**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MICHIGAN**

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| MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE; ST. VINCENT CATHOLIC CHARITIES,<br><br>*Plaintiffs*,<br><br>v.<br><br>ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; JOOYUEN CHANG, in her 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,<br><br>*Defendants*. | No. 1:19-cv-00286<br><br>HON. ROBERT J. JONKER |

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

St. Vincent will lose its adoption contract on Sept. 30 unless it receives judicial relief. That will have serious consequences for the children St. Vincent serves, the families who partner with it, and the State's child welfare system. Plaintiffs' motion demonstrated that the State's actions violate the Free Exercise and Free Speech Clauses and that injunctive relief is necessary.

In its response, the State minimizes the good work done by St. Vincent, makes irrelevant or foreclosed legal arguments, and fails to grapple with the stakes in this case: the closure of a religious agency that has served Michiganders for decades, a closure that would occur before Plaintiffs have the opportunity for their claims to be heard.

Michigan claims its private settlement was a consent decree, but that argument is foreclosed by binding precedent and Michigan's own actions. Michigan claims it is penalizing St. Vincent under a generally applicable policy, but acknowledges that it permits exceptions. Michigan claims it is not compelling speech, but does not dispute that in order to continue providing adoptions and foster care, St. Vincent must provide written

analysis and recommendations contrary to St. Vincent's religious beliefs about marriage.

The federal government's response simply points the blame at Michigan, calling into question Michigan's reliance on federal law to shield its unconstitutional actions.

None of these arguments change what the law requires: a preliminary injunction should be granted to preserve the status quo and protect children and families while this case proceeds.

## ARGUMENT

### I. Plaintiffs are likely to succeed on the merits.

#### A. Plaintiffs are likely to succeed on their Free Exercise claims.

Strict scrutiny applies because Michigan has (1) created discretion to grant case-by-case exemptions, (2) selectively enforced its policies, and (3) targeted religious exercise for disfavored treatment. Prelim. Inj. Mem., ECF No. 6 at PageID.199. Any one failure triggers strict scrutiny; here, all three occurred.

***Discretionary exemptions.*** Michigan admits that its contracts permit case-by-case exemptions. When the government has unconstrained discretion to grant "individualized exemptions," that is

"the antithesis of a neutral and generally applicable policy[.]" *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). Here, there are no binding constraints on the State's authority to grant exemptions—they can be granted 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." State Br., ECF No. 34 at PageID.946.

The State's sole defense is that such discretion is only used in "unforeseen circumstances." *Id.* But the State cites no guidelines or any written criteria limiting how this exemption is used. *See id.*; Bladen Decl., ECF 34-4 at PageID.1001-1003. The State's willingness to grant exceptions for other reasons, but not for religion, triggers strict scrutiny. "[G]reater discretion in the hands of governmental actors makes the action taken pursuant thereto more, not less, constitutionally suspect." *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004).

***Selective Enforcement.*** Michigan fails to rebut the showing that its nondiscrimination provisions are being selectively enforced against religious organizations. ECF No. 6 at PageID.201. A selectively enforced policy is subject to strict scrutiny. *Ward*, 667 F.3d at 738.

Numerous non-religious agencies specialize in serving particular populations. ECF No. 6 at PageID.181-182, 203-204. The State claims these agencies comply with non-discrimination policies, but doesn't even claim to have investigated their compliance. *See id.* at PageID.203-204; Neitman Decl., ECF No. 34-3 at PageID.976-978. The fact that only religious agencies have been targeted for investigation and compliance demonstrates selective enforcement. Worse, the State says it investigated religious agencies due to complaints filed with the State—but those complaints were filed by a state official. ECF No. 34-3 at PageID.974-975; ECF No. 34-4 PageID.994.

The State also does not rebut the fact that state contractors (like Boys to Men Group Home and Ruth Ellis Center) "discriminate" on the basis of protected characteristics. ECF No. 6 at PageID.203-204. Their only response is that these are "child caring institutions, not CPAs." ECF No. 34 at PageID.944. The State does not dispute that these organizations contract with the State to serve children, nor does it dispute that these organizations discriminate based on characteristics protected under the State's non-discrimination policy. *Id.* While not serving in an *identical*

*capacity*, there is no principled reason to treat their actions differently from those of St. Vincent.

