UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

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

Defendants.

No. 2:17-cv-13080-PDB-EAS

Hon. Paul D. Borman

Mag. Elizabeth A. Stafford

GROUP OF 53 MICHIGAN STATE LEGISLATORS' MOTION FOR LEAVE TO FILE AMICUS BRIEF

Proposed Amicus Curiae are a group of 53 Michigan State Legislators ("State Legislators") who either sponsored, voted in favor of, or now support 2015 P.A. 53 ("P.A. 53").[1]

District courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *NGV Gaming, Ltd.*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quoting *Cobell v. Norton*, 246 F. Supp. 2d

[1] Amici include 52 current legislators and 1 former state legislator.

59, 62 (D.D.C. 2003)); *see also United States v. Alkaabi*, 223 F. Supp. 2d 583, 592 (D.N.J. 2002) (the role of an amicus curiae is as a "friend of the court" who can "assist in a case of general public interest, to supplement the efforts of counsel, and to draw the court's attention to law that might otherwise escape consideration.").

Applied here, State Legislators have a unique interest in this case and a unique perspective as those who passed or supported the law being challenged in this case. This perspective will be helpful to this Court in its resolution of the matter.

Pursuant to Local Rule 7.1(a), State Legislators sought the concurrence of counsel for all parties. Defendants Nick Lyon and Herman McCall have no objection to the filing of the proposed amicus brief attached as Exhibit A. Plaintiffs and Defendants-Intervenors St. Vincent Catholic Charities, Melissa and Chad Buck, and Shamber Flore take no position. Therefore, State Legislators respectfully submit this motion to the Court for its consideration and request that this Court grant leave to file the proposed amicus brief accompanying this motion.

Respectfully submitted this 30th day of January, 2018.

/s/ Jeremy D. Tedesco

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, I electronically filed the foregoing document with the Clerk of Court using the ECF system which will provide electronic copies to counsel of record.

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EXHIBIT A

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AMICUS CURIAE BRIEF OF 53 MICHIGAN STATE LEGISLATORS IN SUPPORT OF DEFENDANTS' AND INTERVENORS' MOTIONS TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

CONCISE STATEMENT OF ISSUES PRESENTED[1]

1. Is mere disagreement with the law sufficient to confer standing for Plaintiffs to challenge a statute under the Equal Protection Clause or the Establishment Clause?

2. Do Plaintiffs have standing to challenge a statute under the Equal Protection Clause or Establishment Clause if Plaintiffs allege the statute inflicts only stigmatic harm?

3. Do Plaintiffs have standing when the alleged injuries were caused by their own actions?

4. Do allegations of a past injury establish standing to obtain declaratory and injunctive relief?

5. Have Plaintiffs stated a claim under the Establishment Clause or Equal Protection Clause when they do not challenge state action?

6. Does Plaintiffs' requested relief create an avoidable conflict with the Michigan Free Exercise Clause, which provides more protection than the Federal Free Exercise Clause?

[1] State Legislators incorporate by reference the first, second and fourth issues presented by Defendants as well as the third and fifth issues presented by the proposed Defendant-Intervenors.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Allen v. Wright, 468 U.S. 737 (1984); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992); *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Michigan v. Doran*, 439 U.S. 282 (1978).

INTEREST OF AMICUS CURIAE

Amici are a collection of 53 Michigan state legislators.[2] The amici have an interest in ensuring that 2015 P.A. 53 is interpreted properly. A full list of these legislators appears in Appendix 1 to this brief.

INTRODUCTION

"When it is necessary for a child in this state to be placed with an adoptive or foster family, placing the child in a safe, loving, and supportive home is a paramount goal of this state." Mich. Comp. Laws § 722.124e(1)(a). To achieve that goal, Michigan passed 2015 P.A. 53 which preserves the many child-placement agencies with which Michigan has worked with for decades and allows the religiously-affiliated ones to operate in accordance with their beliefs and constitutional rights. This legislation created a win-win. Michigan can place more children in adoption and foster homes; more child placement agencies can achieve their mission of serving children; more children receive the love and care they deserve.

But two years after P.A. 53 passed, Plaintiffs filed this lawsuit, not because P.A. 53 hinders them from adopting or fostering children—they can currently seek to do so—but because they object on Establishment and Equal Protections grounds to how some religious placing agencies select families for foster and adoption care. Federal courts, however, are not vehicles to vindicate ideological objections of

[2] Amici include 52 current legislators and 1 former state legislator.

concerned bystanders. As those who passed and support P.A. 53, Amici write to explain the purpose of this law and to urge this Court to dismiss this lawsuit for three reasons.

