UNITED STATES DISTRICT COURT
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; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan.

Defendants.

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2:19-CV-11661-DPH-DRG

Hon. Denise Page Hood

Hon. David R. Grand

PLAINTIFF CATHOLIC CHARITIES WEST MICHIGAN'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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PLAINTIFF CATHOLIC CHARITIES WEST MICHIGAN'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff Catholic Charities West Michigan has been serving foster children for over 70 years. But this long-established ministry is now threatened with closure because new government officials are defying the Legislature's religious accommodation laws and demanding that Catholic Charities violate its beliefs or lose all existing and future State contracts that allow it to serve foster children. With current contracts set to expire or renew on September 30, and Catholic Charities likely to prevail one or more of its claims, a preliminary injunction is warranted.

ARGUMENT

I. Catholic Charities is likely to succeed on the merits of one or more of its claims.

A. The new policy violates Public Acts 53, 54, and 55.

Defendants advocate for an interpretation of Public Acts 53, 54, and 55 that would render these statutes meaningless, eviscerate their protections, and bring about the exact opposite of what the Michigan Legislature expressly intended when it passed them.

Defendants' interpretation is quite astonishing. According to Defendants, the 2015 laws merely allow a child placing agency to decline a referral from MDHHS up until it accepts its first one. Once an agency has accepted a *single* referral, Defendants contend that the agency must then perform all services for prospective foster and

adoptive parents regardless of whether they have identified a particular child for foster or adoptive placement. (ECF No. 22 at 21.)

This interpretation not only guts the entire text, but also directly contradicts that fact that Michigan law expressly allows child placing agencies to decline "any services" that conflict with their religious beliefs. Mich. Comp. Laws § 722.124e(2). And while "foster care case management and adoption services provided under a contract with the department" are excluded from those protections, *id.* § 722.124e(7)(b), Defendants improperly read the exception to swallow the rule. The exception relates to services performed for a *specific* child *after* accepting that *particular child's* referral, *i.e.*, a contract to which Catholic Charities does not object. It does not prevent Catholic Charities from "turn[ing] away an Applicant," as Defendants contend. (ECF No. 22 at 18). Nor could it plausibly be read to do so, as Public Act 53 plainly instructs agencies that decline "any services" to "[p]romptly refer" the "applicant" to another agency or the department's website. Mich. Comp. Laws § 722.124e(4). Defendants cannot legitimately argue that Applicants cannot be referred when the Act specifically states they can.

B. The new policy burdens Catholic Charities' religion and thus triggers strict scrutiny under Article I, § 4 of the Michigan Constitution.

Defendants concede that strict scrutiny applies to free-exercise claims brought under Article I, § 4 of the Michigan Constitution, but try

to avoid that stringent test by saying that their policy does not burden Catholic Charities' religion. (*See* ECF No. 22 at 28–29.) The record shows, however, that Defendants are attempting to terminate Catholic Charities' longstanding contracts with the State unless Catholic Charities does exactly what its religious beliefs forbid it to do. As explained in Catholic Charities' opening brief, this is a substantial burden. (*See* ECF No. 11 at 27.)

C. The new policy also triggers strict scrutiny under the Free Exercise Clause of the U.S. Constitution.

Defendants next argue that Catholic Charities' federal free-exercise claim does not trigger strict scrutiny because their policy is "neutral, generally applicable, and presumed valid." (ECF No. 22 at 23.)

As explained in Catholic Charities' opening brief, a law or government action burdening religion is not "presumed valid" merely because it is neutral and generally applicable. (*See* ECF No. 11 at 28–30.) Regardless, Defendants' new policy is neither. Defendants are not enforcing a longstanding nondiscrimination provision (as they claim), but rather are imposing a new policy (ignoring the legislature's religious accommodation) that targets particular religious beliefs about marriage. Indeed, the nondiscrimination provision was added to the State's foster care and adoption contracts at the same time the Legislature enacted the 2015 laws, and the contracts incorporate those

statutory protections. (Slater Decl. ¶ 24, attached as Ex. 1; *see also* ECF No. 22-3 at 9 [Hoover Aff. ¶ 22].)

