UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN, Plaintiff, v. MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JOOYEUN CHANG, in her official capacity as Executive Director for the Children's Services Agency; and DANA NESSEL, in her official capacity as Attorney General of Michigan. Defendants.	No. 2:19-cv-11661-DPH-DRG HON. DENISE PAGE HOOD MAG. J. DAVID R. GRAND **[PROPOSED] INTERVENOR DEFENDANTS' [PROPOSED] RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

Proposed Intervenor Defendants Kristy and Dana Dumont submit this Proposed Response in Opposition to Plaintiff Catholic Charities West Michigan's ("CCWM") Motion for a Preliminary Injunction. For the reasons stated below and explained more fully in the attached Brief, CCWM has not demonstrated a likelihood of success on the merits, a likelihood that it will suffer irreparable harm in advance

of trial, or that the balance of the equities or the public interest favors the requested injunction, so its motion should be denied.

1. CCWM is a taxpayer-funded child placing agency ("CPA") that contracts with the State to provide public child welfare services for children in the State's custody. These services include recruiting, screening, and recommending foster and adoptive placements for children. CCWM seeks to compel the Michigan Department of Health and Human Services ("MDHHS") to renew its contract, while permitting CCWM to violate the non-discrimination clause in that contract by employing religious beliefs to categorically exclude qualified prospective families for wards of the State, based solely on their sexual orientation.

2. CCWM has not demonstrated a likelihood of success on its federal Free Exercise claim because (i) there is no constitutional right to a taxpayer-funded government contract to provide government services in accordance with one's religious beliefs and (ii) the State's non-discrimination requirement is a neutral, generally applicable policy that furthers a legitimate government interest. The outcome is no different under the Michigan freedom of worship and religious belief clauses. The non-discrimination requirement does not burden religious exercise, and even if it did, it satisfies any level of scrutiny because it furthers several compelling government interests, including accessing families for children in need and ending discrimination against Michigan families.

3. CCWM's Free Speech claims fail because in choosing to carry out government services under contract with the State, CCWM is not engaging in private speech.

4. CCWM will not succeed on its claim that certain 2015 state statutes compel the State to permit CCWM to discriminate because those statutes explicitly do not apply to services "provided under a contract with [MDHHS]." Mich. Comp. L. § 722.124e.

5. Finally, all of CCWM's claims fail for the additional reason that the Establishment and Equal Protection Clauses bar the relief they seek.

6. None of the remaining preliminary injunction factors support the requested injunction, which would harm children and families by forcing the State to permit agencies to discriminate against qualified prospective parents, as the attached expert testimony explains. Indeed, public records show that CCWM delayed at least two children's adoptions and neglected to reunite a third child with his siblings because of its refusal to place children with same-sex couples. To the extent CCWM's inability to dictate the terms of a taxpayer-funded government contract could be deemed a cognizable harm, it is heavily outweighed by these harms to children and families.

Dated: July 24, 2019

Respectfully submitted,

/s/ Ann-Elizabeth Ostrager

Jay Kaplan (P38197)
Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
Telephone: (313) 578-6823
jkaplan@aclumich.org
dkorobkin@aclumich.org

Daniel Mach
American Civil Liberties Union Foundation
915 15th Street NW
Washington, DC 20005
Telephone: (202) 675-2330
dmach@aclu.org

Leslie Cooper
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2633
lcooper@aclu.org

Garrard R. Beeney
Ann-Elizabeth Ostrager
Leila R. Siddiky
Jason W. Schnier
Lisa M. Ebersole
Hannah M. Lonky
James G. Mandilk
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004-2498
Telephone: (212) 558-4000
beeneyg@sullcrom.com
ostragerae@sullcrom.com
siddikyl@sullcrom.com
schnierj@sullcrom.com
ebersolel@sullcrom.com
lonkyh@sullcrom.com
mandilkj@sullcrom.com

Counsel for Proposed Intervenor Defendants

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN, Plaintiff, v. MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JOOYEUN CHANG, in her official capacity as Executive Director for the Children's Services Agency; and DANA NESSEL, in her official capacity as Attorney General of Michigan. Defendants.	No. 2:19-cv-11661-DPH-DRG HON. DENISE PAGE HOOD MAG. J. DAVID R. GRAND **BRIEF IN SUPPORT OF [PROPOSED] INTERVENOR DEFENDANTS' [PROPOSED] RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

Page

CONCISE STATEMENT OF ISSUES PRESENTED vii
CONTROLLING OR MOST APPROPRIATE AUTHORITY viii
PRELIMINARY STATEMENT 1
BACKGROUND 3
A. Michigan's Child Welfare System 3
B. The *Dumont* Case and Settlement Agreement 5
LEGAL STANDARD 6
ARGUMENT 6
I. CCWM HAS FAILED TO DEMONSTRATE A LIKELIHOOD OF PREVAILING ON ANY CLAIMS 6
A. CCWM Will Not Prevail on Its Free Exercise Claims 6
1. There is no right to a taxpayer-funded government contract to provide government services in accordance with one's religious beliefs 6
2. The non-discrimination provision is a neutral and generally applicable policy that furthers a legitimate government interest 7
3. The outcome is no different under the State Constitution 13
B. CCWM Will Not Prevail on Its Free Speech Claim Because Defendants Have Not Compelled Any Private Speech 17
C. CCWM's Claim Based on the 2015 Laws Cannot Succeed Because the 2015 Laws Do Not Cover Services Provided Under Contract with MDHHS 18
D. Allowing CPAs to Use Religious Criteria to Exclude Same-Sex Couples Would Violate the Establishment and Equal Protection Clauses of the Constitution 20
1. The Establishment Clause prohibits the use of religious eligibility criteria in government programs 20