***Religious Targeting.*** Finally, the State argues that it is merely engaging in neutral enforcement of a long-standing policy. ECF No. 34-4 at PageID.994. This argument cannot be squared with the express discrimination in the State's recent announcements, ECF No. 6 at Page.ID.208-209; ECF No. 6-1 at PageID.238, nor with its own prior actions. The State acknowledges that the Department was aware of St. Vincent's religious policies in 2017, yet it did not attempt to terminate its contracts or even require a corrective action plan. *Id.* at PageID.994, 996. In fact, it *renewed* its foster care contract with St. Vincent in September 2018, more than a year after it admits to knowing of St. Vincent's religious practices. Seyka Decl., Ex. C.

Also in October 2018, the State represented in court: "Regarding the claim that the Department 'is aware of certain child placing agencies' refusal to accept same-sex couples,' the Department admits that some child-placing agencies have a sincerely held religious belief that prevents them from licensing or adopting to same-sex couples, which is protected

by PA 53." Answer at PageID.1189, *Dumont v. Gordon*, No. 2:17-cv-13080 (E.D. Mich. Sept. 28, 2018), ECF No. 52.

This year, the State (1) switched its position in the *Dumont* litigation, (2) threatened new enforcement actions against St. Vincent, (3) issued DHS communications forbidding the actions taken by St. Vincent in compliance with its religious beliefs, and (4) required new training for child welfare workers on this issue. ECF No. 6 at PageID.196, PageID.207-208; Seyka Decl., Ex. B. This is evidence of state action targeting a disfavored religious practice.

The targeting is particularly acute since Michigan is penalizing activities outside its contracts. Michigan's foster and adoption contracts do not list home studies as a "service," and St. Vincent finances those studies through a separate cost center. ECF No. 6-1 at Page.ID233-234.

Michigan's new enforcement policy is coupled with statements by Attorney General Nessel evincing the same sort of religious targeting that the Supreme Court condemned in *Masterpiece*. Nessel has stated that the "AG's office can always be used as a bully pulpit in order to educate on [LGBT] issues," and further explained that religious communities like Catholic Charities should be "educate[d]" "as much as

possible" about "the importance of accepting LGBTQ people" because "there are a lot of religious organizations that have changed their views on this over the course of time."[1] Nessel also described Michiganders who supported the law protecting St. Vincent as "hate mongers."[2] Nessel has even accused those who supported Michigan's protections for faith-based foster care and adoption providers of "dislik[ing] gay people more than [they] care about the needs of foster kids."[3] Such "hostility [i]s inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion." *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018).

This distinguishes the case from *Fulton*, where the most inflammatory statements came from the mayor, whom the court said did not play "a direct role, or even a significant role, in the process." *Fulton v. City of Philadelphia*, 922 F.3d 140, 157 (3d Cir. 2019). Nessel's role is both direct

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[1] Kate Opalewski, *Q&A with Mich. Democratic Attorney General Candidate Dana Nessel,* PRIDESOURCE (Jan. 10, 2018), https://pridesource.com/article/dana-nessel-qa/.

[2] Fox 2 Detroit, *Opponents say adoption bill discriminates against gays and lesbians* (Mar. 4, 2015), http://www.fox2detroit.com/news/opponents-say-adoption-bill-discriminates-against-gays-and-lesbians.

[3] Rick Pluta, *Faith-based adoption bills headed to House floor,* MICHIGAN RADIO (Mar. 4, 2015), https://www.michiganradio.org/post/faith-based-adoption-bills-headed-house-floor.

and significant. In *Fulton*, the court also stated there was "no evidence of any foster care agencies discriminating in ways that would violate the Fair Practices Ordinance prior to this controversy." *Id.* at 158. But here, there is evidence that the State knowingly permitted religious exceptions, and that it permits non-religious exceptions today.