First, Plaintiffs have not alleged a case or controversy. Neither ideological disagreement with the law nor self-inflicted harm for a non-existent injury can confer Article III standing. Second, Plaintiffs' constitutional claims, which allege no state action, lack merit. Michigan's historical practice and P.A. 53's careful crafting comply with the Establishment Clause and avoid Establishment concerns by minimizing state interference with the internal affairs of faith-based organizations. P.A. 53's implementation also satisfies the rational basis review required for equal protection. Third, Plaintiffs' requested relief would violate the free exercise rights of children and child-placing agencies in Michigan. This Court should avoid a ruling that creates unnecessary constitutional conflict. The better course is to dismiss this lawsuit and to continue to allow Michigan's broad array of child-placement agencies to care for the greatest number of children possible.

ARGUMENT

I. P.A. 53 seeks to maximize the welfare of children.

A. Faith-based agencies have played key roles in the foster and adoption area.

Well before the Michigan Department of Health and Human Services ("DHHS") was formed in 1965, faith-based organizations were providing numerous

services to the state's poor and vulnerable.[3] These organizations were the primary providers of child placement services in Michigan. *Id.* For decades, DHHS has sought their assistance to tackle many diverse needs. *See* Mich. Comp. Laws § 722.124e(1)(f) ("Faith-based and non-faith-based child placing agencies have a long and distinguished history of providing adoption and foster care services in this state.").

Today, Michigan has been recognized as a leader for its innovative approach to adoption and its 80% adoption-placement rate.[4] According to DHHS, "[t]he success of Michigan's program can be attributed to the unique partnership between public and private agencies responsible for adoption planning and placement of foster children who become permanent wards."[5]

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[3] *Hearing on H.B. 4188-4190 Before the H. Comm. on Families, Children, and Seniors*, 2015 Sess. (Mich. 02/18/15) [hereinafter *02/18/15 Hearing*] (statement of Tom Hickson) (http://www.house.mi.gov/SharedVideo/PlayVideoArchive.html ?video=FAMI-021815.mp4 at 13:10-14:02); *02/18/15 Hearing* at 1:12:28-1:12:38 (testimony of William Blacquiere); Bethany Christian Services, *Our History*, https://www.bethany.org/about-us/our-history (last visited Jan. 15, 2018).

[4] *Hearing on H.B. 4188-4190 Before the House*, 2015 Sess. (Mich. 03/18/15) [hereinafter *03/18/15 Session*] (statement of Rep. Andrea LaFontaine) (http://www.house.mi.gov/SharedVideo/PlayVideoArchive.html?video=Session-031815.mp4 at 1:05:36-1:05:49).

[5] *Hearing on H.B. 4188-4190 Before the Sen. Comm. on Families, Children, and Seniors*, 2015 Sess. (Mich. 04/22/15) [hereinafter *04/22/15 Hearing*] (testimony of Rep. Eric Leutheuser) (Families-Seniors-HumanServ-04-22-2015_0303PM _42_38.mp3 at 1:58-2:09).

These successful public-private partnerships are not just limited to Michigan. Many faith-based organizations have worked with state agencies across the country to serve children's best interests. Unfortunately, a lack of religious tolerance and respect for diversity has led some of these associations to come to an abrupt end.

B. Faith-based agencies were forced to close in other states.

In 2006, Catholic Charities of Boston, which had been engaged in the ministry of adoption for well over a century, faced a difficult choice: violate its conscience, or close its doors. Massachusetts interpreted its antidiscrimination law to require Catholic Charities to place children with same-sex couples. Catholic Charities asked the state legislature to change its interpretation, so that it could continue to practice a tenant of its faith; but Massachusetts refused.[6] The result was a loss for the children of Boston. Catholic Charities closed its adoption services, leaving a huge gap in the fostering and caring of disadvantaged children in the area. *Id.* ("It's a shame because it is certainly going to mean that fewer children from foster care are going to find permanent homes. . . . This is a tragedy for kids.").[7]

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[6] Maggie Gallagher, *Banned in Boston*, THE WEEKLY STANDARD (May 15, 2006), http://www.weeklystandard.com/banned-in-boston/article/13329.

[7] *See also* Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL'Y 297, 298 (2008) (noting that Catholic Charities was responsible for the placement of one-third of all Boston area private adoptions).

A few months later, the Archdiocese of San Francisco faced a similar dilemma.[8] To avoid violating the tenants of the Catholic faith, Catholic Charities was forced to withdraw from direct placement in San Francisco and was instead limited to helping identify children for adoption. *Id*.