Nor can Defendants' express and pervasive hostility be ignored. First, Defendants are trying to eliminate a religious accommodation enacted by the people's representatives. Targeting faith-based agencies is not neutral. Second, this new policy fulfills AG Nessel's promise to prohibit faith-based providers from participating in the State's foster care system unless they agree to violate their beliefs. Indeed, Nessel has stated that "[p]roponent[s]" of Public Acts 53, 54, and 55 "dislike gay people more than [they] care about the needs of foster care kids"; that Public Acts 53, 54, and 55 are "a victory for the hate monger"; and that religious communities should be "educate[d]" "as much as possible" about "the importance of accepting LGBTQ people" because many religious organizations "have changed their views on this over the course of time." (Compl. ¶¶ 138–42, ECF No. 1-2.) 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. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018).[1]

[1] This case is distinguishable from *Fulton v. City of Philadelphia*, 922 F.3d 140, 157 (3d Cir. 2019), where the court determined that the government official making the most anti-religious statements did not play "a direct role, or even a significant role, in the process." In contrast, Nessel's role is both direct and significant. Additionally, *Fulton* did not involve government officials ignoring a law allowing religious agencies to continue to place children in accordance with their beliefs.

D. The policy compels speech, triggering strict scrutiny.

In response to Catholic Charities' free-speech claims, Defendants claim that their new policy does not compel speech because the required "assessments" are based on "licensing guidelines." (ECF No. 22 at 32.)

But the home study process necessarily involves subjective analyses of a variety of important (and sensitive) factors, including "[m]arital and family status" and "[s]pirituality or religious beliefs." Mich. Admin. Code, R. 400.12310(3)(a), R. 400.12605(3)(a). And in the end, a child placing agency must submit to the State—*in writing*—whether it recommends ("yes" or "no") that an applicant be licensed for foster care and whether an adoptive placement would be in the child's best interests. (Ex. 1, Slater Decl. ¶ 12.) While Defendants try to diminish the significance of Catholic Charities' beliefs, they do not (and cannot) dispute that Catholic Charities sincerely believes making these recommendations for same-sex couples would violate its beliefs. *See Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) (cannot question "the validity of particular litigants' interpretations of those creeds").

In addition, the Supreme Court has held that the "general rule" that the "speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995).

E. The new policy fails strict scrutiny.

Defendants' claimed interests in "ending" discrimination and "promoting" the interests of Michigan's children are in direct conflict with the specific findings of the Legislature. They are also not enough to satisfy strict scrutiny. (ECF No. 22 at 29.)

First, Defendants cannot be heard to argue that they are "promoting the best interests of Michigan's children" (ECF No. 22 at 29), when the Legislature has already found that it is in the best interest of children to allow Catholic Charities to continue serving. *See* Mich. Comp. Laws § 722.124e(1). Defendants cannot claim harm to a government interest the Legislature has already decided does not exist.

Second, strict scrutiny requires this Court to "scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–27 (2014) (citation omitted). And such "broadly formulated interests" are insufficient to carry the heavy burden under strict scrutiny. *Id.*

Third, Defendants admit that "Michigan law and MDHHS policy" allow child placing agencies to decline referrals "for any reason," including a discriminatory one. (ECF No. 22 at 21). The new policy thus "cannot be regarded as protecting an interest of the highest order" when existing exemptions already permit "appreciable damage to that supposedly vital interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993).

II. The remaining preliminary injunction factors weigh in favor of Catholic Charities.

Any "balance of harms" or "equities" analysis also heavily weigh in favor of Catholic Charities. Defendants have not identified any "harm" that will result from preserving the status quo—as it has existed for over 70 years—by allowing Catholic Charities to operate consistently with its faith during the pendency of this litigation along with the dozens of secular agencies. By contrast, if a preliminary injunction is denied, the disruption of operations, having to cut 100 employees, loss of decades of goodwill, loss of family relationships (both prospective and existing), and loss of reputation, to name a few, that Catholic Charities would suffer is undeniable. (Ex. 1, Slater Decl. ¶¶ 29–32.) And these are all in addition to the legally sufficient harm of even temporary loss of its constitutional freedom to continue its ministry and speak as it chooses.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the opening brief, this Court should grant the motion for preliminary injunction.

Dated: August 7, 2019

Respectfully submitted,

/s/ Jeremiah Galus

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2019, I caused the foregoing to be filed with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record.

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