No. 19-2185

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 the 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 Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,
Defendants-Appellants,

and

ALEX AZAR, in his official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants.

On Appeal from the United States District Court for the Western District of Michigan
1:19-cv-00286-RJJ-PJG

RESPONSE OF PROPOSED INTERVENORS KRISTY DUMONT AND DANA DUMONT IN SUPPORT OF DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Proposed Intervenors Kristy and Dana Dumont actively seek to foster one or more children through Michigan's public child welfare system and, ultimately, to adopt. After being turned away by state-contracted, taxpayer-funded child placing agencies ("CPAs")—including Plaintiff-Appellee St. Vincent Catholic Charities ("STVCC")—solely because of their sexual orientation, the Dumonts and others sued officials in the Michigan Department of Health and Human Services ("MDHHS"). They secured a settlement agreement requiring MDHHS to retain and enforce the non-discrimination provision already in its contracts with CPAs, which forbids discrimination against prospective parents on the basis of, *inter alia*, sexual orientation. After the settlement, STVCC sued. The court below entered a preliminary injunction compelling MDHHS, notwithstanding non-discrimination provisions in the standard CPA contracts entered into by STVCC, to permit STVCC to continue turning away applicants based on religious objections to accepting same-sex couples. To ensure that the Dumonts can participate in the public child welfare system on equal footing with other qualified prospective parents, Proposed Intervenors respectfully submit this brief in support of the emergency motion for stay pending appeal filed by Defendants-Appellants Robert Gordon, Joo Yeun Chang, and Dana Nessel, in their official capacities.

Each of the factors considered on a motion to stay is satisfied here. *See Coal. To Defend Affirmative Action* v. *Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). The State—and the Dumonts, if they are granted permission to intervene as Defendants-Appellants—are likely to succeed on the merits of this appeal for several reasons. ***First***, MDHHS regulates CPAs on the basis of their contracted-for actions—recruiting and vetting foster and adoptive families and recommending family placements for children—not their beliefs. The Free Exercise Clause does not bar the State from requiring its contractors to comply with a non-discrimination provision when providing public child welfare services. ***Second***, in concluding that MDHHS's enforcement of its contracts' non-discrimination requirement was motivated by anti-religious hostility, the district court relied upon several factual findings that were clearly erroneous—or, at least, so hotly contested that they could not be accepted without an evidentiary hearing under this Court's precedent. ***Third***, the preliminary injunction is inconsistent with the Constitution: it would violate the Establishment and Equal Protection Clauses to permit state-contracted, taxpayer-funded child placing agencies to use religious eligibility criteria to exclude same-sex prospective foster and adoptive parents when providing public child welfare services.

The other factors also weigh in favor of a stay pending appeal. The preliminary injunction is irreparably harming children and prospective parents by

requiring MDHHS to allow STVCC to categorically exclude same-sex couples and limit the pool of families to which STVCC foster children have access. The Dumonts are also experiencing irreparable harm through the deprivation of their constitutional rights, the stigma of knowing the State's agents can treat them as unfit parents as a result of their sexual orientation, and the practical obstacles of being limited to a subset of the CPAs that are available to other families seeking to foster or adopt through the public child welfare system.

FACTUAL BACKGROUND

The Dumonts incorporate the Factual Background sections of their motion to intervene, Dkt. 15, and their brief *amici curiae* in the court below, R. 62.

ARGUMENT

An appellate court "review[s] [a] motion [for a stay pending appeal] in light of four factors: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Russell* v. *Lundergan-Grimes*, 769 F.3d 919, 920–21 (6th Cir. 2014) (per curiam). In light of the district court's errors of law and clear factual errors, the State (and the Dumonts, if permitted to intervene) are likely to prevail on appeal. As to the other factors, a stay is

appropriate because MDHHS, children in its care, and same-sex couples are being irreparably injured by the preliminary injunction.

