No. 19-2185

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

STATE DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

Appellants Michigan Department of Health and Human Services

(MDHHS) Director Robert Gordon, MDHHS Children's Services Agency

Executive Director JooYeun Chang, and Michigan Attorney General Dana Nessel, in their official capacities, move this Court, under Fed. R. App. P. 8(a)(2)(A)(ii) and 6 Cir. R. 27, for an emergency stay of the preliminary injunction (Injunction) entered by the district court in its September 26, 2019 Opinion (Exhibit 2) and Order (Exhibit 3) (collectively, "Opinion"). Appellants' Notice of Appeal is Exhibit 1.

On October 22, 2019, the district court denied Appellants' motion for stay of the Injunction pending appeal, incorporating its Opinion granting the Injunction. (Exhibit 4, Stay Order.) The court granted the Injunction enjoining Appellants from enforcing MDHHS's non-discrimination policy against Appellee St. Vincent Catholic Charities (SVCC), finding that the policy targets religion and cannot withstand strict scrutiny. (Exhibit 2.) The court denied the stay motion for the same reasons it granted the Injunction. (Exhibit 4.)

This Court should grant an immediate stay pending its review of the district court's order, which will likely be reversed on appeal.

INTRODUCTION

Absent a stay, the Injunction mandates MDHHS to stand by as SVCC turns away otherwise qualified same-sex and unmarried couples or LGBTQ individuals who want to care for children in the State's care.

The Injunction likely falls on appeal because it is untethered to the facts and law and upends the status quo. It compels the State to turn a blind eye to taxpayer-funded discrimination cloaked in religious exercise.

The Third Circuit and federal district courts have rejected Free Exercise challenges to non-discrimination policies similar to the one here. *E.g., 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 WL 2138355 (N.D.N.Y. May 16, 2019).

MDHHS's non-discrimination policy prohibits discrimination based on sexual orientation, gender identity, and other characteristics. It is facially neutral and generally applicable and remains aligned with Michigan law, including 2015 Public Act 53 (PA 53). It is also included in SVCC's state contracts and has been since September 2015.

The policy neither imposes an unconstitutional burden on religious exercise nor targets religion. Rather, the status quo established in 2015, which the district court purports to maintain but actually unravels, requires all contracted child placing agencies (CPAs) to provide services to state-supervised children in care without discrimination. These services include conducting home studies and making assessments and placement-related decisions for prospective foster or adoptive parents of children in care (Services), using state-established foster-care-licensing and adoption-approval criteria unrelated to whether a family is LGBTQ.

A CPA becomes obligated to provide Services for a child by accepting a referral from MDHHS. Since PA 53 was enacted in 2015, law and MDHHS policy have permitted a CPA to reject *for any reason*, including a CPA's religious beliefs, an MDHHS referral of a child needing Services. But once a CPA accepts a referral, that law and policy require the CPA to provide Services to the child in compliance with the non-discrimination policy. For example, a CPA cannot refuse to perform a home study because a prospective family is LGBTQ. With the Injunction in place, however, this no longer holds true for SVCC.

Absent a stay, law and policy must take a back seat to the Injunction. MDHHS cannot enforce contractual provisions designed to protect the best interests of children in its care. Under the Injunction, SVCC may refuse Services for children in care by turning away prospective LGBTQ families. And if Appellants are forced to ignore SVCC's violations, the harm to Appellants, prospective families, children in state-supervised care (including those who identify as LGBTQ) and their families, and the LGBT community is immeasurable and irreparable. The message is that they do not measure up. This is unacceptable, and a stay of the Injunction is necessary and supported by the weight of the stay factors.

STANDARD OF REVIEW

The stay factors are: (1) likelihood that Appellants will succeed on the merits on appeal; (2) likelihood that Appellants will suffer irreparable harm absent a stay; (3) the prospect that others will be harmed by the stay; and (4) the public interest in granting the stay. *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). These are not prerequisites, but must be balanced together. *Id.* While "[t]here are several ways to look at the likelihood

that the [Injunction] will be upheld on appeal[,]" here, as in *Granholm*, "each of them holds little promise" that the Injunction can be upheld. *Id*.