In response, Michigan claims that Nessel is immune from suit. While that is incorrect (as Plaintiffs will discuss in their opposition to the motion to dismiss), even if Nessel were personally immune from suit, her actions still serve as evidence of religious targeting by the government in the same way that an immune prosecutor's statements might serve as evidence to attack the underlying conviction.[4] The human rights commissioners in Colorado may have enjoyed *personal* immunity, but the Supreme Court still looked to their statements to invalidate the actions of *the commission* in *Masterpiece*. 138 S. Ct. at 1729.

Finally, the State raises various irrelevant arguments. Defendants first question the standing of the Bucks and Shamber Flore, but do not question St. Vincent's standing. "[O]nly one plaintiff needs to have

[4] *See, e.g., United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001) (remanding based upon "prosecutor's remarks at trial").

standing in order for the suit to move forward." *Parson v. U.S. Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015). Plaintiffs will address this further in response to the State's motion to dismiss, but it is no bar to granting injunctive relief.

The State also questions the logic of St. Vincent's religious beliefs, asking why St. Vincent could serve a non-Catholic couple but not a same-sex couple. ECF No. 34 at PageID.953. It is not the place of the State, or the Court, to determine whether Plaintiffs' religious beliefs are valid, only whether they are sincere. *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . . the validity of particular litigants' interpretations of those creeds."). And Defendants have not questioned Plaintiffs' sincerity. Catholic has no theological bar to certifying the home of an opposite-sex married couple of another faith.

**B. Plaintiffs are likely to succeed on their Free Speech claims.**

Michigan has attempted to compel St. Vincent's speech, and has threatened to exclude it entirely from foster care and public adoption if it does not comply. ECF No. 6 at PageID.214-217. Michigan claims that

St. Vincent is only evaluating applicants according to state criteria—it need only "check a box." ECF No. 34 at PageID.952-53.

Even this were purely factual speech, it may not be compelled. In *NIFLA v. Becerra*, the Supreme Court struck down a required notice which stated: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services . . . . To determine whether you qualify, contact the county social services office . . . ." 138 S. Ct. 2361, 2369 (2018). This was undoubtedly factual speech about the state's offerings, not the opinions of the provider. Yet it was still impermissible: "By compelling individuals to speak a particular message, such notices alter the content of their speech." *Id.* at 2371 (internal quotation omitted).

Similarly, in *Riley*, the Supreme Court invalidated a requirement that professional fundraisers state "the average percentage of gross receipts actually turned over to charities." 487 U.S. at 786. As the Court explained, "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Id.* at 795.

Michigan's new policy must also face strict scrutiny because it places unconstitutional conditions on St. Vincent's conduct. Michigan attempts

to distinguish *AOSI* and *FCC v. League of Women Voters* on the basis that those involved private speech, while a home study is a "public function." But "public function" is a term of art that does not apply here: "The public function test requires that the private entity exercise powers which are traditionally exclusively reserved to the state, such as holding elections or eminent domain." *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (internal citation omitted). Home studies are not a power exclusively reserved to the state; Michigan concedes that "most adoption services in Michigan are privatized." ECF 34-2 at PageID.967. And the State makes claims about generalized administrative costs, but does not rebut the fact that St. Vincent does not bill the State for home studies, and St. Vincent pays for recruiting and home studies from its own pocket, through a separate cost center. ECF No. 6-1 at PageID.233.

Nor does Michigan respond on the bigger issue: St. Vincent will be completely excluded from providing foster care and adoptions to children in the child welfare system unless it pledges allegiance to the State's new policy. ECF No. 6 at PageID.218. "[I]f a party objects to a condition on" government funding, her ordinary "recourse is to decline the funds." *Agency for Int'l Dev. v. AOSI*, 570 U.S. 205, 214 (2013). But this argument

only works when the contractor *can* "decline the funds" and continue the activity. When funding is tied to the authority to do "what would be illegal otherwise," then that condition is "akin to an occupational license." *Dep't of Tex., Veterans of Foreign Wars of the U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427, 436-37 (5th Cir. 2014) (en banc). Here, Michigan concedes that agencies "must be licensed by the Department in order to provide foster care and adoption services." ECF No. 34-3 at PageID.973.