2. Allowing state-contracted CPAs to exclude same-sex couples would violate the Equal Protection Clause.....22

II. THE REMAINING PRELIMINARY INJUNCTION FACTORS DO NOT SUPPORT CCWM'S MOTION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Agency for Int'l Dev. v. *Alliance for Open Society Int'l, Inc.*,
570 U.S. 205 (2013).....7

Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. *Grumet*,
512 U.S. 687 (1994).....20

Bonnell v. *Lorenzo*,
241 F.3d 800 (6th Cir. 2001) 6, 23

Bowen v. *Kendrick*,
487 U.S. 589 (1988).....22

Clark v. *Martinez*,
543 U.S. 371 (2005).....19

In re Constitutionality of 1970 P.A. 100,
180 N.W.2d 265 (1970) 13

Doe v. *Porter*,
370 F.3d 558 (6th Cir. 2004) 20

Dumont v. *Lyon*,
341 F. Supp. 3d 706 (E.D. Mich. 2018) .....*passim*

Edwards v. *Aguillard*,
482 U.S. 578 (1987).....21

Emp't Div., Dept. of Human Res. of Or. v. *Smith*,
494 U.S. 872 (1990).....7

Fulton v. *City of Phila.*,
922 F.3d 140 (3d Cir. 2019) .....*passim*

Garcetti v. *Ceballos*,
547 U.S. 410 (2006).....18

Hosanna-Tabor Evangelical Lutheran Church and Sch. v. *EEOC*
565 U.S. 171 (2012).....8

Ill. Bible Colls. Ass'n v. *Anderson*,
870 F.3d 631 (7th Cir. 2017) 9

Larkin v. *Grendel's Den, Inc.*,
459 U.S. 116 (1982).....20, 21

Lehr v. *Robertson*,
463 U.S. 248 (1983).....22

Masterpiece Cakeshop, Ltd. v. *Colo. Civil Rights Comm'n*,
138 S. Ct. 1719 (2018).....*passim*

McCready v. *Hoffius*,
586 N.W.2d 723 (Mich. 1998).....13, 15, 17

Nat'l Inst. of Family and Life Advocates v. *Becerra*,
138 S. Ct. 2361 (2018).....18

New Hope Family Servs., Inc. v. *Poole*,
2019 WL 2138355 (N.D.N.Y. May 16, 2019) 1

Obergefell v. *Hodges*,
135 S. Ct. 2584, 2607 (2015).....12

Overstreet v. *Lexington-Fayette Urban Cnty. Gov't*,
305 F.3d 566 (6th Cir. 2002) 6

Roberts v. *U.S. Jaycees*,
468 U.S. 609 (1984).....15

Rumsfeld v. *Forum for Academic and Institutional Rights, Inc.*,
547 U.S. 47 (2006).....18

Santa Fe Indep. Sch. Dist. v. *Doe*,
530 U.S. 290 (2000).....21

Smith v. *Jefferson Cnty. Bd. of Sch. Comm'rs*,
788 F.3d 580 (6th Cir. 2015) 21

State v. *Arlene's Flowers, Inc.*,
441 P.3d 1203 (Wash. 2019) 12

Teen Ranch v. *Udow*,
389 F. Supp. 2d 827 (W.D. Mich. 2005) 7, 18

Estate of Thornton v. *Caldor*,
472 U.S. 703 (1985).....22

Trinity Lutheran Church of Columbia, Inc. v. *Comer*,
137 S. Ct. 2012 (2017).....9, 10

Winter v. *Natural Res. Def. Council, Inc.*,
555 U.S. 7 (2008).....6

Constitutional Provisions and Statutes

U.S. Const. art. I.....*passim*

U.S. Const. art. XIV .....*passim*

Mich. Const. art. I, § 4 .....*passim*

Mich. Comp. L. § 722.23.....23

Mich. Comp. L. §§ 722.124e, 722.124f, 710.23g, 400.5a.....*passim*

Mich. Comp. L. § 722.953.....4

Other Authorities

Mich. Admin. Code R. 400.12201 *et seq*.....4

Mich. Admin. Code R. 400.12304, 400.12706.....4

MDHHS, *Adoption Services Manual*.....4, 19

MDHHS, *Children's Foster Care Manual* 19

David Eggert, *Major Michigan Adoption Agency Just Reversed Policy To Allow Same-Sex Couples To Adopt*, DETROIT FREE PRESS.....10

CONCISE STATEMENT OF ISSUES PRESENTED

Michigan contracts with child placing agencies ("CPAs") and refers State wards to them, paying them taxpayer money to recommend family placements for those children. All of Michigan's contracts with CPAs prohibit discrimination on the basis of sexual orientation. The issues presented are:

1. Whether a CPA is entitled to a government contract permitting it to apply religious criteria to prevent children from being placed with qualified same-sex couples, in light of the Federal Free Exercise Clause, the Michigan Constitution freedom of worship and religious beliefs clauses, the Federal Free Speech Clause, or Michigan statutes.

2. Whether, consistent with the Establishment and Equal Protection Clauses, Michigan can be compelled to delegate child placing services for wards of the State to a CPA that will carry out those services using religious exclusion criteria.