ARGUMENT

The district court declined to hold an evidentiary hearing on SVCC's motion for a preliminary injunction and declared that it made no factual findings.[1] (Exhibit 2, n.1.) Yet, the Opinion rests precariously on erroneous factual underpinnings that are directly contradicted by unrefuted affidavits and documents submitted by MDHHS. When MDHHS's policy is properly analyzed on the correct factual foundation, the Injunction is not likely to be upheld on appeal. Therefore, a stay is warranted.

I. The district court's analysis supporting the Injunction teeters on three faulty factual pillars.

To begin, the record shows that the lower court clearly erred in its "findings" on at least three critical issues—(1) the status quo between the parties before the Injunction issued; (2) whether MDHHS policy changed at the direction of Nessel after she took office; and (3) whether

[1] Sixth Circuit precedent requires that the district court hold an evidentiary hearing to resolve any factual dispute. *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 553 (6th Cir. 2007). Because the court expressly declined to hold a hearing, the testimony submitted in Appellants' affidavits constitutes the undisputed factual record on appeal.

Nessel's views expressing her concerns about LGBTQ discrimination and harm to children constitutes religious hostility that should be imputed to MDHHS's 2015 non-discrimination policy.

First, although the court 's stated goal was to preserve the status quo, (Exhibit 2; Exhibit 4), it did not do so. It erroneously found that, prior to Nessel taking office, the status quo between MDHHS and state-contracted CPAs allowed agencies to refuse to provide state-supervised children in care with Services that conflict with a CPA's sincerely held religious beliefs. (Exhibit 2.)

The record, however, confirms that the status quo between MDHHS and CPAs, including SVCC, is that CPAs must comply with MDHHS's facially neutral, generally applicable non-discrimination statement (Policy).[2] The Policy is expressly grafted into SVCC's adoption and foster care case management contracts, and has been since 2015 and 2016 respectively. (Exhibit 5, Adoption Contract;

[2] MDHHS' non-discrimination statement provides: "The 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." https://www.michigan.gov/mdhhs/0,5885,7-339-73970_7701_76675-77286--,00.html.

Exhibit 6, FC Contract.) It prohibits discrimination on the basis of sexual orientation, gender identity, and other protected characteristics in the provision of Services to state-supervised children for whom the CPA has accepted a referral. (Exhibit 5; Exhibit 6; Exhibit 7, Bladen Aff. ¶¶ 15-19.) This is consistent with Michigan law.

Second, the court incorrectly found that, after Nessel took office, MDHHS changed its position in pending litigation challenging MDHHS's practice of contracting with faith-based agencies for Services,[3] and that Nessel directed MDHHS to adopt a "new" non-discrimination policy and settle the lawsuit based on the purported "new" policy. (Exhibit 2.)

Again, the unrefuted record establishes that the court clearly erred. MDHHS did not change its litigation position after Nessel took office. Rather, MDHHS maintained its authority to contract with faith-based agencies. (Exhibit 8, *Dumont* Settlement Agreement.) Nessel neither directed MDHHS to settle the lawsuit nor dictated the terms of settlement. (Exhibit 7, ¶ 32.) And she did not direct MDHHS to change

[3] *Dumont v. Lyon*, Case No. 2:17-cv-13080 (E.D. Mich. Sept. 20, 2017) (*Dumont*).

its Policy. *Id.* MDHHS's Policy remains unchanged, and the settlement requires it to maintain the Policy provisions in its CPA contracts and continue enforcement. (Exhibit 8.)

Third, the court erred in finding that Nessel's views on PA 53, expressed as a private citizen, a candidate, or a public official, support the inference of religious targeting and in reviewing MDHHS's Policy under strict scrutiny. (Exhibit 2.)

A review of Nessel's statements in context confirm the court erred. Nessel's statements as a private citizen and candidate regarding then-pending legislation expressed her concern with LGBTQ-discrimination and harm to children in the context of publicly funded foster care and adoption programs. The statements express no hostility or animosity toward religion generally or any religion specifically. Nor have they changed MDHHS's Policy. (Exhibit 7, ¶ 32.)

