

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

ST. VINCENT CATHOLIC
CHARITIES,

Plaintiff,

v.

INGHAM COUNTY BOARD OF
COMMISSIONERS,

Defendant.

Civil No. 1:19-CV-1050

Hon. Robert J. Jonker

**PLAINTIFF'S
MEMORANDUM IN SUPPORT
OF MOTION FOR PARTIAL
SUMMARY JUDGMENT**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
INTRODUCTION.....	1
STATEMENT OF UNDISPUTED FACTS	4
1. St. Vincent’s refugee resettlement programs	4
<i>A. The Refugee Health Services Contract.....</i>	<i>4</i>
<i>B. The Community Agency Grant</i>	<i>5</i>
<i>C. The Health Center Interpreting Contract</i>	<i>9</i>
2. The Board targets St. Vincent.	9
<i>A. After St. Vincent files Buck v. Gordon, Commissioners pri-</i> <i>oritize funding for agencies that conform to their non-dis-</i> <i>crimination principles.....</i>	<i>9</i>
<i>B. St. Vincent obtains a preliminary injunction as its Ingham</i> <i>County funding program comes up for renewal</i>	<i>10</i>
<i>C. November 4th: The Human Services Committee tries to cut</i> <i>St. Vincent’s Refugee Health Services Contract in half.....</i>	<i>11</i>
<i>D. November 12th: The Board—with no other options and</i> <i>facing legal pressure—renews St. Vincent’s one-year con-</i> <i>tract but continues to seek alternatives.....</i>	<i>15</i>
<i>E. November 18th: The Human Services Committee denies</i> <i>St. Vincent’s Community Agency Grant request.....</i>	<i>16</i>
3. St. Vincent files suit to protect its rights	18
<i>A. The Board doubles down on religious hostility</i>	<i>18</i>
<i>B. Only an impending preliminary injunction led the Board</i> <i>to acknowledge the \$40,000 contract’s existence</i>	<i>19</i>

<i>C. The Board’s ever-changing explanations for denying St. Vincent a Community Agency Grant</i>	20
LEGAL STANDARD	20
ARGUMENT	21
I. The Board violated the Free Exercise Clause	21
A. The Board’s conduct was not neutral.....	22
B. The Board did not act according to any generally applicable standard	28
C. The Board cannot satisfy strict scrutiny.....	30
II. St. Vincent is entitled to summary judgment on its First Amendment Retaliation and Section 1983 Retaliation Claims	32
A. St. Vincent engaged in First Amendment conduct.....	33
B. The Board’s conduct with respect to the grant, and targeting of St. Vincent’s other contracts, would chill an ordinary person from asserting his rights	34
C. The circumstances surrounding the denial of St. Vincent’s grant request confirm the Board’s decision was retaliatory.....	38
III. St. Vincent is entitled to relief.....	43
A. St. Vincent is entitled to declaratory relief.....	44
B. St. Vincent is entitled to \$4,500 in damages	46
C. St. Vincent is entitled to permanent injunctive relief	47
1. <i>The Board violated St. Vincent’s First Amendment rights</i>	48
2. <i>The Board’s threats to defund St. Vincent and find a different provider make permanent injunctive relief necessary</i>	48

CONCLUSION	50
CERTIFICATE OF COMPLIANCE.....	52

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Am. Civil Liberties Union of Ky. v. McCreary Cty.</i> , 607 F.3d 439 (6th Cir. 2010).....	47, 48
<i>Am. Home Assur. Co. v. Evans</i> , 791 F.2d 61 (6th Cir. 1986).....	46
<i>AmSouth Bank v. Dale</i> , 386 F.3d 763 (6th Cir. 2004).....	45
<i>Axson-Flynn v. Johnson</i> , 356 F.3d 1277 (10th Cir. 2004).....	30
<i>Bd. of Cty. Comm’rs v. Umbehr</i> , 518 U.S. 668 (1996).....	34, 35
<i>Bowen v. Kendrick</i> , 487 U.S. 589 (1988).....	41
<i>Buck v. Gordon</i> , No. 1:19-cv-286, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019).....	<i>passim</i>
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	20, 21
<i>Cent. Nat’l. Ins. Co. of Omaha v. Dana Corp.</i> , 900 F.2d 259 (6th Cir. 1990).....	21
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520 (1993).....	<i>passim</i>
<i>Cole v. City of Memphis</i> , 108 F. Supp. 3d 593 (W.D. Tenn. 2015).....	43, 45, 46
<i>Cole v. City of Memphis</i> , 839 F.3d 530 (6th Cir. 2016).....	43