3. Whether the requested relief should be denied in light of the harm to Michigan children and families that would result if the State is required to permit discrimination against prospective foster and adoptive parents seeking to care for children in the public child welfare system.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Agency for Int'l Dev. v. *Alliance for Open Society Int'l, Inc.*, 570 U.S. 205 (2013) (no burden on First Amendment rights where condition to receipt of government funding is related to scope of funded government program); *Dumont* v. *Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018) (allegations of state-contracted CPA's use of religious criteria to exclude families headed by same-sex couples stated Establishment and Equal Protection claims; intervening CPA's Free Exercise and Free Speech arguments were "unconvinc[ing]"); *Emp't Div., Dept. of Human Res. of Or.* v. *Smith*, 494 U.S. 872 (1990) (rational basis review applies to neutral, generally applicable laws that incidentally burden religion); *Fulton* v. *City of Phila.*, 922 F.3d 140 (3d Cir. 2019) (affirming district court's refusal to enjoin Philadelphia's non-discrimination policy; rejecting Free Exercise and Free Speech claims of government-contracted foster care agency that refused to place children with same-sex couples for religious reasons); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause prohibits delegation of public functions to entities using religious criteria); *McCready* v. *Hoffius*, 586 N.W.2d 723 (Mich. 1998) (anti-discrimination law survived strict scrutiny under Michigan Constitution notwithstanding incidental burden on religion); *Teen Ranch* v. *Udow*, 479 F.3d 403, 410 (6th Cir. 2007) (State did not violate First Amendment when it rescinded contract of agency that included religious programming in its care for youth).

PRELIMINARY STATEMENT

Catholic Charities West Michigan ("CCWM"), a state-contracted, taxpayer-funded child placing agency ("CPA"), asks this Court to force the Michigan Department of Health and Human Services ("MDHHS") to abandon the non-discrimination clause in its contracts with CPAs so that CCWM can apply religious criteria to turn away qualified families headed by same-sex couples.

CCWM claims a constitutional right both to get a taxpayer-funded contract to provide child placing services on behalf of the State and to disregard the non-discrimination requirement applicable to all CPAs. The identical claim was asserted by an intervening CPA in *Dumont* v. *Gordon*, 2:17-cv-13080-PDB-EAS (E.D. Mich.) ("*Dumont*"), and Judge Borman "[was] unconvinced that [the CPA] can prevail on a claim that prohibiting the State from allowing the use of religious criteria by [CPAs] hired to do the State's work would violate [the CPA's] Free Exercise or Free Speech rights." *Dumont*, 341 F. Supp. 3d 706, 749 (E.D. Mich. 2018). Substantially the same claim was also rejected by a unanimous panel of the Third Circuit Court of Appeals in *Fulton* v. *City of Philadelphia*, 922 F.3d 140, 165 (3d Cir. 2019) (affirming a district court's refusal to preliminarily enjoin Philadelphia's similar non-discrimination policy and rejecting the Free Exercise and Free Speech claims of an agency unwilling to accept same-sex couples for religious reasons); *see also New Hope Family Servs., Inc.* v. *Poole*, 2019 WL 2138355, at *19

(N.D.N.Y. May 16, 2019) (New York "stands on firm ground in requiring authorized agencies to abide by [its] non-discrimination policies when administering public services.").

CCWM has not met its burden for a preliminary injunction. CCWM is unlikely to succeed on the merits of any of its claims. *First*, CCWM cannot prevail on its Free Exercise claims. (1) The right to Free Exercise does not entitle organizations accepting taxpayer dollars to perform government services to unilaterally dictate the terms of their state contracts. (2) The contracts' non-discrimination provision is a neutral, generally applicable policy that governs the actions of all state contractors that provide public child welfare services and rationally furthers legitimate government interests. (3) The outcome is no different under the Michigan Constitution because the non-discrimination requirement does not burden religious exercise and, even if it did, it satisfies any level of scrutiny because it is the least restrictive way to further several compelling government interests, including accessing families for children in need and ending discrimination against Michigan families. *Second*, CCWM's Free Speech claims will fail because the government-contracted services at issue here are not private speech. *Third*, CCWM's statutory claim will fail because the pertinent laws do not cover state-contracted services. *Finally*, none of CCWM's claims can succeed because the relief sought would violate the Establishment and Equal Protection Clauses. The State

cannot impose religious eligibility criteria when selecting families for state wards, nor delegate that government service to CPAs that do so.

CCWM has not satisfied any of the other requirements for a preliminary injunction. Granting the injunction would substantially harm children in the public child welfare system, as well as prospective parents, as described in the expert report submitted in *Dumont* by child welfare expert Dr. David M. Brodzinsky. Ex. A, Expert Report of David M. Brodzinsky, Ph.D. ("Brodzinsky Rpt."), ¶ 26. When agencies exclude families based on religious criteria unrelated to the ability to care for a child, it results in fewer families for children in need. *Id*. ¶¶ 25-28, 34-39. As examples of such harms, MDHHS's past investigations show that CCWM's refusal to place children with same-sex couples delayed two adoptions and kept one child separate from his siblings. Ex. C, Special Investigation Report 2018C0223029; Ex. D, Special Investigation Report 2017C0208001.

Because CCWM has not met its burden, this Court should deny CCWM's motion for injunctive relief.

BACKGROUND

A. Michigan's Child Welfare System

MDHHS administers Michigan's foster care and adoption system and must "help eliminate barriers to the adoption of children[,]. . . promote the provision of a stable and loving family environment[, and] promote the well-being and safety

of all children who receive foster care or are adopted . . . ." Mich. Comp. L. § 722.953. To discharge its obligations, MDHHS contracts with private CPAs, who must comply with their statutory, regulatory, and contractual obligations. *See, e.g.*, *id.* §§ 400.14f, 722.112(1); Mich. Admin. Code R. 400.12201 *et seq*. Once a CPA accepts MDHHS's referral of a child's case, it receives taxpayer dollars to provide services for the child, including to identify and recruit potential foster and adoptive parents and assist them through the licensing process. Mich. Admin. Code R. 400.12304, 400.12706; MDHHS, *Adoption Services Manual* ("ADM") 0400.[1]

MDHHS grants CPAs discretion in evaluating families and selecting appropriate placements for children. CPAs generally choose from the roster of families they have recruited and licensed. Compl., *Dumont*, ECF No. 1, ¶ 34; State Defendants' Answer, *Dumont*, ECF No. 52, ¶ 34; Ex. B, Declaration of Katie Page Sander ("Sander Decl.") ¶ 11. To ensure that CPAs evaluate all prospective families, every CPA's contract prohibits discrimination on the basis of certain characteristics unrelated to the ability to care for a child, including sexual orientation. *E.g.*, ECF No. 1-2, PageID.88, 144.

