show a substantial likelihood of success to the extent they claim SVCC was hostilely targeting because of its religious affiliation or beliefs.

b. Rational basis review applies.

Given that the non-discrimination clause does not interfere with Plaintiffs' right to exercise their religion because the nondiscrimination clause is a neutral, generally applicable provision without any evidence of targeting a CPA's religious beliefs or nature, rational basis review applies. "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 clause at issue reflects federal requirements and the Department's goal of ending discrimination in the context of foster care and adoption services to this vulnerable population of children, Bladen Aff., ¶8, which is valid under *Fulton*, 320 F.Supp.3d at 703-04, 922 F.3d at 165. Thus, Plaintiffs have not shown a likelihood of success on the merits, and their motion must be denied.

c. Even under the strict scrutiny standard, Plaintiffs' constitutional claim fails.

Notably, even under the strict scrutiny standard, Plaintiffs cannot show a substantial likelihood of success on the merits. 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); *Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 590 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, No. 18-107, 2019 WL 1756679 (U.S. Apr. 22, 2019). And, requiring compliance with a neutral, generally applicable contract is the least restrictive way

to accomplish this compelling interest *Equal Employment Opportunity Comm'n*, 884 F.3d at 593-97 (enforcing Title VII is the least restrictive means to ending discrimination); see also *Fulton*, 922 F.3d at 163 ("It is black-letter law that 'eradicating discrimination' is a compelling interest … [a]nd mandating compliance is the least restrictive means of pursuing that interest.")(internal citations and quotations omitted).

5. Plaintiffs' Free Speech Claim fails because if the contract they voluntarily entered with the State constitutes speech, it is the Department's speech–not SVCC.

Plaintiffs cannot show a substantial likelihood of success on their Free Speech claim because the contract with the Department did not create a forum for speech, and SVCC's voluntary agreement to it does not constitute SVCC's protected speech.

a. Voluntarily entering into a contract does not constitute religious speech.

The Department's decision to contract with private agencies, whether faith-based or not, does not create a forum for protected speech. *Teen Ranch*, F.Supp.2d at 839-40 . These contracts exist to direct state funds to private agencies providing foster care and adoption services to children in the child welfare system. The contract does not create a forum for voicing objections to or support for any prospective foster parent's sexual practices or religious values. *Fulton*, 320 F.Supp.3d at 696-97. The contracts at issue are for the performance of public services; they do not require SVCC to adopt the Department's viewpoint. *Fulton*,

922 F.3d at 160-61. Nor does the Department's contract require SVCC to sanction any foster parent's sexual practices or marital status on religious or moral grounds. (Goad Aff., ¶¶7-9; ; Neitman Aff., ¶¶12-13; Bladen Aff., ¶¶12-13.)

By signing the contract, SVCC is not inherently required to engage in or refrain from religious speech. The examples of speech that Plaintiffs present in support of a preliminary injunction demonstrate this, including making a recommendation for licensure or adoption based on factors like the stability of a prospective foster care parents' relationship, the parents' strengths and weaknesses, the role of religion in the homes and parenting styles, which must be evaluated based on the Department's licensing guidelines and without moral judgment or religious opinion. (Goad Aff., ¶¶7-9; Neitman Aff., ¶¶7, 9, 12-13; Bladen Aff., ¶¶12-13.) Moreover, the completion of the home studies is included in the duties that SVCC has agreed to perform when providing services for children in care and for which it is paid. (Goad Aff., ¶¶10-13; Neitman Aff., ¶¶8, 9-10.) And SVCC need only check a box indicating whether a license is recommended. (Neitman Aff. at ¶9, Attachment 1.)

Plaintiffs' own allegations demonstrate a capacity to conduct such evaluations without violating SVCC's religious nature. They state that "[a]doptive and foster families are not expected to share SVCC's faith" and that SVCC "happily services both LGBTQ individuals and children" in other contexts. (Doc.6, PageID.186.) If SVCC is able to recommend a non-Catholic couple for licensing as a foster parent without consideration that such recommendation constitutes speech in

dereliction of its sincerely held Catholic beliefs, it is not clear why the same would not apply to a gay or lesbian individual. Just as SVCC cannot discriminate in providing state-contracted services to children in care by turning away non-Catholic prospective foster and adoptive parents, SVCC cannot discriminate when providing such services to children by turning away same-sex couples and LGBTQ individuals.

b. The Department neither compels speech nor places unconstitutional conditions on SVCC.