St. Vincent cannot simply decline the funds and continue providing foster care and adoptions for those children on "its own time and dime." *AOSI*, 570 U.S. at 218. Child welfare agencies cannot "declin[e] the subsidy and finance[e] their own unsubsidized program," *Rust v. Sullivan*, 500 U.S. 173, 199 n.5 (1991). Therefore, Michigan's unconstitutional conditions must face strict scrutiny.

Nor do Michigan's arguments succeed as a matter of fact. The home study requires subjective, written analyses of a variety of factors—indeed, the State acknowledges as much. ECF No. 34 at PageID.953. The State protests this is not "religious speech," and attaches various declarations attesting that this is all about state criteria. *Id.*

While the State is free to believe that providing this written assessment and certification does not conflict with Catholic teaching, that is not the State's judgment to make. *See supra.* St. Vincent has testified that the mandated speech is inconsistent with its religious beliefs. ECF No. 6-1 at PageID.231. Nor is this belief unusual or newly-minted: the serial closure of Catholic adoption and foster agencies in Boston; San Francisco; Washington, DC; and the entire state of Illinois illustrate that this issue has serious theological implications for the agencies involved.[5]

**C. The State's policy fails strict scrutiny.**

Michigan's perfunctory arguments are insufficient to carry its heavy burden under strict scrutiny. As Plaintiffs explained in their opening memorandum, the compelling-interest test requires courts to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants—in other words, to look to the marginal interest in enforc[ement]." *Burwell v. Hobby Lobby*, 573 U.S. 682,726-27

[5] *See Discrimination Against Catholic Adoption Services,* United States Conference of Catholic Bishops (last visited June 12, 2019) *http://www.usccb.org/issues-and-action/religious-liberty/discrimination-against-catholic-adoption-services.*cfm (listing examples).

(2014) (internal quotation marks and citation omitted). The State merely asserts a broad interest in anti-discrimination; it fails to explain the specific harms in allowing St. Vincent to continue its religious exercise.

As a third party, Proposed Intervenors attempt to do the State's homework. They suggest that exempting St. Vincent could deter same-sex couples who wish to foster. Invr. Br. in Opp'n, ECF No. 35 at PageID.1145 n.11. But they offer only speculation and hearsay to back up that supposition. Even "plausible hypotheses are not enough to satisfy strict scrutiny," *Contractors Ass'n of E. Pa. v. City of Phila.*, 6 F.3d 990, 1008 (3d Cir. 1993), and "ambiguous proof will not suffice." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 800 (2011). Michigan cannot show that excluding faith-based agencies is the least restrictive means of accomplishing its interests. As Plaintiffs have shown, the prior referral policy was correlated with *more* children going to permanency from foster care, *more* children finding placements, and *fewer* children entering the foster care system. ECF No. 6-13

### D. Complying with the Free Exercise Clause does not violate the Establishment or the Equal Protection Clauses.

Potential Intervenors argue that that the State is *required* by the Establishment and Equal Protection Clauses to exclude St. Vincent. But

under the Establishment Clause, the Supreme Court has long recognized that religious accommodations are permissible. *See, e.g., Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987) (upholding Title VII exemption for religious organizations). Where there is a system of "private choice," the actions of religious participants do not violate the Establishment Clause. *Zelman v. Simmons-Harris*. 536 U.S. 639, 662 (2002); *see also Freedom from Religion Found. v. McCallum*, 324 F.3d 880, 883–84 (7th Cir. 2003) (upholding government-funded halfway house program with religious contractors). Allowing a policy exemption to one private charity receiving public funds—among the many agencies foster parents may choose—follows *Zelman* and *McCallum*.[6]

The Equal Protection argument ignores the distinction between government action and private action. "[A] State normally can be held

[6] Proposed Intervenors also argue that Michigan's policy does not burden Plaintiffs' Free Exercise rights. In *Teen Ranch v. Udow*, the Sixth Circuit found an Establishment Clause violation because there was no "true private choice" and Teen Ranch "coerc[ed] children into participating in religious activities." 479 F.3d 403, 406, 409 (6th Cir. 2007). Unlike the children in *Teen Ranch*, adult prospective adoptive parents have a system of true private choice. It is no surprise that the brief Free Exercise analysis found no violation in light of this Establishment Clause violation. *Id.* at 409-10.

responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). That would not be implicated by the State permitting (especially under protest) private choices contrary to its general policy stances.