[1] The ADM and the *Children's Foster Care Manual* ("FOM") are available at https://dhhs.michigan.gov/olmweb/ex/html/.

B. The *Dumont* Case and Settlement Agreement

Kristy and Dana Dumont are a "prospective adoptive famil[y] . . . ready, willing, and able to provide a 'forever family' to children in the foster care system." *Dumont*, ECF No. 1, PageID.2-3. After contacting two CPAs and being turned away on the basis of the CPAs' religious objection to same-sex couples, *id.*, PageID.16, the *Dumont* Plaintiffs filed suit against the then-heads of MDHHS and the Children's Services Agency ("State Defendants") in September 2017, claiming the State's practice of permitting CPAs to use religious criteria to exclude same-sex couples violated the Establishment and Equal Protection Clauses. In denying in substantial part motions to dismiss filed by the State Defendants and the intervening CPA, the court held that the *Dumont* Plaintiffs had stated claims under both the Establishment and the Equal Protection Clauses. *Dumont*, 341 F. Supp. 3d 706. The court also stated it "[was] unconvinced that [the CPA] can prevail on a claim that prohibiting the State from allowing the use of religious criteria by [CPAs] hired to do the State's work would violate [the CPA's] Free Exercise or Free Speech rights." *Id.* at 749.

After considerable discovery, on March 22, 2019, the *Dumont* Plaintiffs and the State Defendants executed the Settlement Agreement, *Dumont*, ECF No. 82, which requires the State to retain and enforce the non-discrimination provision in its contracts with CPAs. *Id.*; *Dumont*, ECF No. 83. CCWM's action seeks to nullify the Settlement Agreement.

LEGAL STANDARD

The preliminary injunction is "one of the most drastic tools in the arsenal of judicial remedies," *Bonnell* v. *Lorenzo*, 241 F.3d 800, 808 (6th Cir. 2001), so it "should not be extended to cases which are doubtful or do not come within well-established principles of law." *Id.* at 826. The movant has the "burden of proving that the circumstances clearly demand it." *Overstreet* v. *Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). The "plaintiff . . . must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

ARGUMENT

I. CCWM HAS FAILED TO DEMONSTRATE A LIKELIHOOD OF PREVAILING ON ANY CLAIMS.

A. CCWM Will Not Prevail on Its Free Exercise Claims.

1. *There is no right to a taxpayer-funded government contract to provide government services in accordance with one's religious beliefs.*

There is no Free Exercise right to carry out a State function, using State funds, in accordance with one's religious beliefs. *Fulton* v. *City of Phila.*, 922 F.3d 140, 152-53 (3d Cir. 2019), *cert. pet. filed* (U.S. Jul. 22, 2019). The State's non-discrimination policy applies not to CCWM's private activity, such as private

placement adoption work, but only to government services CCWM voluntarily performs under the CPA contracts. If CCWM does not wish to contract with the State on the terms the State requires, it need not. *See Agency for Int'l Dev.* v. *Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 214 (2013) ("[I]f a party objects to a condition on the receipt of [government] funding, its recourse it to decline the funds."); *Teen Ranch* v. *Udow*, 389 F. Supp. 2d 827, 837-38 (W.D. Mich. 2005) ("There is no question that . . . the State's failure to contract with a particular faith-based organization would not violate the organization's Free Exercise rights."), *affirmed*, 479 F.3d 403, 410 (6th Cir. 2007).

2. *The non-discrimination provision is a neutral and generally applicable policy that furthers a legitimate government interest.*

Assuming the non-discrimination provision burdened CCWM's exercise of religion (which it does not), the requirement is neutral and generally applicable and furthers legitimate government interests—indeed, compelling ones, *see infra* Part I.A.3—so it does not violate the Free Exercise Clause. *See Emp't Div., Dept. of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 878-82 (1990). CCWM offers several theories to avoid *Smith*, but each is legally and/or factually wrong.

Notably, CCWM does not even attempt to grapple with the Third Circuit's rejection of a near-identical challenge in *Fulton*. There, as here, an agency argued that the Free Exercise Clause required Philadelphia to permit religiously-motivated discrimination against prospective same-sex foster parents.

The Third Circuit disagreed, holding that the City's non-discrimination requirement was a neutral, generally applicable policy. *Fulton*, 922 F.3d at 159.

a. *The non-discrimination provision does not intrude on ecclesiastical governance.*

CCWM attempts to circumvent *Smith* by citing *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171 (2012), and dicta in *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), for the proposition that because caring for orphans and abandoned children is "central to [CCWM's] religious faith and teachings," the government is prohibited from enforcing the non-discrimination provision. ECF No. 11, PageID.614. But as *Hosanna-Tabor* made clear, per *Smith*, "[the] right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 556 U.S. at 190. *Hosanna-Tabor* recognized a narrow exception to *Smith* only in the context of "government involvement in . . . ecclesiastical decisions" such as "determin[ing] which individuals will minister to the faithful." *Id*. at 188. Contrary to CCWM's argument, *Hosanna-Tabor* expressly affirmed that *Smith* remains applicable to government regulation of decisions outside of internal ecclesiastical governance, even where motivated by religious belief. *Id*. at 190.