Plaintiffs' compelled speech and unconstitutional conditions arguments are misplaced. As argued above, SVCC's contract to perform public services does not create a forum for speech. Nor has SVCC been compelled to speak or adopt the Department's point of view. Rather, SVCC voluntarily assumed contractual obligations—including enforcement of the non-discrimination clauses and the completion of home studies. (Goad Aff., ¶¶15-16; Neitman Aff., ¶¶1-10, 13; Bladen Aff. at ¶¶22-24.) The Department does not ask or require SVCC to endorse or approve of a specific relationship or type of relationship. (Goad Aff., ¶¶7-9; Neitman Aff., ¶¶7, 9; Bladen Aff., ¶¶12-13.) Indeed, the recommendation on the home study merely requires SVCC to check a box. (Neitman Aff. at ¶9, Attachment 1.) Instead, the Department simply requires SVCC to fulfill the commitments to which it agreed in 2015 and 2016 in return for almost $2 million in public funds. (Ex.F,p.2)

Insisting that an agency—like SVCC—abide by the same rules that apply to other agencies "in the performance of its public function under [a] foster-care contract" does not constitute compelled speech or an unconstitutional condition. *Fulton*, 922 F.3d at 161. This stands in stark contrast to *Agency for Int'l Dev. v. AOSI*, 570 U.S. 205, 219 (2013), in which grant recipients were required to adopt and even promote the grantee's viewpoint on the legalization of prostitution and sex trafficking, and *FCC v. League of Women Voters of California*, 468 U.S. 364, 375-78 (1984) in which the FCC banned editorials, which constitute a "vital and independent form of communicative activity." In the present case, the Department has asked that SVCC fulfill the public functions of providing foster care and adoption services pursuant to contract, to which SVCC agreed. And those public functions do not require SVCC to endorse or approve of same-sex marriages.[8]

B. Plaintiffs cannot show that they will suffer irreparable injury or lack an adequate legal remedy.

As discussed above, Plaintiffs' current claims amount to a collateral attack on the *Dumont* Consent Decree and a dispute over SVCC's contract with the Department, legal remedies they could have pursued in *Dumont,* where they insisted that intervention was the only way to protect the rights they assert now.

[8] Because both SVCC's contracts and licenses with the Department are voluntary, they have no entitlement to them. *See, e.g.*, *Smith*, 431 U.S at 844-47; *Renfro*, 884 F.2d at 944 (6th Cir. 1989). In such relationships, participants can agree to curtail their rights. *Hall v. Sweet*, 555 F. App'x 469, 476 (6th Cir. 2016), Ex.K (daycare provider's consent to inspections in her licensing application constituted valid waiver of Fourth Amendment right to be free from warrantless searches.)

Aluminum Workers Int'l Union v. Consol. Aluminum Corp., 696 F.2d 437, 446 (6th Cir. 1982)(courts may not issue injunctive relief to a party with a legal remedy). With legal remedies available and nevertheless remaining silent, Plaintiffs cannot demonstrate that they are entitled to the extraordinary relief of a preliminary injunction intended to maintain the status quo. The status quo–in place since 2015–requires SVCC to honor the non-discrimination provision of the contract for providing services to children in care or face disciplinary action.

As for irreparable injury, Plaintiffs claim they will be irreparably injured if their First Amendment rights are violated. While such a violation can constitute an irreparable injury, as explained above Plaintiffs have not demonstrated a substantial likelihood of success on the merits for their claims.

Plaintiffs also claim they will be irreparably injured if SVCC ceases to provide state-contracted foster care and adoption services. However, if such a result occurs because SVCC breached the non-discrimination provision of its agreements with the Department, such injury is not the result of conduct by State Defendants. *Shuttle Packaging Sys. v. Tsonakis,* No. 1:01-cv-691, 2001 U.S. Dist. LEXIS 21630 (W.D. Mich. Dec. 17, 2001),Ex.H. And, an alleged loss of business opportunity does not constitute irreparable harm. *S. Milk Sales, Inc. v. Martin,* 924 F.2d 98, 103 (6th Cir. 1991); *Acorn Building Components, Inc. v. Local Union No. 2194 of Int'l Union, United Auto, etc.*, 416 N.W.2d 442, 447 (Mich. App. 1987). Similarly, that some SVCC staff may lose employment or income does not constitute irreparable harm.[9]

[9] The claim of SVCC staff, who are non-parties, cannot be raised in the present case.