In 2010, the Archdiocese of Washington, D.C., which had provided support to children and families for over eighty years through a partnership with the District of Columbia, was forced to drop its foster care and public-adoption program.[9] This was due to D.C.'s passage of a law that officials interpreted to require providers of these services to place children with same-sex couples. *Id.*

In Illinois, faith-based organizations were also shut out. The state did not renew the contracts of religious agencies that refused to sacrifice their religious beliefs, forcing the transfer of hundreds of children and families to other child welfare agencies.[10] Evangelical Child and Family Agency's contract with the Illinois Department of Children and Family Services had been renewed annually for over

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[8] Cicero A. Estrella, *Catholic Charities scaling back its role in adoption services*, SFGATE (August 3, 2006), http://www.sfgate.com/bayarea/article/SAN-FRANCISCO-Catholic-Charities-scaling-back-2515267.php.

[9] Julia Duin, *Catholics end D.C. foster-care program*, THE WASHINGTON TIMES (February 18, 2010), https://www.washingtontimes.com/news/2010/feb/18/dc-gay-marriage-law-archdiocese-end-foster-care/.

[10] Manya A. Brachear, *Last faith agency opposed to civil union adoptions out of foster care*, CHICAGO TRIBUNE (November 16, 2011), http://articles.chicagotribune.com/2011-11-16/news/ct-met-evangelical-foster-care-gone-20111116_1_ken-withrow-faith-agency-catholic-charities-agencies.

four decades until it was required to violate their beliefs and place prospective foster care with parents in civil unions. *Id.* Catholic Charities' affiliates in Illinois were likewise shutdown, despite also serving in the state's social service network for over forty years.[11] "In the name of tolerance, we're not being tolerated," said Bishop Thomas J. Paprocki of the Diocese of Springfield. *Id.*

The departure of these agencies from providing foster care and adoption services in each of these states left serious holes in the social services landscape. "[F]amilies were disrupted, already transient children were again shuffled around, important services were lost, and state child welfare agencies took on more than they could handle." Exhibit 1A to Reply in Supp. of Proposed-Intervenors' Mot. to Intervene, ECF No. 24-1. It also left these jurisdictions more homogenous, devoid of diversity and private choices that had previously existed for decades.

C. Michigan children flourish with a diversity of options.

In Michigan, there are approximately 13,000 children who are in need of foster care and/or adoptive services.[12] Those children come from a myriad of diverse

[11] Laurie Goodstein, *Bishops Say Rules on Gay Parents Limit Freedom of Religion*, NEW YORK TIMES (December 28, 2011), http://www.nytimes.com/2011/12/29/us/for-bishops-a-battle-over-whose-rights-prevail.html.

[12] Mich. Dept. of Health & Hum. Serv., *Foster Care*, http://www.michigan.gov/mdhhs/0,5885,7-339-73971_7117---,00.html (last visited January 15, 2018).

backgrounds.[13] To fully accommodate these large numbers, a broad spectrum of options is needed.

A variety of adoption services better serves a diverse public than does a homogenous system. That was certainly the case in Boston, San Francisco, the District of Columbia, and Illinois, and for Catholic Charities and the other faith-based institutions before they were forced to shut down their vital work in those respective jurisdictions.

In 2015, Michigan State Legislators considered whether to provide more diverse private options or standardize the private options available to help adopted children and families.[14] Recognizing that both "[f]aith-based and non-faith-based child placing agencies have a long and distinguished history of providing adoption and foster care services in [Michigan]," and that "adoption and foster care licensees [] represent a broad spectrum of organizations and groups," the State Legislature determined that:

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[13] The Kids Count Data Center: A Project of The Anne E. Casey Foundation, *Children in foster care by race and Hispanic origin* (Feb. 2017) http://datacenter.kidscount.org/data/tables/ 6246-children-in-foster-care-by-race-and-hispanic-origin#detailed/2/24/false/573/2638,2601,2600,2598,2603,2597, 2602, 1353/12992,12993.

[14] *02/18/15 Hearing* at 1:13:38-1:14:47 (testimony of William Blacquiere); *02/18/15 Hearing* at 1:01:44-1:02:02 (statement of Rep. Anthony Forlini); *04/22/15 Hearing* at 1:07:03-1:07:14 (testimony of Vicki Schultz) ("Without these bills, agencies such as ours may be asked to perform services which would go against our belief system, ultimately forcing us out of the foster care and adoption services.").

> Having as many possible qualified adoption and foster parent agencies in this state is a substantial benefit to the children of this state who are in need of these placement services and to all of the citizens of this state because the more qualified agencies taking part in this process, the greater the likelihood that permanent child placement can be achieved.