Analyzing the Policy under the correct factual foundation and legal framework, Appellants are likely to succeed on appeal. The Injunction should be stayed.

II. The Injunction should be stayed because Appellants are likely to succeed on the merits on appeal.

Appellants are likely to succeed on the merits on appeal because MDHHS's Policy withstands SVCC's Free Exercise challenge. Stripping away the district court's error in applying strict scrutiny, this Court is tasked with analyzing MDHHS's facially neutral and generally applicable Policy under a rational basis review—and the Policy survives that review.

Even under strict scrutiny, the Policy stands. Not only does the Policy serve to end invidious discrimination, it is also the least restrictive means for accomplishing the State's compelling interest of serving the best interests of children in its care.

A. Appellants will succeed on appeal because MDHHS's non-discrimination policy does not unconstitutionally burden SVCC's free exercise rights.

The Policy is a neutral and generally applicable policy that imposes no unconstitutional burden on SVCC's free exercise rights. The contracted Services to be provided to children in care require SVCC to assess whether prospective foster and adoptive families meet State-established criteria, not whether the family is LGBTQ. By signing the

contracts, SVCC agreed to provide these Services and abide by MDHHS's non-discrimination policy.

These Services and the Policy do not unconstitutionally burden religion. Home studies assess whether prospective families meet State-established criteria for licensing as a foster parent or certifying as an adoptive parent, and nothing more. (Exhibit 9, Neitman Aff.,¶ 9-12; Exhibit 10, Hoover Aff., ¶¶ 8-12) CPAs are not asked to endorse, approve, or disavow a familial relationship based on discriminatory factors, including sexual orientation or gender identity. (Exhibit 7, ¶¶ 10-11; Exhibit 9, ¶ 12; Exhibit 11, Goad Aff., Exhibit 11, ¶ 8.) To the contrary, MDHHS's Policy prohibits consideration of such criteria.

For every state-supervised child needing Services, MDHHS asks whether a CPA will accept a referral to provide Services to the child. Law, contracts, and policy permit the CPA, including SVCC, to reject the referral for any reason, including if SVCC believes the Services needed by the child conflict with its religious beliefs. Mich. Comp. Laws § 722.124f; Exhibit 5, ¶ I.,K; Exhibit 6, ¶ 2.9(h). Once a CPA accepts a referral in return for taxpayer funds, however, it is contractually

obligated to provide Services to the child without discrimination. Mich. Comp. Laws § 722.124e; Exhibit 7, ¶ 26.

This choice comports with the Free Exercise Clause, which does not require MDHHS to contract with SVCC on different terms than other CPAs because of its religious beliefs. *See Teen Ranch v. Udow,* 389 F.Supp.2d 827, 838–39 (W.D. Mich. 2005), aff'd 479 F.3d 403, 408–09 (6th Cir. 2007) (State department is not required, under the Free Exercise Clause, to contract with a faith-based organization where the organization's beliefs purportedly prohibit compliance with the department's policy.) The Supreme Court has long recognized that "the Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*¸ 476 U.S. 693, 699 (1986).

Although not binding on this Court, the Ninth Circuit's analysis in *Navajo Nation v. United States Forest Servs.,* 535 F.3d 1058, 1064 (9th Cir. 2008), is persuasive and aptly summarizes this point:

> Our nation recognizes and protects the expression of a great range of religious beliefs. Nevertheless, respecting religious credos is one thing; requiring the government to change its conduct to avoid any perceived slight to them is quite

> another. No matter how much we might wish the government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government--let alone a government that presides over a nation with as many religions as the United States of America--could function were it required to do so. (Internal citations omitted.)

For these same reasons, SVCC's free exercise claim fails, and Appellants are likely to succeed on appeal.

B. The Policy passes rational basis review.

A policy of neutral and general applicability is subject only to rational basis review, even amidst allegations that such policy adversely impacts religion. *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 535 (1993).

