IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

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,

and

ST. VINCENT CATHOLIC CHARITIES; MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE,

Defendant-Intervenors.

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

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF MOTION TO DISMISS

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Defendant-Intervenors incorporate by reference Defendants' first issue presented.

2. Defendant-Intervenors incorporate by reference Defendants' second issue presented.

3. Whether Plaintiffs have stated a claim under the Establishment Clause when there is a rich history of our country protecting the work of religious adoption agencies and protecting important partnerships between government and faith-based charities.

4. Defendant-Intervenors incorporate by reference Defendants' fourth issue presented.

5. Whether Plaintiffs' requested relief would result in religious discrimination against Defendant-Intervenors in violation of the Free Exercise Clause.

6. Whether Plaintiffs' requested relief would result in content-based compelled speech contrary to the First Amendment.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Blum v. Yaretsky, 457 U.S. 991 (1982); *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701 (6th Cir. 2015); *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

INTRODUCTION

This is not a case about who can and who cannot adopt a foster child in Michigan. It is about whether the Constitution forbids the State from working with a variety of agencies, to ensure the most possible alternatives for families wanting to foster or adopt a child. As the State's legislative findings explain, "[h]aving as many possible qualified adoption and foster parent agencies in this state is a substantial benefit to the children" of Michigan 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(c). Plaintiffs allege no facts showing that providing *more* options somehow prevents Plaintiffs from adopting. Nor have Plaintiffs pled any facts showing (or even suggesting) that other agencies are not sufficient alternatives for Plaintiffs. Indeed, judicially noticeable sources show that Plaintiffs are surrounded by other agencies, and Plaintiffs could even work with these agencies to adopt children in St. Vincent's care. It is no surprise that Plaintiffs could not allege facts to the contrary.

Plaintiffs state that they "desire to adopt children from the public foster care system." ECF ¶¶ 19-20. But the only thing preventing Plaintiffs from adopting is Plaintiffs' insistence on only wanting specific faith-based agencies—whose views Plaintiffs reject—to perform the initial licensing groundwork for them. This self-inflicted obstacle falls far short of establishing cognizable injury for standing. And

given that Plaintiffs have now conceded that St. Vincent is not a state actor, Plaintiffs also fail to establish any cognizable constitutional claim *at all*.

Plaintiffs ask this Court to force the State to exclude agencies like St. Vincent from helping children simply because St. Vincent is unable to provide written evaluations and recommendations to the State contrary to its religious beliefs. But excluding St. Vincent for that reason would not only violate the Free Exercise and Speech clauses, it would do absolutely nothing to provide more homes for children at a time when the State has an acute need for more foster agencies recruiting more families. No other court has adopted the rule Plaintiffs advocate, and this Court should likewise decline their invitation to cause further needless harm to the State's most vulnerable children.

LEGAL STANDARD

When ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), courts must consider whether the "complaint . . . contain[s] sufficient factual matter" to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Courts "need not accept as true legal conclusions or unwarranted factual inferences." *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007).

ARGUMENT

I. Plaintiffs have not pled facts demonstrating standing.

Standing requires "material allegations," of an injury in fact caused by Defendants' conduct and likely to be redressed by a favorable decision. *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 710 (6th Cir. 2015). But Plaintiffs failed to make such allegations. Instead, they offer a hodge-podge of different types of claimed injuries—several of which don't even appear in the Complaint, and all of which fail as a matter of law.

First, Plaintiffs assert that they face a "practical barrier to adopting a child out of the state-run foster care system." ECF 37 at ii. But this argument is doubly flawed because St. Vincent is not a state actor, and the Plaintiffs have failed to make material allegations to support the "practical barrier" they assert exists.

As an initial matter, the only actions Plaintiffs identify as allegedly causing this injury are actions of purely private parties: faith-based agencies. ECF 1 ¶¶ 59-63, 67-68. In their most recent brief, Plaintiffs concede that "the Complaint does not argue that [St. Vincent] or other agencies are state actors." ECF 37 at 15. This concession makes complete sense, as private parties do not become state actors merely by virtue of receiving public funds for providing public services.[1] But

[1] *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 840–41 (1982) ("Acts of . . . private contractors do not become acts of the government by reason of their

Plaintiffs cannot then hold the State liable as though St. Vincent *were* a state actor.