Mich. Comp. Laws § 722.124e(1)(c). Catholic Charities and Bethany Christian Services, the two institutions mentioned in Plaintiffs' complaint, together facilitate 25-30% of Michigan's foster care adoptions.[15] While there are many other faith-based agencies in the state, the loss of these two alone would greatly lessen the number and diversity of adoption and foster-care options available.

D. After considering legislation passed in other jurisdictions, Michigan enacted its own law.

Michigan was not the first state to confront this issue. In fact, before passage of P.A. 53, North Dakota and Virginia enacted similar legislation. N.D. CENT. CODE §§ 50-12-03, 50-12-07.1 (2003); VA. CODE ANN. § 63.2-1709.3 (2012). Both of their laws accommodated a broad array of private child-placement agencies, allowing them to serve children without violating their religious beliefs about family or marriage. N.D. CENT. CODE §§ 50-12-03, 50-12-07.1 (2003); VA. CODE ANN. § 63.2-1709.3 (2012). Utilizing this successful legislation as a guide, Michigan determined to pass its own law that would codify its existing practices and allow as many private

[15] *New Michigan law lets agencies cite faith in handling adoptions*, THE COLUMBUS DISPATCH (June 12, 2015), http://www.dispatch.com/article/20150612/NEWS/306129600.

agencies as possible to remain open, thereby creating an environment where the largest number of children could find their "forever home."[16]

On June 11, 2015, Governor Rick Snyder signed P.A. 53 into law, which was a combination of three House Bills (Nos. 4188, 4189 and 4190) sponsored by lawmakers from both parties during the 2015 Legislative Session. Mich. Comp. Laws §§ 722.124e and 722.124f. Section 124e of the law states that a child placing agency "shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency," and the state or local government may not take "adverse action" against the child placing agency for doing so. Mich. Comp. Laws §§ 722.124e(2), (3). Importantly, "'[s]ervices' includes any service that a child placing agency provides, *except for foster care case management and adoption services provided under a contract with the department*." Mich. Comp. Laws § 722.124e(7)(b) (emphasis added).

The statute further provides that if a child placing agency declines to provide services, the child placing agency shall promptly refer the applicant to another agency that is willing to provide the declined services or promptly refer the applicant to the DHHS's website that identifies other licensed agencies. Mich. Comp. Laws

[16] *03/18/15 Hearing* at 1:05:54-1:06:22 (testimony of Rep. Andrea LaFontaine).

§ 722.124e(4). In addition, "[i]f the department makes a referral to a child placing agency for foster care case management or adoption services under a contract with a child placing agency, the child placing agency may decide not to accept the referral if the services would conflict with the child placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency." Mich. Comp. Laws § 722.124f(1).

II. The Complaint should be dismissed for lack of standing.

To bring a federal lawsuit under Article III, Plaintiffs must establish standing. *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015). That means Plaintiffs must show (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is "traceable to the challenged action of the defendant"; and (3) the injury will be "redressed by a favorable decision." *Id.* (quotation marks omitted). Plaintiffs cannot satisfy any of these requirements.

A. No injury in fact.

None of the Plaintiffs allege any legal injury. Although Plaintiffs Dumonts and Busk-Suttons say they are "ready, willing, and able to provide a 'forever family' to children in the foster care system" (Compl. ¶ 5, ECF No. 1), they have no right to work with a specific child placing agency. And P.A. 53 does not stop them from fostering or adopting; at any time, they can work with numerous other agencies to

realize their goal. *See* Def.-Intervenors' Mot. to Dismiss 4-5, ECF No. 19. Likewise, P.A. 53 does not stop Plaintiff Ludolph from fostering and adopting either. Nor does the Complaint allege otherwise. Rather, it alleges that some private placing agencies declined to work with some of the Plaintiffs (Compl. ¶¶ 61, 63, 68, ECF No. 1) and that the Plaintiffs as taxpayers have "strong[] oppos[ition]" to P.A. 53. (Compl. ¶ 73, ECF No. 1).

But those are not viable legal injuries. There is no state action in what religious private placement agencies do. And though Plaintiffs may be deeply offended by what these agencies do and believe, the state did not create that purported harm. Certainly, P.A. 53 does not require the private placement agencies to act in a way Plaintiffs find objectionable. At most, Plaintiffs object to the fact that P.A. 53 exists and DHHS allows these agencies to place children the way they always have.

But that objection is an abstract one—mere disagreement with the law—shared by anyone who shares Plaintiffs' ideology. And mere disagreement does not confer standing. The Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984) (concluding mere disagreement insufficient for equal protection claim); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982) (same for Establishment Clause claim).