I. The State and the Dumonts Are Likely To Succeed on the Merits of This Appeal.

A. MDHHS's Contracting Decisions Do Not Violate the Free Exercise Clause.

The Free Exercise Clause does not prevent MDHHS from ensuring that agencies it contracts with to place state wards do so in accordance with state policy. *See, e.g.*, *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("As a general matter, if a party objects to a condition on the receipt of [government] funding, its recourse is to decline the funds."); *see also Rust* v. *Sullivan*, 500 U.S. 173, 193 (1991). The Free Exercise Clause's protection against government encroachment on religious exercise does not mean the government is required to affirmatively fund religious activity. *See Teen Ranch* v. *Udow*, 389 F. Supp. 2d 827, 837 (W.D. Mich. 2005), *aff'd*, 479 F.3d 403, 411 (6th Cir. 2007). In *Teen Ranch*, Michigan had partnered with Teen Ranch, a religious organization providing residential care for youth in state custody. After the State ceased placing children with Teen Ranch based on concerns that it incorporated religious teachings into state-contracted programming, Teen Ranch sued, claiming—much like STVCC—that ending the contract relationship "violate[d] the Free Exercise Clause because it conditions the receipt of a governmental benefit on Teen Ranch's

surrender of its religious beliefs and practices and burdens the Free Exercise of Plaintiff's religious beliefs." 389 F. Supp. 2d 827, 837. The district court rejected the claim on the basis that the Free Exercise Clause imposes no affirmative requirement on government entities to fund religious activity, *id.* at 838–39, and this Court affirmed, fully adopting the rationale of "the district court's well-considered opinion." 479 F.3d, at 411.

Just as Teen Ranch had no Free Exercise right to a government contract to promote its religion to state wards in youth residential care, STVCC has no right to a government contract to perform child placing on the basis of religious criteria. Of course, STVCC is free from the State's contractual non-discrimination requirements in its private activities, including its private adoption work. MDHHS's contracting decision does not burden STVCC's ability to freely exercise religion; it only provides that activities performed under a taxpayer-funded state contract must be performed in accordance with the State's non-discrimination policies. *Cf. Teen Ranch*, 479 F.3d at 409 ("[A] state contract for youth residential services is not a public benefit.").

The Free Exercise Clause would be implicated if MDHHS excluded CPAs from participating in government contracts because of their "religious identity." *See Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2015, 2024 (2017) ("The rule is simple: No churches need apply."). However,

MDHHS contracts with many religious agencies—including, as the Dumonts noted in the court below, religious agencies that object to same-sex marriage—so long as they comply with the non-discrimination requirement in their contracts. *See* Response in Opposition to Motion for Preliminary Injunction, R. 62, Page ID # 2210 n.17 (citing David Eggert, *Major Michigan Adoption Agency Just Reversed Policy To Allow Same-Sex Couples To Adopt*, DETROIT FREE PRESS (Apr. 22, 2019, 1:44 PM), https://www.freep.com/story/news/local/michigan/2019/04/22/adoption-foster-bethany-christian/3540472002/). As the Third Circuit held in a substantially similar case earlier this year, "while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from general, neutrally applied legal requirements." *Fulton* v. *City of Phila.*, 922 F.3d 140, 159 (3rd Cir. 2019) (holding that the city's non-renewal of its contract with a religiously affiliated foster care agency, based on the agency's turning away of same-sex couples in violation of the city's anti-discrimination ordinance, did not substantially burden the agency's free exercise of religion).

B. The District Court Rested All of Its Legal Conclusions on Clearly Erroneous Factual Findings.

Appellants are likely to succeed on the merits of this appeal because all of the district court's legal conclusions—including its conclusion that the State's enforcement of its non-discrimination requirement was motivated by anti-religious hostility—were based on clearly erroneous findings of fact—or, at a minimum,