The Supreme Court has made clear that "a State normally can be held responsible for a private decision *only* when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis added). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Id.* at 1004-05. Thus, in *Blum*, even though the state was aware of a private party's actions, did not prevent them, and even provided funding to the private party in response to its actions, the state was not responsible for those actions because it did not "influence[]" them. *Id.* at 1005; *see also DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989) (government not liable for the actions of private parties even if it is "aware" and didn't stop them).

Here, all that Plaintiffs have alleged is that the State "is aware" of religiously-based referrals by agencies and "has not stopped them from engaging in this conduct." ECF 1 ¶ 3. Plaintiffs have not alleged any state influence in the decisions of faith-based agencies regarding whether to make religiously-motivated

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significant or even total engagement in performing public contracts."); *Molnar v. Care House*, 574 F. Supp. 2d 772, 784 (E.D. Mich. 2008), *aff'd*, 359 F. App'x 623 (6th Cir. 2009) (private government contractor providing social services was not a state actor even though it "receive[d] large amounts of public funding, and receive[d] clients through state agency referrals").

referrals. Nor could they, as the Complaint notes that the "manner by which faith-based child placement agencies operate" had "been in practice" before the State passed a law to ensure that such agencies did not have to close their programs. ECF 1 ¶¶ 45-46. Nor is there even a financial incentive for agencies to refer families elsewhere. Thus, this Court should reject Plaintiffs' attempt to impermissibly "impos[e] on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 936 (1982).

Not only is there no state action at issue, Plaintiffs have failed to make any "material allegations," regarding any practical barrier to adopting children. *Parsons*, 801 F.3d at 710. Plaintiffs have never alleged that other alternatives are unavailable to them or insufficient, nor have they ever explained why St. Vincent or Bethany Christian Services—two agencies with religious beliefs the Plaintiffs reject—are the only agencies they want to work with. This failure is not surprising: a map on the State's website shows that Plaintiffs have an array of nearby agencies available to perform the groundwork for adoption.[2] And according to Google

[2] The State's publicly available Michigan Adoption Resource Exchange (MARE) website lists at least seven other foster or adoption agencies in the tri-county area of the Dumont Plaintiffs, and 19 other foster or adoption agencies in the Detroit area near the Busk-Sutton Plaintiffs. Adoption Agencies and Foster Care in Michigan, Michigan Adoption Resource Exchange (2018), https://mare.org/Agency-Map. The Sixth Circuit has made clear that courts may

Maps, four foster or adoption agencies are located closer to the Dumont Plaintiffs' hometown of Dimondale than St. Vincent, making other options *more* convenient.[3]

Furthermore, once licensed by another agency, Plaintiffs would even be able to adopt children in St. Vincent's care. The State's adoption contract explains that if a licensing agency "has an identified adoptive family for a child under supervision of another agency the [first agency] shall work cooperatively with the child's agency" to complete the adoption. ECF 16-2 at 7.[4] Plaintiffs have not alleged any refusal by St. Vincent or any other agency to completing such an adoption under the contract.

Rather than explain why these options are insufficient, Plaintiffs rely on a vague claim that they "intend to produce evidence" regarding practical barriers. Their only citation for this is an oral assertion Plaintiffs' counsel made at the last hearing.

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consider judicially noticeable facts such as government contracts, publicly-listed addresses of agencies, and information contained on government websites. *See Gordon v. England*, 354 F. App'x 975, 978 (6th Cir. 2009); *see also Qiu Yun Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013) ("A document posted on a government website is presumptively authentic if government sponsorship can be verified by visiting the website itself.").

[3] ECF 18-2 at 13. This Court has taken judicial notice of distances calculated using Google maps in the past. *See United States v. Kemp*, No. 15-CR-20442, 2016 WL 3049403, at *8 n.3 (E.D. Mich. May 31, 2016).

[4] Agencies under contract with DHS must register a child waiting to be adopted for listing on MARE shortly after accepting a child's case. For instance, St. Vincent's adoption contract requires children be placed on MARE "within 30 days of acceptance of the case if no adoptive resource has been identified." ECF. 16-2 at 27. "Once a child is registered on MARE, the child is available on a statewide basis for placement by any private adoption agency under contract with DHS or any DHS local office." MDHS Adoption Contract Management (2018) http://www.michigan.gov/mdhhs/0,5885,7-339-73971_7116-23480--,00.htm.