Nor can Plaintiffs save their lawsuit by re-characterizing their injury as a stigmatic harm created by P.A. 53. In the Equal Protection context, stigmatic harm only confers standing on those "'who are personally denied equal treatment'" by the government's "challenged discriminatory conduct[.]" *Allen*, 468 U.S. 737, 755 (1984). And P.A. 53 does not cause any differential treatment; it allows a broad array of private parties to place children in homes the children so desperately want and need. *See Moore v. Bryant*, 853 F.3d 245, 249 (5th Cir. 2017) ("Accordingly, to plead stigmatic-injury standing [under equal protection], Plaintiff must plead that he was personally subjected to discriminatory treatment."). The same holds true in the Establishment Clause context. *See Barber v. Bryant*, 860 F.3d 345, 353 (5th Cir. 2017) (rejecting stigmatic harm as basis for Establishment Clause claim because "[w]here a statute or government policy is at issue, the policy must have some concrete applicability to the plaintiff.").

Even more troublesome, some Plaintiffs caused their own alleged injury. For example, Plaintiffs Dumonts and Busk-Suttons went out of their way to seek out religiously-affiliated child placement agencies in the hope of being declined. Def.-Intervenors' Mot. to Dismiss 4-6, ECF No. 19. But self-inflicted injury cannot satisfy the injury-in-fact requirement. *See, e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves…."); *ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 266 (3d Cir.

2001) (rejecting standing when plaintiffs visited display "in order to describe the display for this litigation").

And just as problematic, the Dumonts and Busk-Suttons' *past* decision to use a religious placement agency cannot establish an injury justifying the only relief they seek—prospective relief to prevent *future* harm. *See* Compl., Prayer for Relief, ECF No. 1. "Past exposure to [even] illegal conduct does not in itself show a present case or controversy regarding injunctive relief…." *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974). Because it is completely speculative whether (or when) Plaintiffs will seek to adopt or foster in the future or whether they will intentionally use or coincidentally stumble on a religious placement agency that cannot place children with same-sex families, Plaintiffs lack standing for prospective relief. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (concluding that "some day" intentions insufficient to establish imminent injury).

The only future "injury" Plaintiffs can establish is their objection to the existence of P.A. 53. For this reason, Plaintiffs must invoke taxpayer standing as their primary basis for standing. (Compl. ¶ 7, ECF No. 1). But taxpayers generally do not have standing to challenge a law. *See Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 599 (2007) (summarizing taxpayer standing). As a rare exception, taxpayer standing exists in the Establishment Clause context only when "'tax revenues are expended on the disputed practice.'" *Henderson v. Stalder*,

287 F.3d 374, 380-81 (5th Cir. 2002). And even then, tax revenues must be specifically approved by the legislature and not "discretionary Executive Branch expenditures." *Hein*, 551 U.S. at 608; *see also Sherman v. Illinois*, 682 F.3d 643, 646 (7th Cir. 2012) (applying this requirement to state taxpayer standing).

But Plaintiffs' lawsuit fails on both counts. It does not identify any specific *legislative* provision authorizing funds spent on any practice they object to. At most, DHHS—not the legislature—chooses which private placement agencies to allocate funds to and decides whether that allocation complies with P.A. 53. Mich. Comp. Laws § 722.124e. And DHHS does so in a religiously neutral way, to both religious and non-religious agencies. That type of discretionary *executive* spending unrelated to the objected to conduct is not subject to state-taxpayer suits. *See, e.g.*, *Freedom From Religion Found., Inc. v. Nicholson*, 536 F.3d 730, 741 (7th Cir. 2008) (finding no taxpayer standing when Congress "mandated that the VHA provide medical care to veterans and, at least in a broad sense, it has contemplated that the VA generally will provide chaplain services … [because] no specific congressional action mandates, requires or even intimates that chaplains be used in any particular way to accomplish this goal.") (citation omitted).

B. No causal connection.

Just as Plaintiffs cannot prove injury in fact, they cannot prove any causal connection between their alleged injury and the complained of conduct. *See Lujan*,

504 U.S. at 560-61 (requiring injury be "fairly . . . trace[able] to the challenged action of the defendant.").

In this instance, passage of P.A. 53 and its implementation did nothing to alter the status quo and instead merely codified existing practice.[17] Further, the Dumonts and Busk-Suttons complain about the actions of two child placement agencies, neither of which was sued by Plaintiffs. And Plaintiff Ludolph never alleges that she interacted with any Defendant. Therefore, because the links of causation are not "fairly traceable" to Defendants, and include "the independent action of [at least one] third party not before the court," all of Plaintiffs' claims must be dismissed for lack of causation. *Allen*, 468 U.S. at 739, 757 (finding lack of causation because chain of causation "involve[d] numerous third parties"). *Id*. at 759. *National Family Planning and Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("[E]ven if self-inflicted harm qualified as an injury it would not be fairly traceable to the defendant's challenged conduct.").