Essroc Cement Corp v. CPRIN, Inc., 593 F.Supp.2d 962, 969 (W.D. Mich. 2008). Plaintiffs' alleged irreparable injury is not sufficient to justify the extraordinary relief requested here.

C. Both the public interest and that of State Defendants strongly weigh against injunctive relief.

Plaintiffs ask that this Court to excuse SVCC from honoring the terms of the contracts to which SVCC agreed. But it is well-established that the public has a strong interest in the enforcement of voluntary contract obligations. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 551 (6th Cir. 2007); *Skurka Aerospace, Inc. v. Eaton Aerospace, L.L.C.*, 781 F.Supp.2d 561, 579 (N.D. Ohio 2011). The public has a similar interest in discrimination-free contracting processes. *B&S Transport, Inc. v. Bridgestone Americas Tire Operations, LLC*, No, 13-2793, 2014 WL 804771, at *9 (N.D. Ohio Feb. 27, 2014),Ex.I. Plaintiffs' proposed remedy—a continuation in perpetuity of SVCC's contract with the Department—hardly comports with the public's interest.

The Department, like all parties to contracts, also has a keen interest that "contractual agreements will be enforced." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ran*, 67 F.Supp.2d 764, 781 (E.D. Mich. 1999). The very essence of contract law is that the parties to a contract are entitled to the benefit of their bargain. *Detroit Edison Co. v. NABCO, Inc.*, 35 F.3d 236, 239 (6th Cir. 1994). And State Defendants have an interest in ensuring that the citizens of Michigan receive the

benefit of the 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 and promoting tolerance. *Obergefell,* 135 S.Ct at 2604; *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).

The most analogous case, *Fulton*, found that the public interest strongly weighed against injunctive relief. The district court found that preventing discrimination is "undeniably a legitimate [public] interest." 320 F.Supp.3d at 704, n.35. In affirming, the Third Circuit held that "[d]eterring discrimination" in the provision of government services "is a paramount public interest." 922 F.3d at 165. State Defendants share this interest in eradicating discrimination in the provision of government services. *Id.*; *Fulton*, 320 F.Supp.3d at 703-04. *See also*, e.g., *Equal Employment Opportunity Comm'n*, 884 F.3d at 590; *Colin*, 83 F.Supp.2d at 1150-51.

In addition to the interests of the public and State Defendants, this Court must consider the impact on others, including LGBTQ individuals. Plaintiffs ask this Court to allow them to break their contract in order to discriminate against LGBTQ individuals, impermissibly sending 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). In addition, the children whose best placement was same-sex partners would be harmed if this Court grants Plaintiffs' request.

To the extent Plaintiffs' claim that Michigan's foster children will be harmed if injunctive relief is not granted, they are mistaken. If SVCC chooses to cease providing foster care or adoption services, the Department has a process for finding new placements for the children SVCC serves without any sacrifice in the quality of care received by those children. (Neitman Aff., ¶¶27-30.) Accordingly, the interests of the public, State Defendants, and Michigan's children weigh strongly against Plaintiffs' request for injunctive relief.

CONCLUSION AND RELIEF REQUESTED

Plaintiffs fail to establish that they are entitled to the extraordinary remedy of preliminary injunctive relief. In the first place, they challenged a consent decree in the wrong court and lack standing. Second, they have suffered no irreparable injury. Nor can they show a likelihood of success on the merits. Instead, like the plaintiffs in *Fulton*, they seek to use the courts to avoid following their own contractual commitments due to a policy dispute with the Department. Finally, the public interest and that of the Department strongly favor the enforcement of contracts and preventing discrimination. This Court must deny injunctive relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of W.D. Mich. LCivR 7.2(b)(i) because, excluding the parts exempted by W.D. Mich. LCivR 7.2(b)(i), it contains 10,378 words. The word count was generated using Microsoft Word 2016.

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