See ECF 37 at 7 n.2. But there are at least two fundamental problems with this allegation. First, "[i]n assessing whether the complaint states plausible claims," the court's review is confined "to the complaint itself" not Plaintiffs' contentions at a hearing or facts they may assert in future. *Agema v. City of Allegan*, 826 F.3d 326, 332 (6th Cir. 2016); *Parsons*, 801 F.3d at 706 (same). Second, even if the court were to credit the remarks made by Plaintiffs' counsel, the bare "conclusory statements" lack even a modicum of factual specificity and are wholly inadequate. *Iqbal*, 556 U.S. at 686.

Second, Plaintiffs argue in their newest brief that they are injured by not having the same "options that are available to other families" with regard to working with their choice of faith-based agencies such as St. Vincent. ECF 37 at 9. But this new claim appears nowhere in Plaintiffs' Complaint. In addition, not every family in Michigan has the option to work with every agency. Certain agencies that place Native American children only do so with families of Native American ancestry,[5] and faith-based agencies like St. Vincent also do not perform assessments for

[5] For example, the mission of one adoption agency within Michigan is to "recruit non-relative Native American homes . . . that fall within the Sault Tribe priority of placement," and it also provides services to tribal children's "relatives and tribal members." Sault Ste. Marie Tribe of Chippewa Indians, Adoption and Foster Home Promotion and Recruitment (Feb. 7, 2013), https://bit.ly/2HNAEnZ. The Sault Tribe Tribal Code states that absent "extraordinary circumstances," only a "member of the Tribe is eligible to adopt a child." Sault Ste. Marie Tribal Child Welfare Code, Tribal Code §§ 30.703, https://bit.ly/2rnae12; *see* 25 U.S.C. § 1915.

unmarried couples, ECF 1 ¶ 43.

Further, unlike the Bucks and Flores, who provided detailed explanations for why St. Vincent is their preferred agency, Plaintiffs have offered no factual explanation for why they are fixated on faith-based agencies like St. Vincent. In fact, they have made clear that they reject these agencies' religious beliefs[6]—which makes them peculiar options for Plaintiffs to prefer.

Moreover, any injury flowing from Plaintiffs inability to be licensed by faith-based agencies like St. Vincent is simply not an injury that is redressable by this Court. If Plaintiffs are successful in this lawsuit, they still will not be able to have their adoption groundwork performed by St. Vincent. They will simply ensure that St. Vincent is forced to close its foster and adoption programs altogether, and then *no* families will have this option. ECF 1 ¶¶ 45-46. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976) (no standing when it was "speculative whether the desired exercise of the court's remedial powers . . . would result in the availability" of the services that the plaintiffs sought).

Third, Plaintiffs argue in their briefs that they experienced a stigmatic injury when St. Vincent, a private party, did not agree to perform the groundwork for

[6] Plaintiffs have asserted that St. Vincent's religious "criteria . . . have nothing to do with their ability to care for a child" and just amount to inappropriate "religious litmus tests." ACLU, ACLU Challenges Discriminatory Practices in Michigan's Foster Care System (Sept. 20, 2017) https://bit.ly/2wH3bAX.

Plaintiffs to adopt. But courts have only allowed plaintiffs "who are personally denied equal treatment" by a "governmental actor" to raise stigmatic injury. *United States v. Hays*, 515 U.S. 737, 743–44 (1995); *Parsons*, 801 F.3d 701, 711–12 (stigmatic injury must "derive[] directly from an unexpired and unretracted government action" (citation omitted)). All of the cases that the Plaintiffs rely on involve state action that directly caused the stigma.[7] Plaintiffs have conceded that the denial of services in this case resulted from a non-state actor, and thus they cannot allege standing for a stigmatic harm based on that denial.

Further, Plaintiffs never alleged this injury in their Complaint. Even if they had, Plaintiffs' conclusory allegation is insufficient. Courts require plaintiffs to provide factual specificity regarding how the government action gives rise to stigma. *See Meese v. Keene,* 481 U.S. 465, 473–75 (1987) (plaintiff would not have standing if he merely alleged reputational harm without a detailed factual explanation).