based on the court's improper acceptance of hotly disputed factual assertions without an evidentiary hearing. These clearly erroneous factual findings include that (1) MDHHS suddenly changed its enforcement policy when Dana Nessel took office, and (2) enforcement of the non-discrimination policy does not advance the State's stated purposes of child welfare and equality because STVCC places children with same-sex couples on a non-discriminatory basis. The district court deemed these factual findings critical to its analysis, relying on them to distinguish an otherwise analogous case, *Fulton* v. *City of Philadelphia.* Opinion, R. 69, Page ID # 2520 (distinguishing *Fulton* on the grounds that in *Fulton* "[t]here was no sudden change in the City's position after new officials who had expressed anti-religious views took office," and "there was no record of the agency involved actually placing children on a non-discriminatory basis with same-sex parents certified by others"). Because clearly erroneous findings formed the basis for the court's legal conclusions, Appellants are likely to succeed on appeal.

1. The Court's finding that MDHHS's enforcement of the non-discrimination clause was motivated by anti-religious bias was clearly erroneous.

The principal ground relied on by the district court in granting the injunction—that MDHHS's enforcement of its non-discrimination requirement against STVCC was motivated by hostility toward the agency's religious beliefs—is not supported by the record. MDHHS requires that all CPAs to which it delegates

child placing responsibilities sign a contract containing a non-discrimination policy; this serves the goals of promoting the well-being of children and equality. *See* Declaration of C. Hoover, R. 34-5, Page ID ## 1011-12 (CPAs must be willing to work with all families "in order to find the most appropriate placement for [each] child," and families must be allowed to choose among all agencies, considering the "many factors [that] can go into determining which agency works best for [them].").

Without recognizing, considering, or assessing the credibility of that testimony concerning MDHHS's actual motivations, the district court found instead that MDHHS is enforcing its non-discrimination requirement against STVCC because of anti-religious hostility. In so finding, the district court relied primarily upon its finding that the State had a "sudden change" in its position after Attorney General Nessel took office. Opinion, R. 69, Page ID # 2520.

To the contrary, the evidence shows MDHHS enforced the non-discrimination requirement in its contracts, including against agencies with religious objections to same-sex couples, long before Attorney General Nessel's election when it conducted at least two prior investigations for sexual orientation discrimination. *See* Response in Opposition to Motion for Preliminary Injunction, R. 62, Page ID # 2208; R. 67 (correcting citations). In one case, a CPA refused to place a child with his biological siblings, because those siblings were in the care of

a same-sex couple.[1] In another case, a CPA refused to finalize an adoption because Michigan (compelled by *Obergefell*) had recognized the same-sex marriage of the adoptive couple.[2] In each case, MDHHS required the CPA to enter into a corrective action plan. This evidence shows that MDHHS's enforcement of the non-discrimination provision, including against agencies with religious objections to compliance, was State practice going back to at least 2017, well before Attorney General Nessel took office in 2019.

Consistent with this, when the *Dumont* case was filed over two years ago, an MDHHS employee initiated investigations into STVCC and the other CPA that had turned away the *Dumont* plaintiffs. That employee averred: "I did not initiate these investigations based on the religious beliefs of St. Vincent [and] Bethany Christian Services . . . . [MDHHS] 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 it has voluntarily agreed to." Declaration of S. Bladen, R. 34-4, Page ID ## 994, 996. The STVCC investigation had not merely been commenced well before Attorney General Nessel took office; interrogatory responses from *Dumont*, which

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[1] Special Investigation Report 2018C0223029, *available at* https://cwl-search.apps.lara.state.mi.us/Home/ViewReport/236855.

[2] Special Investigation Report 2017C0208001, *available at* https://cwl-search.apps.lara.state.mi.us/Home/ViewReport/208062.

the Dumonts introduced into the record below, confirm that the investigation was "completed and [was] pending final approval" ***while Attorney General Schuette was still in office***. *See* Defendants' Objections and Responses to Plaintiffs' Amended First Set of Interrogatories, R. 62-3, Page ID # 2304.

Given the record evidence showing MDHHS's history of investigating and issuing corrective action plans for other agencies while Attorney General Schuette was still in office, the district court clearly erred in finding that the State's enforcement of the non-discrimination requirement was triggered by Attorney General Nessel's alleged anti-religious views.[3]

2. The district court relied upon clearly erroneous factual findings in rejecting MDHHS's interests in child welfare and equality as a "pretext."