<i>Davis v. Robert</i> , 192 F. Supp. 3d 847 (E.D. Mich. 2016).....	37
<i>Dominguez v. Correctional Med. Servs.</i> , 555 F.3d 543 (6th Cir. 2009).....	21
<i>Emp’t. Div. Dep’t. of Human Res. v. Smith</i> , 494 U.S. 872 (1990).....	30
<i>Fritz v. Charter Twp. of Comstock</i> , 592 F.3d 718 (6th Cir. 2010).....	36
<i>Frontier Ins. Co. v. Blaty</i> , 454 F.3d 590 (6th Cir. 2006).....	46
<i>Grand Trunk W. R.R. Co. v. Consol. Rail Corp.</i> , 746 F.2d 323 (6th Cir. 1984).....	44
<i>Harbin-Bey v. Rutter</i> , 420 F.3d 571 (6th Cir. 2005).....	38
<i>Harris v. Bornhorst</i> , 513 F.3d 503 (6th Cir. 2008).....	36
<i>Hill v. Lappin</i> , 630 F.3d 468 (6th Cir. 2010).....	38
<i>Kallstrom v. City of Columbus</i> , 136 F.3d 1055 (6th Cir. 1998).....	48
<i>Kinney v. Weaver</i> , 367 F.3d 337 (5th Cir. 2004).....	35
<i>Libertarian Party of Ohio v. Husted</i> , 751 F.3d 403 (6th Cir. 2014).....	49
<i>Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n</i> , 138 S. Ct. 1719 (2018).....	22, 24, 25, 26
<i>Memphis Cmty. Sch. Dist. v. Stachura</i> , 477 U.S. 299 (1986).....	47

<i>Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274 (1977).....	40
<i>Murphy v. Lane</i> , 833 F.2d 106 (7th Cir. 1987).....	38
<i>Oscar Renda Contracting, Inc. v. City of Lubbock</i> , 463 F.3d 378 (5th Cir. 2006).....	35
<i>Randolph v. Ohio Dep't of Youth Servs.</i> , 453 F.3d 724 (6th Cir. 2006).....	38
<i>Savoie v. Martin</i> , 673 F.3d 488 (6th Cir. 2012).....	44
<i>Scottsdale Ins. Co. v. Flowers</i> , 513 F.3d 546 (6th Cir. 2008).....	45
<i>Thaddeus-X v. Blatter</i> , 175 F.3d 378 (6th Cir. 1999).....	<i>passim</i>
<i>Trinity Lutheran Church of Columbia, Inc. v. Comer</i> , 137 S. Ct. 2012 (2017).....	34, 41
<i>United Specialty Ins. Co. v. Cole's Place, Inc.</i> , 936 F.3d 386 (6th Cir. 2019).....	44
<i>United States v. Miami Univ.</i> , 294 F.3d 797 (6th Cir. 2002).....	49, 50
<i>Village of Arlington Heights v. Metro. Hous. Dev. Corp.</i> , 429 U.S. 252 (1977).....	27
<i>W. World Ins. Co. v. Hoey</i> , 773 F.3d 755 (6th Cir. 2014).....	44
<i>Ward v. Polite</i> , 667 F.3d 727 (6th Cir. 2012).....	23, 31
<i>Women's Med. Prof'l Corp. v. Baird</i> , 438 F.3d 595 (6th Cir. 2006).....	47

<i>Zilich v. Longo</i> , 34 F.3d 359 (6th Cir. 1994).....	33
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Other Authorities

Fed. R. Civ. P. 56(a).....	20
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INTRODUCTION

St. Vincent Catholic Charities (“St. Vincent”) provides crucial services to refugees in need throughout Ingham County. St. Vincent is also the only agency with the authorization and expertise to provide the full range of these services to all refugees—including LGBTQ refugees—that resettle in Ingham County. The Ingham County Board of Commissioners (the “Board”) has acknowledged that St. Vincent is the “best game in town” when it comes to serving refugees. Nevertheless, the Board is cutting off and threatening refugee services funding for St. Vincent. Why? Because it disagrees with St. Vincent’s unrelated lawsuit against Michigan and dislikes St. Vincent’s religious exercise.

The material facts are not in dispute, and the Board’s discrimination is overt. The Board stated on the record at a public meeting that it wants to stop working with St. Vincent solely because it disagrees with St. Vincent’s speech, religious exercise, and audacity to defend those rights in court. After making those statements, the Board then proceeded to single out St. Vincent by denying it a \$4,500 grant—a grant that the Board awarded to every other agency recommended by the County Controller. This was a grant that the Board awarded to St. Vincent the year before,

based on the *same* scope of work and the *same* proposed budget. In fact, the Board treated St. Vincent's grant application in a way that it had never treated any of the 390 applications recommended to it by the County Controller over a ten-year period. The only thing that had changed was St. Vincent's well-publicized lawsuit defending its First Amendment rights. This is prohibited religious targeting and retaliation.

In addition to the grant, the Board has put two contracts at risk—contracts through which St. Vincent provides crucial health services to refugees. Like the grant, St. Vincent must continue to go before the Board each year to seek authorization to continue these services, and the Board holds the power to terminate these contracts at any time. The Board has repeatedly threatened these contracts and relented only in the face of a potential injunction.

