UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

NICK LYON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency,

Defendants.

No. 17-cv-13080-PDB-EAS

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

REPLY BRIEF IN SUPPORT OF DEFENDANTS NICK LYON'S AND HERMAN MCCALL'S MOTION TO DISMISS

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2. Plaintiffs' claims fail as a matter of law because they cannot show that CPAs are state actors and they fail to state either Establishment Clause or Equal Protection claims.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority: *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 602-03, 605 (2007); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993).

REPLY ARGUMENT

I. Plaintiffs fail to satisfy the elements of Article III and taxpayer standing.

Because Plaintiffs lack the right to be foster or adoptive parents, *Renfro v. Cuyahoga County Department of Human Services*, 884 F.2d 943, 944 (6th Cir. 1989)—much less a right to work with a specific third-party child-placing agency (CPA)—they fail to allege a cognizable injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Nor do they allege injuries traceable to any conduct by State Defendants. Instead, their alleged injuries were either caused by CPAs or were self-inflicted by seeking to work only with CPAs that have constitutionally-protected religious beliefs regarding marriage's meaning. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("The First Amendment ensures that religious organizations . . . are given proper protection" in practicing their beliefs.). Plaintiffs "cannot manufacture standing . . . by inflicting harm on themselves." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

Plaintiffs also fail to assert redressable claims. Forcing faith-based CPAs out of the child-welfare system entirely will not compel those agencies to work with Plaintiffs, and Plaintiffs have always had the ability to work with other CPAs in close proximity to Plaintiffs'

homes. This is not an unsupported "factual assertion" (Doc. 28, Pg. ID 12 n.13); it is something Plaintiffs themselves have alleged and must be assumed true for purposes of this motion. (Doc. 1, ¶¶ 45, 46.)

In addition, taxpayers lack standing to challenge discretionary executive action. *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 602–03, 605, 608 (2007). Plaintiffs do not challenge legislative action. Instead, they challenge discretionary contracting practices entrusted to the Michigan Department of Health and Human Services. Mich. Comp. Laws § 400.14f. Indeed, Plaintiffs admit that "DHHS is *authorized* by statute to enter into contracts with private child-placing agencies." (Doc. 28, Pg. ID 636 (emphasis added).) Plaintiffs claim an interest in "[c]hallenging DHHS's practices." (Doc. 1, Pg. ID 16–19.) But they do not challenge any legislation, focusing solely on the Department's alleged contracting practices, which Plaintiffs agree are discretionary. (Doc. 1, Pg. ID 19–21.) Similarly, Plaintiffs' claims for relief focus solely on discretionary contracting practices, not legislative action, thus failing to establish taxpayer standing. (Doc. 1, Pg. ID 21–22.)

Pedreira v. Ky. Baptist Homes for Children, Inc., 579 F.3d 722 (6th Cir. 2009), is inapposite. (Doc. 28, Pg. ID 13–14.) In *Pedreira*, the Sixth

Circuit held that the plaintiffs lacked standing as federal taxpayers, 579 F.3d at 728–31, and had standing as state taxpayers *only* because the state legislature appropriated funds directly to the religious organization, *id.* at 732–33 (noting "specific legislative appropriations to KBHC"). The opposite is true here: there is no specific appropriation or legislative mandate. (Doc. 16, Pg. ID 11.) Equally inapposite is *Bowen v. Kendrick*, 487 U.S. 589 (1988) (Doc. 28, Pg. ID 14), where the Supreme Court *upheld* the constitutionality of a government program that partnered with faith-based organizations. 487 U.S. at 599, 606–08, 613. So are Plaintiffs' stigma-based arguments (Doc. 28, Pg. ID 9–10), since P.A. 53 does not cause differential treatment; it simply allows a diverse group of CPAs to help identify forever homes for children.

II. Plaintiffs' claims fail as a matter of law.

A. Plaintiffs cannot show that CPAs are state actors.

As Defendants' initial brief explained, merely providing services for the government is insufficient to transform those services into state conduct. (Doc. 16, p. 21 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982)). In *Rendell-Baker*, the Supreme Court so held even though a private school's students and funding came almost exclusively from the

government. *Id.* at 841-42. *Accord, Wolotsky v. Huhn*, 960 F.2d 1331, 1336 (6th Cir. 1992); *Crowder v. Conlan*, 740 F.2d 447, 450 (6th Cir. 1984). Plaintiffs' brief does not address *Rendell-Baker*, implicitly conceding the point. And this Court has already rejected Plaintiffs' contrary argument. *Brent v. Wayne Cty. Dep't of Human Servs.*, 2012 WL 12877988, at *11 (E.D. Mich. Nov. 15, 2012), *aff'd in part, rev'd in part on other grounds sub nom. Brent v. Wenk*, 555 F. App'x 519 (6th Cir. 2014) (foster-care agencies are not state actors), Ex. 1. Because CPAs are not state actors, Plaintiffs' claims fail as a matter of law. Period.