Nothing in the language of MDHHS's Policy suggests it is aimed at religious conduct. It is facially broad, prohibiting discrimination on several grounds. The Policy is consistent with federal regulations prohibiting discrimination based on sexual orientation and gender identity, 45 C.F.R. § 75.300(c), and mirrors MDHHS's commitment to ending such discrimination—a commitment dictated by the United States Constitution and supported by decisions of the U.S. Supreme

Court and this Court. *See Obergefell v. Hodges,* 135 S. Ct. 2584, 2604–05 (2015); *Gay v. Cabinet for Health & Family Servs.,* No. 18-5285, 2019 WL 1338524, *5 (6th Cir. Jan. 23, 2019).

Accordingly, MDHHS's Policy must be evaluated and upheld under rational-basis review. The Policy reflects federal requirements and MDHHS's goal of non-discrimination in the context of foster care and adoption services, and serves the best interests of children. *See* 45 C.F.R. § 75.300(c). It passes rational basis review. *See Fulton v. City of Philadelphia*, 320 F.Supp.3d 661, 686–90, 703–04 (3d Cir. 2018). Accordingly, Appellants are likely to succeed on appeal.

C. MDHHS's Policy does not target religion or religious practices, therefore, strict scrutiny does not apply.

SVCC contends—and the district court erroneously found—that despite MDHHS's Policy remaining in effect since 2015 and being consistent with Michigan law, it now constitutes religious targeting. SVCC and the court point to Nessel. Indeed, the court went so far as to say that Nessel is "at the very heart of the case." (Exhibit 2.) The court assigned religiously hostile motives to Nessel and to MDHHS Policy based on her statements about LGBTQ discrimination and harm to

children. (Exhibit 2.) But the law, contracts, and policy were in place long before she took office and remain unchanged today. (Exhibit 7, ¶ 8.)

After Nessel took office, she assumed the role of counsel for MDHHS in *Dumont*, a case challenging MDHHS's decision to contract with faith-based agencies. MDHHS decided to settle and agreed to maintain its existing Policy in CPA contracts and continue enforcing it. (Exhibit 7, ¶ 8; Exhibit 8.) The court found that Nessel directed MDHHS to settle the case and that this was a "pretext for religious targeting." (Exhibit 2.)

MDHHS's sworn affidavit testimony directly refutes any notion that Nessel directed MDHHS to adopt its Policy or settle *Dumont*. (Exhibit 7, ¶ 32.) And the court's reliance on *Lukumi* is misplaced. In *Lukumi*, the Court found religious hostility because at the time the ordinance was under debate, the officials themselves made discriminatory statements against a specific religious group. 508 U.S. 520, 540 (1993). Here, Nessel was a private citizen when PA 53 was still pending legislation. She expressed her own private views, as did SVCC, regarding the impact of the bill.

Even *if* the district court is correct that "*Lukumi* puts no artificial limits on the factors" to be considered in determining religious targeting, neither *Lukumi* nor *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) supports the court's use of Nessel's statements to infer religious hostility and apply strict scrutiny to the Policy. The statements referenced in both Supreme Court opinions were made by council members at or near the time the challenged ordinances or decisions were made. Neither opinion authorizes a court to consider statements made by a private citizen years before taking office, who had no decision-making authority with respect to the policy.

As discussed above, the record confirms that Nessel has no decision-making authority at MDHHS with respect to the Policy, which appeared in SVCC's contract years before she took office and remains in place today.

Moreover, as explained below, the court's analysis of and reliance on Nessel's statements runs afoul of the Supreme Court's direction in *Trump*. Nessel's views have no bearing on the Policy. MDHHS

enforces the Policy consistent with Michigan law to protect the best interests of children – or at least it did until the Injunction was entered.

1. Reliance on Nessel's statements to infer religious hostility affronts binding precedent.

Relying on Nessel's statements to infer religious animus into MDHHS's non-discrimination policy runs afoul of the Supreme Court's instruction in *Trump v. Hawai'i*, 138 S. Ct. 2392, 2416–17 (2018). Here, the Supreme Court confirmed that a federal court's role is *not* to denounce an official's statements but, instead, to "consider the significance of those statements in reviewing a . . . directive, neutral on its face." *Id.* at 2418. This was true even in the face of numerous, slanderous statements—specifically directed at a religion and its followers—by the President and his advisors responsible for the Presidential Proclamation at issue. *Id.* at 2416–17.