Here, the State's non-discrimination requirement does not interfere with internal ecclesiastical decisions, such as the selection of clergy. It covers only government services provided to the public by state contractors and thus, like in *Smith*, it matters not that CCWM's performance of these contracted services may be motivated by religious faith or teaching. *See Ill. Bible Colleges Assoc*. v. *Anderson*, 870 F.3d 631, 642 (7th Cir. 2017) ("Requiring compliance with the State's secular statutory requirements does not implicate *Hosanna-Tabor*'s holding.").[2]

b. *The non-discrimination provision does not target CPAs based on their religious identity or religious beliefs.*

CCWM relies on *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, which forbids "disqualify[ing] [someone] from a public benefit solely because of their religious character." 137 S. Ct. 2012, 2021 (2017). In *Trinity Lutheran*, churches were categorically barred from receiving government funds for playground resurfacing on account of their "religious character." *Id.* at 2024. Here, a CPA's religious character is irrelevant to the State—what matters is that a CPA will comply with its contractual obligations. In fact, the State contracts with many religious

[2] Similarly, *Masterpiece*'s dicta that "it can be assumed that a member of the clergy . . . could not be compelled to perform [a same-sex wedding] ceremony" was carefully limited to the narrow exception of compelling a clergy member to perform a religious ceremony. 138 S. Ct. at 1727. The Court continued, "if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Id.*

CPAs, including at least one that shares CCWM's religious objection to marriage by same-sex couples but has committed to complying with the non-discrimination provisions in its contract.[3] The State's continued partnership with that CPA demonstrates that the policy concerns not their religious *identity*, but only CPAs' *actions*—something *Trinity Lutheran* expressly did not reach. *See id.* at 2024 n.3 ("We do not address religious uses of funding or other forms of discrimination.").

The Third Circuit rejected a similar argument in *Fulton*:

> CSS's theme devolves to this: the City is targeting CSS because it discriminates against same-sex couples; CSS is discriminating against same-sex couples because of its religious beliefs; therefore, the City is targeting CSS for its religious beliefs. But this syllogism is as flawed as it is dangerous. . . . That CSS's conduct springs from sincerely held and strongly felt religious beliefs does not imply that the City's desire to regulate that conduct springs from antipathy to those beliefs.

922 F.3d at 159. CCWM relies on the same syllogism, which fails for the same reasons.[4]

---

[3] 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/.

[4] CCWM also asserts that the non-discrimination provision is gerrymandered against religion because it allows comparable non-religious conduct that undermines the government's interests. This is false. The State does not allow any CPA to discriminate against prospective parents in violation of its contracts, regardless of the motivation. CCWM further asserts that the policy is "underinclusive," pointing to considerations of race, religion and other characteristics employed when seeking the best family placement for an individual child. Those considerations do not exclude any class of families or otherwise undermine the State's interest in accessing

c. *CCWM has failed to demonstrate that the non-discrimination provision was motivated by anti-religious hostility.*

Relying on *Masterpiece*, CCWM claims that now-Attorney General Nessel was "the driving force behind" the non-discrimination policy and was motivated by animus, but CCWM neglects to mention that MDHHS twice investigated CCWM's discrimination against same-sex couples *under the prior Administration* and concluded that CCWM had violated its contracts. Exs. C, D. Moreover, CCWM's complaint and brief contain excerpted phrases devoid of context, which it wants the Court to misconstrue, but, in context, the lack of anti-religious animus is clear.[5] Nessel made many of the cited statements in 2014-2015, when, as a private citizen, she was challenging Michigan's same-sex marriage ban on behalf of her clients, a lesbian couple, in *DeBoer* v. *Snyder*, No. 12-CV-10285 (E.D. Mich.). Nessel's statements do not show animus but instead zealous legal

families for Michigan children. *See Fulton*, 922 F.3d at 158 (rejecting similar argument).

[5] Certain of CCWM's mischaracterizations are particularly egregious. *E.g.*, Compl. ¶ 139 (quoting a statement attributed to Nessel during her campaign—the "AG's office can always be used as a bully pulpit in order to educate on these issues" (improper alteration removed)—without explaining that this was a response to a question about *bullying in schools*, entirely unrelated to adoption or religion). To provide necessary context, articles containing the quoted statements are attached as Exhibits F through K. As to Exhibit F, a related audio recording with statements by Nessel is available at https://www.michiganradio.org/post/faith-based-adoption-bills-headed-house-floor. Similarly, as to Exhibit G, a video is available at http://www.fox2detroit.com/news/opponents-say-adoption-bill-discriminates-against-gays-and-lesbians.

advocacy in response to litigants who vehemently opposed extending equal protection under the law to same-sex couples. As recognized by the Supreme Court, "those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2607 (2015). Likewise, Nessel's campaign-trail statements demonstrate a concern with preventing discrimination and serving the needs of State wards, not with religion.