B. Plaintiffs' fail to state an Establishment Clause claim.

Michigan's child-welfare system does not "fuse" government and religion. (Doc. 28, Pg. ID 15–16.) Unlike issuing liquor licenses, *see Larkin v. Grendel's Den*, 459 U.S. 116 (1982), foster-care and adoption services are not exclusive government functions. Religious organizations actually pioneered the system, E. Wayne Carp, Adoption in America: Historical Perspective 3–7 (2002), and continue to play a vital role today. That history alone is sufficient to defeat Plaintiffs' Establishment Clause claim. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014). And if the use of private, religious agencies to assist the

government is a "union of civil and ecclesiastical control," Doc. 28, p. 16, then all religious hospitals, relief organizations, and shelters are ineligible for government funding and contracts, contrary to what the Supreme Court has held. *E.g.*, *Bowen v. Kendrick*, 487 U.S. 589 (1988).

Michigan's system also does not "privilege religious exercise." (Doc. 28, Pg. ID 648-651.) Unlike the law at issue in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), which required all employers to honor employees' Sabbath observances, P.A. 53 simply allows religious as well as secular agencies to participate in helping children. The law does not burden children, it benefits them: "the more qualified agencies taking part in this process, the greater the likelihood that permanent child placement can be achieved." Mich. Comp. Laws § 722.124e(1)(c). The only thing stopping Plaintiffs from becoming licensed is their insistence that religious CPAs provide the service, despite secular CPAs closer to home. (Doc. 18-1, ¶ 8, Attach A, Pg. ID 462, 471.)

For similar reasons, the State does not "favor" religion. (Doc. 28, Pg. ID 19–20.) The State does not give "preference" to any religious groups, much less those with certain religious beliefs. (*Id.* at 19.) All qualified agencies—religious or non-religious—can serve as CPAs. And

the State does not favor agencies with certain religious beliefs over others. Plaintiffs do not allege the contrary.

C. Plaintiffs' fail to state an Equal Protection claim.

Plaintiffs concede that rational-basis review applies to their Equal Protection claim (Doc. 28, p. 20 n. 23), then suggest the State fails that test because it denies gays and lesbians "all" benefits with respect to adoption and foster care, *id.* at 20–21 (citing *Obergefell*, 135 S. Ct. at 2601, 2606; *Campaign for Southern Equality v. Miss. Dept. of Human Servs.*, 175 F. Supp. 3d 691 (S.D. Miss. 2016)). That is false. There are dozens of Michigan CPAs—including many proximate to Plaintiffs, where Plaintiffs could become licensed today if they desired.

It is equally false that the State's practices "cast aside families that the State's children desperately need." (Doc. 28, p. 21.) The State welcomes *every* qualified family that desires to foster or adopt, and CPAs refer families to other CPAs for a myriad of reasons. But if the State is enjoined from contracting with organizations who maintain their religious beliefs, Plaintiffs' Complaint alleges—correctly—that those organizations will leave the system (Doc. 1, ¶¶ 45, 46), along with the families they serve and recruit. (Doc. 26-1, Pg. ID 4–7; Doc. 24-1.)

Finally, Plaintiffs say they will present evidence that driving religious organizations out of the child-welfare system will not affect the number of available families. (Doc. 28, p. 23–24.) But it is within the realm of "rational speculation" for a legislature to think that driving out religious organizations might reduce the number of participating families (particularly religious ones), and that is sufficient in the rational-basis context. *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). The State acted rationally here, both in its reasonable attempt to maximize the number of families available to children, and its effort to protect CPAs' constitutional rights.

CONCLUSION AND RELIEF REQUESTED

Michigan does not deny *anyone* the ability to foster or adopt children in the State's custody, but instead allows a wide variety of religious and secular agencies to provide adoption and foster-care services, in the hopes of recruiting as many diverse families as possible to provide forever homes. (Doc. 19, Pg. ID 12–14 & nn. 2–6.) This approach neither endorses religion nor excludes prospective families; it maximizes the likelihood of finding loving homes for children. The State's motion to dismiss should be granted.

Respectfully submitted,

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Dated: March 2, 2018

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on March 2, 2018, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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