C. No redressability.

The last prong, redressability, requires "a likelihood that the requested relief will redress the alleged injury." *Nader v. Blackwell*, 545 F.3d 459, 471 (6th Cir. 2008) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998)).

[17] *03/18/15 Hearing* at 1:05:54-1:06:22 (statement of Rep. Andrea LaFontaine).

Plaintiffs request that Defendants be enjoined from contracting with child placement agencies that "exclude same-sex couples from consideration as foster or adoptive parents …" (Compl. ¶ 1 and Prayer for Relief, ECF No. 1). But this requested relief will not satisfy Plaintiffs' alleged injury.

This relief will certainly not permit the Plaintiffs to foster or adopt children in the future. They can do that now. At most, the relief will alleviate Plaintiffs' legal objection. But that will in turn force some religious agencies to stop foster and adoption placement, leaving many Michigan families and children out in the cold. *See 04/22/15 Hearing* at 1:07:03-1:07:14 (testimony of Vicki Schultz) ("Without these bills, agencies such as ours may be asked to perform services which would go against our belief system, ultimately forcing us out of the foster care and adoption services."). Producing that result redresses no legal harm; it inflicts a practical harm on others.

III. The Complaint should be dismissed for failure to state an Establishment Clause or Equal Protection claim.

A. Plaintiffs do not challenge state action.

Establishment Clause and Equal Protection claims both require state action. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). To discern state action, the Sixth Circuit uses the public-function test, the state-compulsion test, and the symbiotic-relationship or nexus test. *Collyer v. Darling*, 98 F.3d 211, 232 (6th Cir. 1996).

But under no test does mere regulation of a private party convert that private party into a state actor. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (holding private school's personnel decisions not attributable to the state, despite "extensive regulation of the school generally"); *Adams v. Vandemark*, 855 F.2d 312, 316-17 (6th Cir. 1988) (holding private not-for-profit corporation was not a state actor, even though subject to state and federal regulation). Nor does public funding or private use of public property establish state action. *See, e.g.*, *Rendell-Baker*, 457 U.S. at 840 (finding private school's personnel decisions not attributable to the state, despite the fact that "virtually all of the school's income was derived from government funding"); *Wolotsky v. Huhn*, 960 F.2d 1331, 1336 (6th Cir. 1992) (finding private not-for-profit corporation which derived "a significant portion of its funding from the government" and which leased one of its facilities from the government at nominal cost was not a state actor); *Crowder v. Conlan*, 740 F.2d 447, 450 (6th Cir. 1984) (holding the state was not responsible for private hospital's personnel decisions even if the hospital derived "a considerable percentage of its revenues from governmental funding" and the county was "owner and lessor of the hospital's physical plant"). *Id*. at 453.

Applied in this instance, the Plaintiffs do not object to any decision attributable to the state. While potential adoption and foster families "must submit an application for a foster care license or to be certified to adopt" by the state (Compl.

¶ 33, ECF No. 1), child placement agencies make their own independent assessment whether they will place a child with a particular family *before* the state evaluates the family for fostering or adoption.[18] Plaintiffs merely object to this independent assessment made by certain religious placing agencies. (Compl. ¶¶ 61-63, ECF No. 1). The state simply has no involvement in that prior assessment and cannot be blamed for it.

B. P.A. 53 complies with the Establishment Clause because it promotes the secular purpose of protecting children.

In *Marsh v. Chambers*, *Van Orden v. Perry*, and *Town of Greece v. Galloway*, the Supreme Court evaluated Establishment Clause claims by asking whether the challenged action was consistent with the country's historical practices and understandings. *See Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 602 (6th Cir. 2015) (Batchelder, J., concurring in part) (surveying these cases). In contexts different from this case, the Sixth Circuit has continued to apply the *Lemon*/endorsement test rather than the more historical approach. *Id*. at 588 (applying *Lemon* in school context). No matter which approach the Sixth Circuit would use in the adoption context, P.A. 53 complies with the Establishment Clause.

[18] *See 02/18/15 Hearing* at 30:07-30:26 (testimony of Jose Carrera) ("What we do when a family comes to us to become a foster parent, an adoptive parent, we do an assessment and make a recommendation to the state. The state is the one that approves or denies their licensure. So all we're doing is an assessment at that point … for the parents …").