Masterpiece is also inapplicable because CCWM seeks unprecedented relief—not the invalidation of an adjudicatory determination concerning past discrimination, but a permanent injunction barring future enforcement of a state non-discrimination policy. *Masterpiece* did not enjoin Colorado's enforcement of its non-discrimination policy against the baker or anyone else. CCWM offers no authority for the sweeping claim that an individual government official's alleged anti-religious bias can forever eliminate the State's ability to enforce its contracts. *Cf. Fulton*, 922 F.3d at 153 n.8 ("[T]he remedy CSS seeks—an injunction forcing the City to renew a public services contract with a particular private party—would be highly unusual.").[6]

[6] Furthermore, a *Masterpiece* analysis is categorically inappropriate here because *Masterpiece* did not concern discretionary executive branch action, like deciding with whom to contract; it concerned "an adjudicatory body" whose anti-religious

3. *The outcome is no different under the State Constitution.*

The outcome is no different under the freedom of worship and religious belief clauses of the Michigan Constitution, art. 1, § 4. Even if the Michigan Supreme Court would today apply the five-part strict-scrutiny-like analysis[7] of *McCready* v. *Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998),[8] the non-discrimination provision does not burden religious belief. CCWM is under no compulsion to provide public child welfare services. *See Fulton*, 922 F.3d at 164 (reasoning that it was "unlikely that the Pennsylvania courts would recognize a substantial burden on CSS's exercise of religion"); *McCready*, 386 N.W.2d at 729 ("The state does not require that the defendants violate their sincerely held religious beliefs. It requires

---

hostility tainted the adjudicative process. *See State* v. *Arlene's Flowers, Inc.*, 441 P.3d 1203, 1218-19 (Wash. 2019). And even if *Masterpiece* reached discretionary government decisionmaking, the decisionmakers here are in MDHHS; *Masterpiece* does not concern statements made only by the decisionmaker's legal counsel.

[7] "The test has five elements: (1) whether a defendant's belief, or conduct motivated by belief, is sincerely held; (2) whether a defendant's belief, or conduct motivated by belief, is religious in nature; (3) whether a state regulation imposes a burden on the exercise of such belief or conduct; (4) whether a compelling state interest justifies the burden imposed upon a defendant's belief or conduct; and (5) whether there is a less obtrusive form of regulation available to the state." 593 N.W.2d at 729.

[8] Because the pertinent holding in *McCready* was vacated, 593 N.W.2d 545 (Mich. 1999), and longstanding precedent provides that the religion clauses of the United States and Michigan constitutions are "subject to similar interpretation," *see Advisory Opinion re Constitutionality of 1970 P.A. 100*, 180 N.W.2d 265, 274 (Mich. 1970), there is doubt regarding whether the five-part test is good law, or whether the Michigan Supreme Court, if confronted with the issue today, would instead hold along with *Employment Division* v. *Smith* that neutral, generally applicable laws need only be rationally related to a legitimate government interest.

only that, if they wish to participate in the real estate market by offering housing for rent, they must comply with the Civil Rights Act."); *see also supra* Part I.A.1 (no Free Exercise right to demand government contracts on preferred terms).

Even assuming a burden on religious exercise, the non-discrimination requirement furthers at least three compelling government interests that the State could not further with less obtrusive regulation: (i) accessing all qualified families for children, (ii) preventing discrimination against Michigan families, and (iii) avoiding a violation of the Establishment and Equal Protection Clauses.

a. *The non-discrimination provision furthers compelling government interests.*

The State has a compelling interest in accessing all qualified prospective families for children in the public child welfare system. As Dr. Brodzinsky, a child welfare expert, explained, excluding qualified families based on religious criteria substantially harms children because it could result in sibling separation, Brodzinsky Rpt. ¶ 32, institutional placements, *id.* ¶ 30, and children aging out with no adoptive family, *id.* ¶ 31. *See also* Exs. C, D (sibling separation prolonged and adoptions delayed by CCWM's discrimination against same-sex couples). Moreover, children in the care of CPAs that discriminate have access to fewer potential families, and this decreased set of options harms them because "[a]ll children have unique needs and families are not fungible." Brodzinsky Rpt. ¶ 27.

CCWM asserts that prohibiting discrimination undermines the State's interest in accessing families because "faith-based agencies like [CCWM] [will] no longer be[] allowed to provide placement services to foster kids . . . ." ECF No. 11, PageID.620. Even if some faith-based agencies chose not to comply with their contracts, CCWM offers no evidence this would diminish the number of prospective parents. Indeed, the State has said that if a CPA with religious objections 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." Ex. E, *Dumont* State Defendants' Objections and Responses to Plaintiffs' Requests for Admission, at 35. The State faces a shortage of families, not of CPAs.

The State has a compelling interest in preventing discrimination against Michigan families. Courts have long recognized the compelling government interest in eradicating discrimination. *Roberts* v. *U.S. Jaycees*, 468 U.S. 609 (1984); *McCready*, 586 N.W.2d at 455. And recently, the *Fulton* court specifically recognized a compelling interest in preventing discrimination in the public child welfare system. 922 F.3d at 163-64.

The State has a compelling interest in complying with the Federal and State Constitutions. Finally, the use of religious criteria to exclude prospective foster and adoptive families would violate the Federal and Michigan Constitutions, which the State has a compelling interest in preventing. *See infra* Part I.D.

b. *The non-discrimination provision is the least obtrusive means of advancing the State's interests.*

CCWM argues that enforcing the non-discrimination requirement is not the least restrictive means of satisfying the State's interests because families can be referred to other agencies that won't discriminate against them. But even where other agencies exist nearby—which is not the case everywhere in the State—allowing any discrimination by CPAs undermines the State's important interests.

First, permitting CPAs to discriminate harms children who "have no choice as to whether they are referred to an agency that excludes families based on religious tests or an agency that accepts all qualified families." *See* Sander Decl. ¶ 20. For example, in 2018, MDHHS found that CCWM improperly refused to unite a child in its care with his siblings because their foster parents were a same-sex couple. Ex. C, at 9 ("[CCWM said it] was not refusing to place the siblings together, they were just refusing to place the siblings together in that specific home."); *see also* Ex. D (finding that CCWM delayed an adoption for a child in its care because it refused to continue working with the child's same-sex parents when *Obergefell* required Michigan to recognize their marriage).