Fourth, Plaintiffs continue to assert taxpayer standing. But the Supreme Court

[7] In *Heckler v. Mathews*, 465 U.S. 728 (1984), the Supreme Court's paradigmatic stigmatic injury case, the government's policy regarding spousal benefits expressly discriminated based on sex. And in *Parsons*, 801 F.3d at 705-06, this Court found that fans of a band suffered a stigmatic injury when a government report expressly disparaged them. The same is true in the Establishment context. Stigmatic standing is found, for example, when the Government actively disparages a particular faith, *Awad v. Ziriax*, 670 F.3d 1111, 1123 (10th Cir. 2012) (challenging validity of state anti-Sharia law where "state amendment expressly condemn[ed] [the plaintiff's] religion"), or engages in a "broader pattern of Christian favoritism" which creates "[f]eelings of marginalization and exclusion[.]" *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012).

has emphasized that taxpayer standing is only permissible where the taxpayer has a "direct and particular financial interest[.]" *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 435 (1952). In other words, the challenged policy must "deplete[] the government's coffers." and lead the government to "increase a taxpayer-plaintiff's tax bill to make up a deficit." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 136 (2011) (citation omitted). Here, far from depleting tax dollars, a religiously-based referral results in an agency forgoing the opportunity to receive tax dollars. The State has recognized that "a private child placing agency does not receive public funding with respect to a particular child or particular individuals referred by the department unless that agency affirmatively accepts the referral." Mich. Comp. Laws § 722.124e(h). Thus, allowing St. Vincent to make religiously motivated referrals does not "deplete[] the government's coffers" and so Plaintiffs have no "direct and particular financial interest."[8]

II. Plaintiffs' constitutional claims lack merit.

A. Private faith-based referrals do not establish religion.

Aside from there being no state action in this case,[9] Plaintiffs' Establishment

[8] Further, taxpayers lack standing to challenge discretionary executive action, which is what Plaintiffs challenge here. *See Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 602–03, 605, 608 (2007).

[9] The Establishment Clause cases Plaintiffs rely on all involve clear state action. *See e.g. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982) (challenging "a statute"); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 702

Clause claim fails because there has been no deprivation of Plaintiffs' First Amendment rights. Plaintiffs continue to advocate a sweeping Establishment Clause rule without any legal authority. They assert: "[W]hen the State hires private agencies to perform a public government function, it must ensure those services are provided . . . just as if the State provided those services directly." ECF 37 at 1. Such a rule would jeopardize a myriad of social service programs, including homeless shelters, hospitals, and many others.[10]

Defendant-Intervenors are not aware of any court that has upheld such an overreaching proposition, but courts have rejected it. For example, in *Lown v. Salvation Army*, the "allegedly purposeful discriminatory actions [of a faith-based government contractor] [could] not be ascribed to the government defendants" merely by virtue of the contractor operating under "contracts" for the "purpose of

(1994) (law creating a school board based on religious lines); *Doe v. Porter*, 370 F.3d 558, 564 (6th Cir. 2004) (school board's decision); *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 588 (6th Cir. 2015) (school board's policy).

[10] *See* Removing Barriers for Religious and Faith-Based Organizations To Participate in HHS Programs and Receive Public Funding, 82 Fed. Reg. 49300-01 (Oct. 25, 2012). Plaintiffs attempt to distinguish the approval of the religious accommodations in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) because that involved "religious employers" who weren't contracting with the government. ECF 37 at 14. But the federal government has long offered the same protection to faith-based groups who *do* receive government contracts. *See* Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965), as amended (carving out hiring protections for faith-based contractors). Plaintiffs' proposed rule would invalidate this longstanding policy.

providing social services." 393 F. Supp. 2d 223, 237 (S.D.N.Y. 2005).[11]

Contrary to Plaintiffs' arguments, the State's partnership with faith-based organizations alongside many other agencies exists "for the permissible purpose of providing social services." *Lown*, 393 F. Supp. 2d. at 237. And the State's policy of not second-guessing religiously-based referrals avoids improper entanglement. *Univ. of Great Falls v NLRB*, 278 F.3d 1335 (D.C Cir. 2002). Finally, as discussed above, Plaintiffs have failed to allege any third-party harms arising from the State's practice, because nothing is stopping them from adopting right now. To the contrary, the State's legislative findings observe that third parties benefit from these partnerships, which is precisely why government has a rich history of relying on faith-based agencies to serve children and families.[12]

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[11] The Sixth Circuit has observed that an Establishment Clause violation is *less* likely if an entity receives funding from a government contract in exchange for services as opposed to government aid (and even aid is often permissible). *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 593–94 (6th Cir. 2015). The court in *Smith* noted the importance of the specific use of funds. Here government does not provide additional funds to an agency for referring a family elsewhere.