Unlike the President, who has direct authority to issue a Presidential Proclamation, Nessel—as a private citizen, candidate, or public official—does not dictate MDHHS policy. In fact, MDHHS confirmed that Nessel's statements had no effect on MDHHS's Policy. The Policy first appeared in SVCC's contracts three years before Nessel

ran for office. (Exhibit 11, ¶¶ 18,19.) It was the basis for the *Dumont* settlement, which occurred after Nessel took office, but "did not announce a new policy," and, instead, "reaffirmed the Department's practice of enforcing provisions of the contract, including the Policy, which has been in place for several years." (Exhibit 7, ¶ 8.) Ms. Stacie Bladen, Deputy Director of MDHHS Children's Services Agency, testified to this in a sworn affidavit, and it stands unrefuted. (*Id.*) The settlement agreement also supports this, referencing the Policy and clarifying that, "[f]or the avoidance of doubt," it prohibits CPAs from refusing to provide children with Services on the basis of a prospective foster or adoptive parent's sexual orientation. (Exhibit 8.)

At no time has Nessel directed MDHHS to adopt, change, or enforce its Policy. (Exhibit 7, ¶ 32.) MDHHS and its staff bear responsibility for these activities—not Nessel. *Id.*

2. Nessel's statements are pro-children and anti-LGBTQ-discrimination, not anti-religion.

The district court clearly erred in interpreting Nessel's statements as expressing religious hostility. None of the statements relied on by the court and SVCC reference religion, Catholicism, or anyone holding a

religious view on marriage. And there is no evidence to support the notion that the genesis of hostility or intolerance towards the LGBTQ community is limited to religious views on marriage when, in fact, discrimination against this community exists amongst secular and non-secular individuals, agencies, and organizations. In fact, MDHHS Policy and Michigan law permit a secular CPA to reject an MDHHS referral for any reason, without regard to whether the rejection is religiously based. But, after accepting the referral, a secular CPA cannot refuse to provide the child with Services—including assessing prospective LGBTQ families—simply because of its views on the LGBTQ community.

It is this intolerance that Nessel addressed when, as a private citizen, she expressed her view 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," and that "***These types of laws*** are a victory for the hate monger but again a disaster for the children and the

state."[4] Even the article quoted in the Opinion, which was written during her campaign, contains only commentary on the prudence of a state law.[5] Notably, that state law *is not* being challenged in this case.

These statements demonstrate Nessel's concern for Michigan's children and over discrimination barring the LGBTQ community from equal participation in publicly-funded foster care and adoption programs.

3. MDHHS policy aligns with Michigan law.

Appellants are also likely to succeed on appeal because the district court incorrectly inferred religious animus from Nessel's views on PA 53. Despite Nessel's views, MDHHS, consistent with the law, permits CPAs to reject a referral and incorporates the Policy in its contracts. (Exhibit 6.)

While Michigan law and MDHHS contracts allow a CPA to reject MDHHS's referral of a State-supervised child needing state-contracted,

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[4] *See* https://michiganradio.org/post/faith-based-adoption-bills- headed-house-floor (emphasis added); *see also* http://www.fox2detroit.com/news/opponents-say-adoption-bill-discriminates-against-gays-and-lesbians (emphasis added).

[5] *See* https://apnews.com/a1fc021e8e2e4b3b829586ba56ad9c07.

foster care or adoption services, neither the law nor the contracts allow a CPA to discriminate in providing services required under foster care case management and adoption contracts with MDHHS. *See* Mich. Comp. Laws § 722.124f; Mich. Comp. Laws § 722.124e(7). Home studies and training are Services that SVCC agreed to provide to children accepted through referrals under contract with MDHHS and for which it receives compensation. (Exhibit 9, ¶¶ 7-9; Exhibit 11, ¶ 7-13.) This makes sense since the "paramount goal" in enacting PA 53 is "placing the child in a safe, loving, and supportive home…." Mich. Comp. Laws § 722.124e(1)(a). Orientation, recruitment and licensing activities are services provided to the children to enable a child's prompt placement with a family. (Exhibit 10, ¶¶ 8-11.)