First, P.A. 53 fits the historical practices of our country. As Defendant-Intervenors note, private, mostly religious, organizations developed the adoption and foster care system, and the state did not become involved until somewhat recently. Def.-Intervenors' Mot. to Dismiss 7-9, ECF No. 19.[19] Evaluating P.A. 53 and Defendants' actions against this historical backdrop, there is no unconstitutional establishment of religion. Just as in legislative prayer, religious influences have traditionally served a role in the adoption context. The Establishment Clause should and correctly does accommodate this historical reality.

Next, P.A. 53 satisfies the *Lemon*/endorsement test which analyzes whether the challenged action has a secular purpose, whether it conveys a message endorsing religion to the objective observer, and whether it causes an excessive entanglement with religion. *See Jefferson Cty.*, 788 F.3d at 587 (summarizing this test). As for secular purpose, P.A. 53 achieves the unquestionable secular purpose of "having as many possible qualified adoption and foster parent agencies in this state." Mich. Comp. Laws §§ 722.124e(1)(a)(c)-(e). DHHS's interpretation of the law also protects the free exercise rights of private child placing agencies and families. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 n.2 (1989) (plurality opinion) (noting

[19] *See also 02/18/15 Hearing* at 13:10-13:48 (testimony of Tom Hickson) (noting that "[f]or over 100 years, the Catholic Church has supported charity agencies operating in Michigan to provide a multitude of services to the poor and vulnerable… Historically, the church provided this service through its many agencies since well before the state ever had any involvement in child placement.").

that a state may reasonably conclude "that religious groups generally contribute to the cultural and moral improvement of the community . . . and enhance a desirable pluralism of viewpoint and enterprise."). There is no reason to doubt the authenticity of these secular purposes. *See ACLU v. Grayson Cty.*, 591 F.3d 837, 853 (6th Cir. 2010) (noting that courts must show "deference to the government's stated reasons" in Establishment Clause context).

As for endorsement, the reasonable person would see P.A. 53 and its implementation for what they are: good faith efforts to maximize the number of children in foster and adoption care. In this context, the reasonable person would know that Michigan neutrally allows both private religious and non-religious child placing agencies to work with families of all stripes. Allowing religious groups to live out their faith in the adoption context does not endorse religion; it avoids burdening religion to help place vulnerable children in a loving home. The system as a whole works to benefit everyone, in a religious neutral way.

Finally, as for entanglement, P.A. 53 and its implementation avoid excessive entanglement by ensuring the state does not referee the internal decisions of religious agencies to approve or refer a particular applicant. By taking a more hands-off approach, P.A. 53 lets religious organizations be religious yet still serve the public good. To be sure, Michigan cannot completely take a hands-off approach in the adoption context. The state must monitor families to ensure they are serving the best

interest of children. But that does not require ongoing, excessive monitoring of agencies. And mere "interaction" or "involvement" between the state and a religious group does not create excessive entanglement. *Agostini v. Felton*, 521 U.S. 203, 233 (1997); *see also* Joseph R. Ganahl, *Fostering Free Exercise*, 88 NOTRE DAME L. REV. 457, 467 (2012) (concluding that statutes that allow religious organizations to place families comply with Constitution).

Apart from mere interaction, Plaintiffs can only speculate about excessive entanglement. Such speculation is not enough. *See Wilder v. Bernstein*, 848 F.2d 1338, 1348 (2d Cir. 1988) ("In the context of child care, however, where the state is obliged to act one way or the other to meet religious needs, it is entirely appropriate to accept some risks and assess entanglement primarily on the basis of what occurs in fact, not what is apprehended to occur.").[20]

C. P.A. 53 complies with the Equal Protection Clause because it satisfies rational basis review.

The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). But not every government distinction triggers strict

[20] Even in the heated abortion context, the government accommodates healthcare providers who have religious objections to performing abortions. *See* Robin F. Wilson, *A Matter of Conviction: Moral Clashes over Same-Sex Adoption*, 22 BYU J. PUB. L. 475, 484-85 (2008) (identifying these accommodations including the Church Amendment, 42 U.S.C. § 300a-7 et seq). Just as courts have upheld these accommodations, this court should do the same here. *Id*.

scrutiny. Only those that adversely impact "a suspect class" or invade "a fundamental right" do; all other classifications receive rational basis review. *Mt. Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 406 (6th Cir. 1999).