The district court found that MDHHS's asserted interests in child welfare and equality were a "pretext for religious targeting" based on factual findings that (a) STVCC will place children with same-sex couples on a non-discriminatory basis and (b) there is no evidence in the record that allowing some CPAs to turn away same-sex couples will harm children or prospective

[3] Also, as the State's motion explains, the past statements of the Attorney General, mostly from her time as a private litigator advocating for LGBTQ rights, demonstrate concerns for equality, not anti-religious bias. *See* Dkt. No. 16-1, at 19-21.

parents. Opinion Granting Preliminary Injunction, R. 69, Page ID ## 2518-19. These findings were clearly erroneous.

First, the court found that STVCC "places children with same-sex couples certified as foster or adoptive parents," Opinion Granting Preliminary Injunction R. 69, # 2520, and does so "on a non-discriminatory basis," *id.* at Page ID # 2518. Understanding the court's error requires a brief overview of Michigan's child welfare system and, especially, the Michigan Adoption Resource Exchange ("MARE"):

When MDHHS removes a child from his or her parents, it has the obligation to quickly find the child a foster home. Complaint, R. 1, Page ID # 20. To carry out this governmental duty, MDHHS relies on CPAs. CPAs guide families through the licensing process in anticipation of fostering; once licensed, families "join that agency's pool of homes waiting to serve a child in need." Declaration of G. Snoeyink, R. 6-1, Page ID # 234. When MDHHS contacts a CPA to seek foster placement for a child, the CPA must quickly decide whether to recommend placement with a family in its pool of licensed foster families. STVCC's pool has no same-sex couples because it refuses to accept same-sex couples seeking licensure, Declaration of K. Dumont, R. 39-2, Page ID # 1517, which means that when STVCC is entrusted with the obligation to find a foster placement, the child at issue will not have the opportunity to be placed with an entire class of prospective families:

same-sex couples. STVCC's refusal to accept same-sex couples harms these children, as shown by unrefuted expert testimony:

> If a State-contracted agency does not accept a class of prospective families such as same-sex couples, children in the care of that agency may lose out on the family that would have best served their needs and, instead, be placed with a family in the agency's pool of licensed families that meets the qualifications to foster or adopt but is a less appropriate choice for the child.

Expert Report of David M. Brodzsinky, Ph.D., R. 62-1, Page ID # 2230.

Eventually, some foster children's parents' parental rights will be terminated, so their permanency goal will change from foster placement to adoption. Of the "approximately 13,000 children in foster care," only "2,000 . . . have a permanency goal of adoption." Declaration of P. Neitman, R. 34-3, Page ID # 972. Some portion of these 2,000 children in foster care seeking adoption will be adopted by other relatives, and some will be adopted by their foster family. Those that remain—"children who are legally free for adoption without an identified adoptive family"—are identified with photos and other information on MARE. Declaration of C. Hoover, R. 34-5, Page ID # 1012; *see* Mich. Comp. L. § 722.954b ("If an adoptive family . . . has not been identified . . . , the supervising agency shall submit the necessary information for inclusion of the child . . . ."); *see also* Mich. Adoption Services Manual, ADM 0110, at 5 (describing MARE as "a registry of children available for adoption") & ADM 0710, at 1 (a system for wards "whose goal is

adoption");[4] MARE Home, www.MARE.org (last accessed Nov. 4, 2019) (as of November 4, just 333 children are photolisted). The vast majority of children in foster care are not listed on the Michigan ***Adoption*** Resource Exchange, as the name would suggest.