Second, "when 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." Brodzinsky Rpt. ¶ 35; *see also* Sander Decl. ¶ 17 (former Program Manager

for statewide Foster Care Navigator Program recalling a same-sex couple who was turned away by an agency and "was so discouraged that they decided not to call another agency"). Those same-sex couples who do choose to brave the sting and humiliation of discrimination will have fewer options than heterosexual couples such that there may be no agency that meets the family's needs and circumstances. Brodzinsky Rpt. ¶¶ 38-39. For all of these reasons, there is no merit to the argument that discrimination is harmless when only some discriminate.

The only way to eradicate discrimination in the child welfare system is to prohibit discrimination in the child welfare system. In *McCready*, plaintiffs likely could have rented lodging elsewhere, but the court held that the State's goal of non-discrimination could brook no exceptions: "a less obtrusive form of regulation [than a prohibition against discrimination] has not been shown to be available to the state." 586 N.W.2d at 730. The *Fulton* court agreed: "[M]andating compliance is the least restrictive means . . . . The harm is not merely that gay foster parents will be discouraged from fostering. It is the discrimination itself." 922 F.3d at 163-64.

B. CCWM Will Not Prevail on Its Free Speech Claim Because Defendants Have Not Compelled Any Private Speech.

CCWM will not succeed on its Free Speech claim because even if child welfare services were analyzed as speech,[9] "[t]he speech here only occurs because

[9] It is doubtful that the provision of child welfare services should be analyzed as speech at all. "Congress, for example, can prohibit employers from discriminating

[the agency] has chosen to partner with the government to help provide what is essentially a public service." *Fulton*, 922 F.3d at 161; *see also Teen Ranch*, 389 F. Supp. 2d at 840 (State-contracted government services are "instances in which the government uses private speakers to transmit information concerning the government's own program."); *Garcetti* v. *Ceballos*, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

C. CCWM's Claim Based on the 2015 Laws Will Not Succeed Because the 2015 Laws Do Not Cover Services Provided Under Contract with MDHHS.

CCWM claims that Michigan Compiled Laws Sections 722.124e, 722.124f, 710.23g, and 400.5a (the "2015 Laws") forbid enforcement of the non-discrimination clause. But the "services" to which these laws apply *exclude* "foster care case management and adoption services provided under a contract with [MDHHS]." *Id.* § 722.124e. The statutes allow agencies to refuse to provide *private* adoption services that conflict with their religious beliefs, and, for state-contracted

---

in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld* v. *Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 61, 62 (2006); *see also Nat'l Inst. of Family and Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2373 (2018) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.").

work, they provide that a CPA "may decide not to accept [a] referral." *Id.* § 722.124f. However, once a CPA accepts the referral of a child from MDHHS, the CPA is bound by the terms of its contract—the 2015 Laws do not alter this.

CCWM seeks to have this Court interpret the statutory term "referral" to mean that when an applicant calls a CPA, MDHHS has made a "referral" which the CPA can decline. But a "referral" occurs only when MDHHS asks if a CPA will take the foster or adoption case of *a child* (or young adult). *See* ADM 0100, 0210; MDHHS, *Children's Foster Care Manual*, at FOM 913-3, 722-16; Decl. of Chris Slater, ECF No. 11-1 ("Slater Decl."), ¶ 19 ("If [CCWM] decides to accept a foster care referral from DHHS, it receives a per diem from the State after *the child* is placed . . . .") (emphasis added). The 2015 Laws do not apply to state-contracted services, and the non-discrimination policy does not restrict CPAs' discretion to decline referrals of children, so the State's policy is not at odds with the 2015 Laws.[10]

[10] For these reasons, the 2015 Laws do not apply to the discrimination at issue in this suit. If, however, the Court concludes that an alternative interpretation is plausible, it should avoid an interpretation that raises constitutional doubts. *See Clark* v. *Martinez*, 543 U.S. 371, 379 (2005) (Where there are "ambiguities in the statutory text," "statutes should be interpreted to avoid constitutional doubts."). Here, for the reasons articulated in Part I.D, an interpretation of the 2015 Laws that permits CPAs to turn away qualified same-sex couples based on religious criteria raises serious doubts, at the very least, under the Establishment and Equal Protection Clauses.

D. Allowing CPAs to Use Religious Criteria to Exclude Same-Sex Couples Would Violate the Establishment and Equal Protection Clauses of the Constitution.

An additional reason CCWM cannot demonstrate likelihood of success on the merits is that if the State were to permit CPAs to use religious criteria to exclude same-sex couples, it would violate the Establishment and Equal Protection Clauses. *See Dumont*, 341 F. Supp. 3d at 734-740.

1. *The Establishment Clause prohibits the use of religious eligibility criteria in government programs.*

If the State were to permit state-contracted CPAs to use religious criteria to screen prospective foster and adoptive families seeking to care for children in the State's custody, this would violate "the core rationale underlying the Establishment Clause[:] preventing 'a fusion of governmental and religious functions.'" *Larkin* v. *Grendel's Den*, 459 U.S. 116, 126–27 (1982) (quoting *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 222 (1963)).[11] 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. The ordinance at issue "delegate[d] to private, nongovernmental entities . . . a power

[11] *See also 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); *Doe* v. *Porter*, 370 F.3d 558, 564 (6th Cir. 2004) (school board violated Establishment Clause by "ced[ing] its supervisory authority over [certain] classes to [a religious school]").

ordinarily vested in agencies of government." 459 U.S. at 122. Likewise, here, the State has vested authority in CPAs to recommend prospective foster and adoptive parents for children in the State's custody. 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 religious entities are screening out certain prospective parents based solely on religious criteria unrelated to the ability to care for a child.