PA 53 does not permit a CPA to refuse to provide these Services by "referring" prospective parents to other agencies in violation of the contracts' non-discrimination provisions. (Exhibit 7, ¶ 26; *Contra* Exhibit 2.) "Referral" as used in PA 53 and MDHHS contracts denotes MDHHS' offering of child's case to a CPA. It does not denote directing a prospective parent to a CPA for licensing and, in fact, MDHHS does not permit this. (Exhibit 7, ¶ 17.) Under the plain language of PA 53 (and

the terms of the MDHHS contracts), a CPA can choose to reject a child referred by MDHHS for any reason, but it cannot redirect a prospective family when providing contracted Services merely because the family includes an unmarried couple, a same-sex couple, or an LGBTQ individual. The district court erred in interpreting this provision.

4. MDHHS's position in *Dumont*, prior to Nessel becoming counsel, is akin to its position here.

The district court inferred religious animus based on its finding that "the State abruptly changed its public litigation position in *Dumont*." (Exhibit 4.) No such change occurred.

In *Dumont* two same-sex couples sued MDHHS officials, challenging the "provision of taxpayer-funded government services based on religious and discriminatory criteria" as a violation of the Establishment Clause and the Equal Protection Clause. (*Dumont*, R. 1.) The *Dumont* plaintiffs sought to enjoin MDHHS from contracting with faith-based agencies. *Id*. In response, MDHHS asserted that its facially neutral contracting policies neither establish a religion nor discriminate. *(Dumont,* R. 16.) MDHHS defended its right to contract

with any CPA willing to abide by the contracts, including faith-based CPAs.

MDHHS takes the same position here: it "does not seek to end its relationship with St. Vincent in so far as the agency is willing and able to fulfill the contractual obligations is has voluntarily agreed to, including the non-discrimination clause." (Exhibit 7, ¶ 10.) The purported change in litigation position after Nessel became counsel of record is a fallacy and does not support an inference of religious hostility.

The record and law make clear that MDHHS's policy was *not* based on religious hostility. It has been in effect since 2015, is consistent with Michigan law, and remains unchanged by Nessel's views and actions. The policy does not target religion and therefore strict scrutiny is not warranted. The court erred in applying strict scrutiny to find that SVCC is likely to succeed on its free exercise claim. Appellants are likely to succeed on the merits on appeal because MDHHS policy passes rational basis review. The Injunction should be stayed.

D. Even if strict scrutiny is applied, Appellants are likely to succeed on the merits on appeal.

Even if MDHHS's Policy is subjected to strict scrutiny review, it stands. 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). Moreover, as explained below, the nondiscrimination policy serves a compelling state

interest by allowing MDHHS to serve the best interests of children in its care.

Even applying strict scrutiny review, Appellants are likely to succeed on the merits on appeal.

III. The Injunction should be stayed because without a stay Appellants and others will suffer irreparable harm.

Allowing the Injunction to stand inflicts irreparable harm to Appellants and to children and their families.

The Injunction irreparably harms Appellants because SVCC is permitted to violate the non-discrimination requirements in its state-contracts and block – even temporarily – potentially qualified prospective adoptive and foster care families from participating in these publicly-funded programs. As CSA Deputy Director Stacie Bladen explained, it benefits MDHHS and Michigan's children "to have as many qualified foster and adoptive parents as possible that can meet the diverse needs of children." (Exhibit 7, ¶ 13.) Allowing any CPA, including SVCC, to categorically turn away prospective foster and adoptive parents in violation of the non-discrimination policy hinders that goal.

Prospective foster and adoptive parents who are turned away by a CPA due to their sexual orientation may discontinue efforts to participate in publicly funded foster care and adoption programs. This irreparably harms MDHHS, the children in its care, and the affected families who receive the message that they do not measure up.