STVCC has never said that it will place children who are not MARE-eligible with same-sex couples; it will not. In reaching a contrary conclusion, the district court relied entirely on (i) STVCC's representation that it will allow same-sex couples to adopt children in STVCC's care through MARE if couples are certified by another agency; and (ii) a declaration submitted with Plaintiffs' reply in support of their motion for preliminary injunction, asserting in a single sentence that "St. Vincent immediately places all children within its care on MARE." Supplemental Declaration of G. Snoeyink, R. 42-4, Page ID # 1662. This representation cannot mean what it literally says; it could only be referring to ***MARE-eligible*** children—the subset of children available for adoption who have no adoptive family identified—given that MARE does not list any other children. *See* Declaration of C. Hoover Decl., R. 34-5, Page ID # 1012; Mich. Comp. L. § 722.954b; Michigan Adoption Services Manual, ADM 0110, at 5 & ADM 0710, at 1. However, contrary to the law governing MARE and the other evidence in the

[4] *Available at* https://dhhs.michigan.gov/OLMWeb/ex/AD/Mobile/ADM/ADM%20Mobile.pdf.

record concerning the program, the district court read this representation literally and credited it. *See* Opinion Granting Preliminary Injunction, R. 69, Page ID # 2504. This formed the basis for the court's finding that STVCC "places children with same-sex couples certified as foster or adoptive parents," *id.* at Page ID # 2520, and does so "on a non-discriminatory basis." *Id.* at Page ID # 2518.

The district court placed enormous weight on this clearly erroneous finding, reiterating it many times. *E.g.*, *id.* at Page ID # 2528-29 ("The State pays St. Vincent to place children with foster or adoptive parents certified as suitable by the State. St. Vincent has done that faithfully, regardless of whether the certified parents were opposite sex, same-sex, or unmarried couples."); *id.* at Page ID # 2519 (The State's position would disrupt a "practice that ensures non-discrimination in child placements."); *id.* at Page ID #2498 (St. Vincent "placed children on a non-discriminatory basis in any home approved by the State."). The district court relied upon this finding at every stage of its legal analysis. *Id.* at Page ID # 2519 (strict scrutiny applies because STVCC's willingness to place in non-discriminatory fashion "strongly suggests the State's real goal is not to promote non-discriminatory child placements, but to stamp out St. Vincent's religious beliefs and replace it with the State's own."); *id.* (non-discrimination policy does not advance State's compelling interests because STVCC "places its children with any certified parent – unmarried couples, same-sex couples, or otherwise"); *id.* at Page ID ## 2524-25

(similar reasoning in balancing the equities).[5] In this way, each of the district court's legal conclusions was founded upon its clearly erroneous findings about STVCC's willingness to place children in a non-discriminatory fashion.

Second, in concluding that MDHHS's asserted rationales are a "pretext for religious targeting," the court also relied upon a clearly erroneous factual finding that "there is nothing in this record that supports a finding that the power of CPAs . . . [to turn away prospective parents] limits the pool of applicants." *Id.* at Page ID # 2519. Because of this purported lack of evidence, the Court concluded that MDHHS's enforcement of its non-discrimination provision "actually undermines" the goal of "making available as many properly certified homes for the placement of foster and adopted children as possible," because in light of that enforcement, STVCC might choose to cease its participation in the public child welfare system. *Id.*; *see also id.* at Page ID # 2520 ("[T]he State's course of action here would constrict the supply of CPAs and undermine the State's intent in getting certified

[5] STVCC's unwillingness to place foster children with same-sex couples is also relevant to understanding the third-party harms that the preliminary injunction is causing. It not only injures prospective foster parents such as the Dumonts, but it likewise injures children in the child welfare system which Michigan must care for: because of the preliminary injunction, if a Michigan child is removed from his or her parents and placed by MDHHS with STVCC, that foster child in STVCC's care will not be placed with a same-sex couple, even if that would be the best placement for that child.

placements for kids."). "This," the court concluded, "strongly suggests that something else—namely, religious targeting—is the state's real purpose." *Id.*