### E. Plaintiffs' claims against the Federal Defendants are proper and ripe.

Relief is also proper against the Federal Defendants. The Federal Defendants' brief is most remarkable for what it does not say: it does not say that Michigan was under any threat of federal enforcement if it did not penalize religious agencies; to the contrary, it disclaims plans to enforce and suggests that St. Vincent is correct that such enforcement would violate the Constitution and RFRA. State Br. in Opp'n, ECF No. 33 at PageID.802.

The Federal Defendants' arguments turn on their claim that they *might* not enforce the law. But the State is already attempting to enforce that same law against St. Vincent. As a result, Plaintiffs' claims are ripe. The State seeks to penalize St. Vincent *now*, and taking the State at its word, it does so to comply with federal law.

Federal Defendants rely on inapplicable cases. In *Simon v. East Kentucky Welfare Rights Organization* [*EKWRO*], 426 U.S. 26 (1976), plaintiffs had not "establish[ed]" that the relevant hospitals "[we]re dependent upon [charitable] contributions." *Id.* at 44. Here, the State's child welfare program is 'dependent' on federal funds, and Michigan identifies federal law as a reason for its policy. In *Adult Video Association v. U.S. Department of Justice*, 71 F.3d 563 (6th Cir. 1995), it was "far from clear that any harm [would] occur." *Id.* at 568. Here, the harm is clear and is already occurring.

Plaintiffs can further address any similar challenges Federal defendants raise in a motion to dismiss or other briefing. But the arguments here are no bar to a preliminary injunction, particularly an injunction against the State.

### F. The *Dumont* settlement agreement was not a consent decree.

The State begins its opposition by arguing that the Dumont settlement was a "consent decree," (a term it uses 20 times). This argument is foreclosed by binding precedent, the terms of the order, and the actions of the parties to the settlement.

An order is only a consent decree if the court order "incorporate[s] the parties' terms." *Pedreira v. Sunrise Children's Servs.* 802 F.3d 865, 871 (6th Cir. 2015). Here, the Eastern District did not incorporate the settlement agreement's terms into its dismissal order. The court was never even *asked* to incorporate those terms into a consent decree. Proposed Order at PageID.1464-1467, *Dumont v. Gordon*, 17-cv-13080 (E.D. Mich. Mar. 22, 2019), ECF No. 82. Instead, at the request of the settling parties, the court dismissed the case "pursuant to the terms of the Settlement Agreement," citing *RE/MAX Int'l v. Realty One* 271 F.3d 633 (6th Cir. 2001).[7] The Sixth Circuit has held that "[t]he phrase 'pursuant to the terms of the [s]ettlement' ***fails to incorporate*** the terms of the [s]ettlement agreement into the order." *Id.* at 642 (emphasis added). Notably, the Court included this language, and the citation to *RE/MAX*, at the request of the State, which submitted it in a proposed order.[8] Thus, the Eastern District's order—entered in the precise form

[7] Order on Stip. of Dismissal at PageID.1469, *Dumont v. Gordon*, No. 2:17-cv-13080 (E.D. Mich. Mar. 22, 2019), ECF No. 83.
[8] Proposed Order at PageID.1464-1467, *Dumont v. Gordon*, 17-cv-13080 (E.D. Mich. Mar. 22, 2019), ECF No. 82.

requested by the State—makes clear that the settlement agreement is *not* incorporated into the order and therefore cannot be a consent decree.

That is presumably why Michigan has not used the term "consent decree" in its communications about the settlement,[9] and other parties to that settlement (Proposed Intervenors here) *still* refrain from using that term today.[10] The court clearly did not think it was entering a consent decree as it (a) issued the dismissal order within the hour, and (b) did not hold any hearing over the merits of the agreement, which would have been required for a consent decree.[11] Simply put, the resolution of *Dumont* was just a settlement agreement, and no one anywhere called it a consent decree until the State's (but not Proposed Intervenors') recent pleadings in this Court.