SVCC has argued that, if it ends its contracts with MDHHS because it refuses to abide by the non-discrimination policy, its families may choose not to participate and leave the program. But a family's *choice* to leave the program pales in comparison to the situation where SVCC's violation of MDHHS's non-discrimination policy blocks a prospective family from participating in the program. LGBTQ families who are turned away because a CPA violates the Policy have no choice. They are rejected not because they fall short of state requirements for licensure or certification, but because SVCC casts them aside, throwing roadblocks in their way and delaying their entry into the program.

On the other hand, families who choose to work only with a certain type of agency, such as a Catholic-affiliated agency, are freely exercising their choice. And they have other options. They can go to any other agency without fear of rejection based on their religious

beliefs because MDHHS's non-discrimination policy protects them. It prohibits every CPA from discriminating—or turning them away—on religious grounds. This is the purpose of MDHHS's Policy—to prohibit a state-contracted CPA from discriminating based on any one of several characteristics, thereby leaving behind a potentially qualified family.

The Injunction also irreparably harms Appellants because they cannot uniformly enforce their CPA contracts, which are rooted to a large extent in state and federal law and regulations. MDHHS benefits from working with CPAs that honor these contractual obligations and suffers irreparable harm when relegated to ad hoc enforcement, even for a short period of time. (Exhibit 7, ¶ 13.)

Moreover, Appellants suffer irreparable harm because the Injunction requires MDHHS to allow a CPA to prevent a child's placement with a same-sex couple or LGBTQ individual or unmarried couple—*even* when placement is in the child's best interest, such as with the child's relative or a sibling.[6] This scenario is not just hypothetical.

[6] Michigan's Foster Care and Adoption Services Act requires that relatives be given first priority in determining placement and that

On at least two prior occasions, even before Nessel took office, MDHHS took contract action against a CPA for violating the non-discrimination policy. In one case, the CPA refused to place a child in care with an LGBTQ relative. In the other, the CPA refused to place a child with siblings already placed with an LGBTQ family. The CPAs refused *because* placing the child with the family conflicted with its religious beliefs. In each situation, MDHHS opened an investigation and required the CPA to provide a corrective action plan to address the violation. (Exhibit 7, ¶¶ 4-9.)

Under the Injunction, MDHHS's hands are tied. SVCC can violate the contracts, the Policy, and Michigan law with impunity. Meanwhile, SVCC will continue to receive taxpayer funds.

IV. The injunction should be stayed because the public interest in a stay is strong.

Staying the injunction also serves the public interest, because enabling MDHHS to enforce contractual obligations serves the public interest. *Certified Restoration Dry Cleaning Network, LLC. v. Tenke*

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siblings be placed together, unless such placement is not in the child's best interest. Mich. Comp. Laws § 722.954a.

Corp., 511 F.3d 535, 551 (6th Cir. 2007). This is even more critical when the contractual provision being challenged prohibits discrimination on many grounds, including sexual orientation. There is a strong public interest in ending discrimination against LGBTQ individuals—especially in this context of a private agency's publicly funded contract with the State to provide foster care and adoption services to children in MDHHS's care. *See Obergefell,* 135 S. Ct. at 2604; *Fulton*, 320 F. Supp. 3d at 704, n.35. Federal regulations governing a significant portion of the funding behind this program also prohibit discrimination on the basis of sexual orientation, gender identity, and marital status. *See* 45 C.F.R. § 75.300(c).

The Injunction actively undermines these public interests. It requires MDHHS to stand by as SVCC refuses Services for children in care by turning away otherwise qualified same-sex and unmarried couples, or LGBTQ individuals, from its publicly funded foster care and adoption programs. This sends the "message . . . that [LGBTQ individuals] are outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000). The same message rings in the ears of LGBTQ children in MDHHS's care and for

whom SVCC agrees to provide Services but nevertheless withholds, to the children's detriment.

CONCLUSION AND RELIEF REQUESTED

Appellants have shown a likelihood of success on appeal and respectfully request that this Court grant an immediate stay of the preliminary injunction issued pursuant to the district court's September 26, 2019 Opinion and Order.

Respectfully submitted,

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Respectfully submitted,

Dated: October 29, 2019

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CERTIFICATE OF SERVICE

I certify that on October 29, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains no more than 5,200 words. This document contains 5045 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2016 in 14-point Century Schoolbook.

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