Here, Plaintiffs cannot identify how P.A. 53 implicates a fundamental right or any suspect classification. That alone forces rational basis review. Even then, Plaintiffs cannot pinpoint any unequal treatment by the state. Michigan treats every potential foster family alike, according to the same neutral criteria. Families can adopt or foster children regardless of their sexual orientation. At most, Plaintiffs object to DHHS accommodating religious placement agencies in a way that does not affect Plaintiffs. That hardly constitutes unequal treatment of Plaintiffs.

Regardless, Michigan's actions satisfy rational basis review, which is satisfied "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *E. Brooks Books, Inc. v. Shelby Cty.*, 588 F.3d 360, 364 (6th Cir. 2009) (citation omitted). And that holds true "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Id*.

P.A. 53 and its implementation satisfy this very low bar because having a "broad spectrum of organizations and groups, some of which are faith based and some of which are not faith based," increases the likelihood that as many Michigan children as possible will find their "forever home." Mich. Comp. Laws §

722.124e(1)(d). Moreover, Michigan has an interest in not violating the free exercise rights of fostered and adopted children in the custody of the state or of the child placement agencies themselves. Mich. Comp. Laws § 722.124e(1)(e).

D. This Court should avoid a ruling that clashes with the federal or state Free Exercise Clauses.

Setting aside that P.A. 53 creates no constitutional problem, this Court should dismiss Plaintiffs' lawsuit to avoid creating a constitutional conflict—violating others free exercise rights. *See Michigan v. Doran*, 439 U.S. 282, 294 n.5 (1978) (noting that "when a potential conflict between the Extradition Clause and some other constitutional provision has been recognized, this Court long ago suggested that the Clause be interpreted so as to avoid the conflict.").

In terms of federal free exercise rights, Defendant-Intervenors discuss how Plaintiffs' requested relief would create First Amendment concerns, including the fact that faith-based agencies may not be excluded because of their religious identity. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017) ("[T]he exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified … is odious to our Constitution all the same, and cannot stand."); Def.-Intervenors' Mot. to Dismiss 14-24, ECF No. 19. Amicus would add that Plaintiffs' requested relief would also likely contradict the Michigan Free Exercise Clause, which provides more protection than the federal Free Exercise Clause. *See Country Mill Farms, LLC v. City of E. Lansing*, No. 1:17-CV-487, 2017 WL

5514818, at *16 (W.D. Mich. Nov. 16, 2017) (concluding that Michigan Free Exercise Clause requires burdens on religious beliefs to satisfy "the compelling state interest test").

Of course, any federal constitutional requirement would trump a state constitutional provision. But federalism and constitutional avoidance concerns favor interpreting the federal Establishment Clause in a way that avoids *unnecessary* conflict with the Michigan constitution. *Cf. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) (concluding in preemption context that Court is reluctant to adopt interpretation overriding state law). This Court should likewise avoid the unnecessary and artificial conflict Plaintiffs try to create between the Establishment Clause and the free exercise rights of Michigan citizens.

CONCLUSION

When it comes to adoption and fostering, children should be the top priority. Because P.A. 53 places children first and tries to maximize their chance to receive the love and care they deserve, Amici respectfully ask this Court to dismiss Plaintiffs' lawsuit against this common-sense legislation.

Respectfully submitted this 30th day of January, 2018.

/s/ Jeremy D. Tedesco

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**Pending admission*

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, I electronically filed the foregoing document with the Clerk of Court using the ECF system which will provide electronic copies to counsel of record.

/s/ Jeremy D. Tedesco

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ATTACHMENT 1

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COMPLETE LIST OF AMICI CURIAE

A. Michigan State Senators

Darwin Booher
Jack Brandenburg
Tom Casperson
Patrick Colbeck
Judy Emmons
Ken Horn
Peter MacGregor
Arlan Meekhof
Mike Nofs
Phil Pavlov
John Proos
David Robertson
Tonya Schuitmaker

B. Michigan State Representatives

Julie Alexander
Tom Barrett
Joseph Bellino
John Bizon
Julie Calley
Ed Canfield
Triston Cole
Laura Cox
Kathy Crawford
Diana Farrington
Ben Frederick
Gary Glenn
Joseph Graves
Shane Hernandez
Holly Hughes
Pamela Hornberger
Gary Howell
Larry Inman
Steven Johnson
Bronna Kahle
Tim Kelly
Kenneth Kurtz*
Dan Lauwers
Beau LaFave
Eric Leutheuser
Peter Lucido
Steve Marino
Aaron Miller
Jeff Noble
John Reilly
Daire Rendon
Jim Runestad
Jason Sheppard
Jim Tedder
Lana Theis
Curt Vanderwall
Hank Vaupel
Rob Verheulen
Roger Victory
Michael Webber

**Former Representative*