Their settlement contract does not and cannot bind Plaintiffs here, who did not join it: "It goes without saying that a contract cannot bind a nonparty." *E.E.O.C. v. Waffle House,* 534 U.S. 279, 294 (2002). Moreover,

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[9] *See, e.g.,* Announcement, ECF No. 37-2 at PageID.1424; Seyka Decl. Ex. B (training materials).

[10] *See* Mot. to Intervene, ECF No. 18 ("settlement agreement" appears two times, "consent decree" zero times); Proposed Br. in Opposition, ECF No. 37 ("settlement agreement" appears 17 times, "consent decree" zero times).

[11] *See*, Order on Stip. of Dismissal, *Dumont*, ECF No. 83.

by its own terms, it is only valid to the extent not "prohibited by law or court order." Order on Stip. of Dismissal at PageID.1445, *Dumont*, ECF No. 83. Should the Court enter an order inconsistent with that agreement, the agreement simply would not apply in that circumstance. The State cannot shield its constitutional violations behind a private contract that is not binding upon Plaintiffs, is not binding upon Federal Defendants, and ***expressly*** does not bind State Defendants to the extent this Court, or any other, enters an injunction against them.

## II. The remaining preliminary injunction factors are satisfied.

"The purpose of a preliminary injunction is simply to preserve the status quo[.]" *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004). St. Vincent merely seeks to preserve a status quo that has been successful for decades, allowing St. Vincent to serve thousands of children in need.

***Irreparable harm.*** Plaintiffs' harms are irreparable as a matter of law: Defendants do not dispute that a violation of Plaintiffs' constitutional rights is always irreparable. *See* ECF No. 6 at PageID.222; ECF No. 34 at PageID.956. They are also irreparable as a matter of fact: St. Vincent's contract is up for renewal September 30, and the effects of

the State's new policy are already being felt. Sekya Decl. at ¶¶3-5. Avoiding such harm is the purpose of a preliminary injunction.

***Public interest.*** Defendants also do not contest the fact that "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge v. Mich. Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir. 1994). Here, the public interest in protecting Plaintiffs is even stronger. Closing down St. Vincent without a full hearing on the merits of this case is not in the best interest of the children the State serves. Roach Report at 5. And keeping St. Vincent open does nothing to prevent same-sex couples who want to adopt from adopting. Strachan Report at 11-12; ECF No. 6 at PageID.223.

***Balance of the hardships.*** The balance of the hardships tips overwhelmingly in favor of St. Vincent, as it will be forced to close its adoption and foster programs if the State is permitted to apply its unconstitutional policy. The State fails to respond; Proposed Intervenors argue that same-sex couples will suffer stigma if St. Vincent is allowed to continue its religious adoption ministry. Plaintiffs' expert speaks to her awareness of many same-sex couples being able to foster children without obstacles. Strachan Report at 11-12. Thus, there is no hard

evidence of deterrent effect, much less widespread effects. This is insufficient to overcome the certainly impending harms if St. Vincent is shut down. *See* ECF No. 6 at PageID.173-176.

Finally, Proposed Intervenors argue that an injunction is "unprecedented" and would "forever eliminate the State's power to enforce its contracts." ECF No. 35 at PageID.1144. Not so. The State cannot use government contracts to restrict constitutional rights. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 685-686 (1996). Nor can it choose to offer contracts or grants in a discriminatory way. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2024 (2017). Removing such unconstitutional barriers is the appropriate remedy.

## CONCLUSION

The motion for preliminary injunction should be granted.

Dated: June 12, 2019

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This memorandum complies with the word limit of L. Civ. R. 7.2(c) because, excluding the parts exempted by L. Civ. R. 7.2(c), it contains 4,298 words. The word count was generated using Microsoft Word 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 12, 2019, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which sends an electronic notification to all counsel who have entered an appearance on the Docket.

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