But there ***is*** substantial evidence in the record "that supports a finding that the power of CPAs . . . [to turn away prospective parents] limits the pool of applicants" and harms children. The Dumonts introduced precisely such expert and lay testimony. *E.g.*, Expert Report of David M. Brodzinsky, Ph.D., R. 62-1, Page ID # 2230 ("Permitting State-contracted agencies to turn away same-sex couples can reduce family placement options for children in the child welfare system, thereby undermining their long-term well-being."); *id.* ("[W]hen State-contracted child placing agencies are permitted to exclude same-sex couples regardless of their qualifications, it creates a deterrent to same-sex couples' participation in the foster care and adoption system as a whole."); Declaration of K. Sander, R. 62-2, Page ID # 2273 (recalling an LGBTQ prospective family that was turned away and "was so discouraged that they decided not to call another agency"). Moreover, evidence showed that children in Michigan's foster care system were directly harmed by agencies' exclusions of same-sex couples. One child was not placed with his siblings because the agency caring for him had a religious objection to placing children with same-sex couples.[6] Another child had a delay in the finalization of his

[6] Special Investigation Report 2018C0223029, *available at* https://cwl-search.apps.lara.state.mi.us/Home/ViewReport/236855.

adoption due to an agency's unwillingness to work with same-sex couples.[7] Without considering, discussing, analyzing, or even acknowledging that evidence, the district court erroneously concluded that there was no evidence of harm.[8]

Appellants are likely to succeed on this appeal because of the district court's reliance on these clearly erroneous factual findings.

3. At a minimum, given that the State and Proposed Intervenors hotly disputed the facts upon which the court relied, failure to hold an evidentiary hearing was error as a matter of law.

Even if these factual findings were not clear error, they were, at the very least, based upon facts that the State and Proposed Intervenors vigorously disputed. In such a circumstance, this Court's precedents require the district court to hold an evidentiary hearing. *See Certified Restoration Dry Cleaning Network, L.L.C.* v. *Tenke Corp.*, 511 F.3d 535, 553 (6th Cir. 2007) ("[W]here facts are bitterly contested

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[7] Special Investigation Report 2017C0208001, *available at* https://cwl-search.apps.lara.state.mi.us/Home/ViewReport/208062.

[8] In addition, there was no support in the record for the district court's assumption that there is a shortage of CPAs to meet the needs of children in care, *see* Opinion Granting Preliminary Injunction, R. 69, Page ID # 2520 ("The State's course of action here would constrict the supply of CPAs."). Indeed, the record showed the opposite. *See Dumont* State Defendants' Responses and Objections to *Dumont* Plaintiffs' Requests for Admission, R. 62-4, Page ID # 2362 ("[I]f [STVCC] chose to cease operations in Michigan, DHHS would be able to use other agencies to provide the recruitment, training and licensing services that had been provided by that agency," and "DHHS would be able to continue providing the same foster care and adoption services to children directly and/or through other agencies.").

and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held.") (alteration in original). Instead, as previously noted, *see supra* Section I.B.1-2, the district court repeatedly credited STVCC's allegations, while failing to acknowledge or consider contrary evidence in the record. This legal error alone merits vacatur of the injunction.

C. Allowing CPAs To Use Religious Criteria To Exclude Same-Sex Couples Would Violate the Establishment and Equal Protection Clauses.

The preliminary injunction should be vacated for the additional reasons that requiring the State to permit CPAs to use religious criteria to exclude same-sex couples would violate both the Establishment Clause and the Equal Protection Clause.

Establishment Clause. The preliminary injunction requires MDHHS to permit a state-contracted, taxpayer-funded CPA to apply religious eligibility criteria while carrying out the State's responsibility to recruit, screen, and recommend placements with prospective foster and adoptive families for wards of the State. For example, consider a child in foster care whose parents retain parental rights. The child is ineligible to be placed through MARE, *see supra* Section I.B.2, so STVCC will not place him or her with a same-sex couple, regardless of the child's needs. Compelled by the preliminary injunction, the child's best interests

notwithstanding, MDHHS must stand by as religious exclusion criteria are used to restrict the eligible population of foster parents for this child.