Allowing the use of religious criteria in the public child welfare system would also violate the Establishment Clause because it would give preference to those religious groups that oppose same-sex relationships as a matter of religious doctrine. *See Edwards* v. *Aguillard*, 482 U.S. 578, 593 (1987) (invalidating Creationism Act because it gave preference to religious views). An injunction requiring the State to carve out a special exception from its anti-discrimination requirements for religious groups that hold a particular religious view would "objectively convey a message" of endorsement for such view. *See Smith* v. *Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 588 (6th Cir. 2015). The State would send the "message" to families "that they are outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist*. v. *Doe*, 530 U.S. 290, 309-10 (2000); *see* Sander Decl. ¶ 17.

Finally, the requested injunction would violate the Establishment Clause by imposing significant burdens on third parties, such as prospective parents and children. *See, e.g.*, *Estate of Thornton* v. *Caldor*, 472 U.S. 703, 709-10 (1985). And it would constitute excessive entanglement with religion. *See Dumont*, 341 F. Supp. 3d at 740; *see also Bowen* v. *Kendrick*, 487 U.S. 589, 608-609 (1988) (reasoning that religious organizations participating in government-funded programs may not use those funds to advance religion, including through discrimination).

2. *Allowing state-contracted CPAs to exclude same-sex couples would violate 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, the categorical exclusion of same-sex couples by a CPA would violate the Equal Protection Clause. Denying children qualified adoptive or foster families based on religious criteria unrelated to the ability to care for a child serves no legitimate government interest. Thus, the *Dumont* Court held that the *Dumont* plaintiffs plausibly alleged that allowing agencies to turn away same-sex couples violates the Equal Protection Clause. *Dumont*, 341 F. Supp. 3d at 741-43.

II. THE REMAINING PRELIMINARY INJUNCTION FACTORS DO NOT SUPPORT CCWM'S MOTION.

CCWM asks this Court not only to enjoin enforcement of a State policy, but also to require the State to enter into a new contract with CCWM, knowing CCWM will continue to discriminate against Michigan families and substitute its religious judgments about the best interests of children in lieu of the professional child welfare standards required by MDHHS.[12] As Dr. Brodzinsky opined, *see supra* Part I.A.3, this drastic remedy would contravene established child welfare standards and harm the children in Michigan's child welfare system by denying them access to good parents. The injunction would also harm the Dumonts and other Michigan same-sex couples by subjecting them to the stigmatic and practical injuries of having to pursue fostering and adopting in a child welfare system that permits discrimination against their kind. *See* Decl. of Kristy Dumont, ECF No. 20-3, ¶ 10 ("[W]e want to have the full range of options available to us that everyone else has."); Decl. of Dana Dumont, ECF No. 20-4, ¶ 10 (same).

[12] *Compare* Mich. Comp. L. § 722.23 (defining "best interest of the child" without reference to the beliefs of the supervising agency); Brodzinsky Rpt. ¶ 26 ("[A]llow[ing] the exclusion of families willing and able to foster and adopt these vulnerable children do[es] not serve the interests of these children[ren]."); *and* Ex. E, at 13-14 (*Dumont* State Defendants admitting that "placement with a same-sex couple was or is in the best interest of [at least one] child"), *with* Slater Decl. ¶ 14 ("[B]ecause of its Catholic beliefs about human nature and the nature of marriage and family, [CCWM] does not believe that foster or adoption placement with same-sex couples is in the best interests of children . . . .").

The only harm asserted by CCWM—apart from a claimed violation of its constitutional rights which, as discussed above, lacks merit—is an inability to unilaterally modify the terms of its taxpayer-funded government contract. To the extent this is a cognizable injury, it is severely outweighed by the harm the injunction would cause to children and families. Though CCWM bears the burden of proof, it offers nothing but rhetoric to support its claim that enforcement of the State's non-discrimination policy would harm children. The Dumonts offer evidence of the children CCWM has harmed in the past. *See* Exs. C, D; *see also* Brodzinsky Rpt. ¶ 26 ("[C]hild welfare policies and practices that allow the exclusion of families willing and able to foster and adopt these vulnerable children do not serve the interests of these children or society in general.").

* * *

When the State removes a child from her home and places her in the care of a private CPA, the non-discrimination provision ensures that that child will have access to all prospective foster or adoptive parents interested in caring for her. If this Court grants CCWM's motion, happenstance will dictate whether children are placed based on their best interests or according to an agency's religious beliefs about what kind of families are suitable and capable of "proper[ly] raising the next generation." ECF No. 11, PageID.600; Slater Decl. ¶ 14. Such a system is not

legally required and would impose great harms. This Court should, therefore, deny CCWM's motion for a preliminary injunction.

Dated: July 24, 2019

Respectfully submitted,

/s/ Ann-Elizabeth Ostrager

Jay Kaplan (P38197)
Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
Telephone: (313) 578-6823
jkaplan@aclumich.org
dkorobkin@aclumich.org

Daniel Mach
American Civil Liberties Union Foundation
915 15th Street NW
Washington, DC 20005
Telephone: (202) 675-2330
dmach@aclu.org

Leslie Cooper
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2633
lcooper@aclu.org

Garrard R. Beeney
Ann-Elizabeth Ostrager
Leila R. Siddiky
Jason W. Schnier
Lisa M. Ebersole
Hannah M. Lonky
James G. Mandilk
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004-2498
Telephone: (212) 558-4000
beeneyg@sullcrom.com
ostragerae@sullcrom.com
siddikyl@sullcrom.com
schnierj@sullcrom.com
ebersolel@sullcrom.com
lonkyh@sullcrom.com
mandilkj@sullcrom.com

Counsel for Proposed Intervenor Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

This the 24th day of July, 2019.

/s/ Ann-Elizabeth Ostrager