[12] Plaintiffs also fail to meaningfully address the historical sources Defendant-Intervenors cite, which show that states partnered with religious agencies to provide foster care and adoption services even though children were often "matched with the preferred religion of the *placing* organization." *See, e.g.*, Ellen Herman, Kinship by Design: A History of Adoption in the Modern United States 50, 125 (2008) (emphasis added); *see also* Paula E. Pfeffer, A Historical Comparison of Catholic and Jewish Adoption Practices in Chicago, 1833-1933 in E. Wayne Carp, Adoption in America: Historical Perspective 112-113 (2002).

B. Private faith-based referrals do not violate Equal Protection.

In addition to failing to identify state action for an equal protection claim,[13] Plaintiffs' fail to contradict the State's legislative findings that having more qualified placement agencies in the State benefits children. Under rational basis review, "those challenging the legislative judgment must convince the court that the legislative facts . . . could not reasonably be conceived to be true by the governmental decisionmaker" when voted upon. *Packnett v. Snyder*, No. 13-12064, 2014 WL 764653, at *4 (E.D. Mich. Feb. 25, 2014) (quoting *Vance v. Bradley*, 440 U.S. 93, 110–11 (1979). Plaintiffs have not made that showing.

III. Plaintiffs seek relief that would violate the First Amendment.

A. Religious discrimination violates the Free Exercise Clause.

Plaintiffs argue that the Free Exercise Clause only prohibits discrimination based on "religious identity." ECF 37 at 21. But the Government is also forbidden from "regulat[ing] or outlaw[ing] conduct because it is religiously motivated," as

[13] All the Equal Protection cases that Plaintiffs rely on involve clear state action. *See e.g. Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (state ban on recognition of same-sex marriage); *Heckler v. Mathews*, 465 U.S. 728, 728 (1984) (sex-based government policy regarding spousal benefits); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 432 (1985) (city zoning ordinance); *Heller v. Doe by Doe*, 509 U.S. 312 (1993) (State's involuntary confinement procedures); *Ondo v. City of Cleveland*, 795 F.3d 597, 608-09 (6th Cir. 2015) (disparities in use of force based on sexual orientation); *Davis v. Prison Health Servs.*, 679 F.3d 433, 439 (6th Cir. 2012) (prison employment policies); *Bower v. Village of Mt. Sterling*, 44 F. App'x 670, 678 (6th Cir. 2002) (challenging hiring process for police).

well as "discriminat[ing] against 'some or all religious beliefs.'" *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)).[14]

B. Requiring agencies to recommend couples against their religious beliefs would unconstitutionally compel speech.

The rule Plaintiffs advocate would require St. Vincent to agree to provide written recommendations and evaluations contrary to its religious beliefs as a condition of partnering with the State. But government cannot exercise control over speech that falls outside the message it pays the organization to convey. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541-43 (2001). Compelling St. Vincent "to pledge allegiance to the Government's policy" would be unconstitutional. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 220 (2013).

CONCLUSION

This Court should grant Defendant-Intervenors' Motion to Dismiss.

Dated: May 4, 2018

Respectfully submitted,
/s/ Stephanie H. Barclay
Counsel for Defendant-Intervenors

[14] Plaintiffs also fail to refute Defendant-Intervenors' arguments that Plaintiffs' desired policy would result in religious targeting by expressly prohibiting religious referrals, and selective enforcement since secular referrals are allowed. ECF 19 at 14. Plaintiffs advance an argument already rejected by the Supreme Court in *Trinity Lutheran*: that "skating as far as possible from religious establishment concerns" can justify religious discrimination. 137 S. Ct. at 2024. Such overzealousness is "limited by the Free Exercise Clause." *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, I electronically filed the above document(s) with the Clerk of Court via CM/ECF, which will provide electronic copies to counsel of record.

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