This violates "the core rationale underlying the Establishment Clause[:] preventing 'a fusion of governmental and religious functions.'" *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 126–27 (1982) (internal citation omitted).[9] In *Larkin*, the Supreme Court invalidated a municipal ordinance that gave churches discretion to veto a liquor license application for any premises located within 500 feet of a church. That ordinance "delegate[d] to private, nongovernmental entities . . . a power ordinarily vested in agencies of government." *Id.* at 122. The *Larkin* Court concluded that the ordinance was unconstitutional because it "***could*** be employed for explicitly religious goals." *Id.* at 125 (emphasis added). Here, the State ***knows*** that STVCC, in recommending placement for state wards, is screening out certain prospective parents based solely on religious criteria. Accordingly, requiring it to allow its contractors to use religious eligibility criteria while providing a government service would violate the Establishment Clause.[10]

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[9] *See also, e.g.*, *Bd. of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 702 (1994) (religious community's control over public education policy violated Establishment Clause).

[10] Allowing the use of religious criteria in the public child welfare system would also violate the Establishment Clause in several other ways. *See, e.g.*, *Edwards* v. *Aguillard*, 482 U.S. 578, 593 (1987) (invalidating Creationism Act because it preferenced certain religious views); *Santa Fe Indep. Sch. Dist*. v. *Doe*, 530 U.S. 290, 309–10 (2000) (prohibiting endorsement of religion that would send the

Equal Protection Clause. At a minimum, Equal Protection prohibits the government from making "distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr* v. *Robertson*, 463 U.S. 248, 265 (1983). Under any level of scrutiny, excluding a class of prospective families based on religious criteria unrelated to the ability to care for a child serves no legitimate government interest. *See* Response in Opposition to Motion for Preliminary Injunction, R. 62, ## Page ID 2202-04 (further explaining why such a system would violate the Equal Protection Clause).

II. The Other Factors Favor a Stay Pending Appeal.

As previously noted, *supra* Section I.B.2 & n.5, the preliminary injunction is harming children in STVCC's care, for whom placement recommendations are being made based on STVCC's religious beliefs, rather than based solely on a child's best interest. Children lose out when families are deterred from fostering or adopting because of discrimination. *E.g.*, Expert Report of David M. Brodzinsky, Ph.D., R. 62-1, Page ID # 2230 ("If a State-contracted agency does not accept a class of prospective families such as same-sex couples, children in the care of that agency may lose out on the family that would have best served their

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"message" to some "that they are outsiders, not full members of the political community") (internal quotation marks and citation omitted); *Est. of Thornton* v. *Caldor*, 472 U.S. 703, 709–10 (1985) (Establishment Clause prohibits laws imposing significant burdens on third parties in the name of religion).

needs."); *id.* ("[W]hen State-contracted child placing agencies are permitted to exclude same-sex couples regardless of their qualifications, it creates a deterrent."); *id.* ("[S]ome same-sex couples who would be interested in fostering or adopting may decline to pursue it altogether if they know that the State authorizes discrimination against sexual minorities.").

The preliminary injunction is also harming the Dumonts and other same-sex couples, who are being forced to pursue foster care through a subset of agencies available to other families and experience the stigma of a system that allows agencies acting on behalf of the State to exclude their kind as unsuitable parents.

For these reasons, and as stated more fully in the Dumonts' brief *amici curiae* below, R. 62, and the evidence attached thereto, *e.g.*, Expert Report of David M. Brodzinsky, Ph.D , R. 62-1; Declaration of K. Sander, R. 62-2, the balance of the equities strongly favors allowing MDHHS to require its agencies to accept all qualified prospective parents and, thus, prohibit discrimination based on sexual orientation and other factors unrelated to the ability to care for a child. The same factors counsel for granting the State's motion for a stay.

CONCLUSION

For the reasons set forth herein and in the State's motion, this Court should stay the preliminary injunction pending appeal.

Dated: November 5, 2019

Respectfully submitted,

s/Garrard R. Beeney

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2019, I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

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