Not only has the Board failed to dispute any of these facts, it has never disavowed any of the targeting evidence St. Vincent has put forward. Nor could it, as the evidence is from the Board's own resolutions, public statements, and government records. Instead, the Board continues the pattern in this litigation: It has demanded that St. Vincent post a quarter-million-dollar bond and twice referred to a charity providing crucial services

to refugees as a “predat[or] on the public fisc.” Further, it took the threat of an impending preliminary injunction for the Board to even acknowledge that a \$40,000 contract with St. Vincent existed.

The material facts regarding the relationship between St. Vincent and the Board are not in dispute, and the only question is whether these facts show unconstitutional religious targeting and unlawful retaliation. They do. Partial summary judgment is warranted.

Without this Court’s intervention, there is every reason to conclude that the Board will continue to target St. Vincent’s ministry and seek to chill its First Amendment freedoms. The loss of the \$4,500 grant, the events leading to its cancellation, and the Board’s conduct afterward lay the threat bare: If the Board can identify a cost-free way to penalize St. Vincent for its religious exercise, the Board will take it. Accordingly, and in addition to awarding St. Vincent actual damages for the discrimination that has already occurred, this Court should enjoin the Board from further retaliatory conduct and declare that the Board cannot target or retaliate against St. Vincent for exercising its rights under the First Amendment.

STATEMENT OF UNDISPUTED FACTS

1. St. Vincent's refugee resettlement programs.

St. Vincent Catholic Charities provides crucial services to refugees resettling in the Lansing community. *See generally* First Harris Decl., ECF No. 5-3 at PageID.109-114. St. Vincent exercises its faith and carries out its mission to “welcome[e] the stranger” and serve “the least of these” through its refugee services program. *Id.* at PageID.110 (internal quotation marks omitted). As one Ingham County Commissioner put it, St. Vincent is “the best game in town” at aiding refugees. Audio: Ingham Cty. Human Servs. Comm. Meeting at 5:00 (Nov. 4, 2019), <https://perma.cc/NR7G-SRAJ>; *see also* Tr., ECF No. 17-11 at PageID.359. In addition to providing services through its own fundraising efforts, ECF No. 5-3 at PageID.111-112, St. Vincent partners with Ingham County to serve refugees through the three principal contracts described below.

A. The Refugee Health Services Contract

Ingham County benefits from St. Vincent's “essential and critical” ministry of helping refugees access health care through the “Refugee Health Services Contract.” *See* Resolution 19-475, ECF No. 16-2 at PageID.183. The Board has renewed this contract with St. Vincent, with

minor changes over time, for at least twenty years.¹ For FY 2020, the contract compensates St. Vincent for \$128,000 in refugee health services that the agency provides. *See* ECF No. 16-2 at PageID.183.²

B. The Community Agency Grant

For many years, the Board has provided grants to “community agencies” that “provide important services . . . to Ingham County residents.” Resolution 16-493, ECF No. 17-14 at PageID.400. From at least May 24, 2016 (when FY 2017 grant funding was authorized) until November 26, 2019 (when FY 2020 grant funding was authorized), the Community Agency Grant process gave sole “priority . . . to those proposals that directly contribute to addressing the County’s long-term priority of ‘Meeting Basic Needs’, such as food, clothing, and shelter.” Resolution 16-235,

¹ This was previously a subcontract subject to a master agreement between Ingham County and the Michigan Department of Health and Human Services (“MDHHS”). ECF No. 5-3 at PageID.114. For FY 2020, it is a standalone contract relying in part upon state funding. *See generally* Third Harris Decl., Ex. G.

² Although the Board has made various conflicting claims about the arithmetic underlying the \$128,000 (*see, e.g.*, Joint Status Report, ECF No. 23 at PageID.519; Mot. to Dismiss, ECF No. 19 at PageID.431), it concedes the key fact: the amount the Board authorized to St. Vincent for this contract is “the same amount as the prior year contract with St. Vincent.” ECF No. 23 at PageID.520.

Third Harris Decl., Ex. A. Under that rubric, St. Vincent received a Community Agency Grant every year that it applied—until FY 2020. *See, e.g.*, ECF No. 17-14 at PageID.404 (FY 2017, St. Vincent receives \$4,000); Resolution 17-436, ECF No. 17-15 at PageID.409 (FY 2018, St. Vincent receives \$4,500); Resolution 18-467, ECF No. 17-16 at PageID.414 (FY 2019, St. Vincent receives \$4,500).

Notably, St. Vincent sought the same Community Agency Grant, for the same scope of work, and with the same proposed budget, for FY 2020 as it did for FY 2019.³ For FY 2019, the Board awarded St. Vincent \$4,500. *Id.* For FY 2020, the County Controller recommended that St. Vincent again receive \$4,500. Resolution 19-502, ECF No. 1-1 at PageID.44. Nevertheless, the Board—for the first time ever—awarded St. Vincent (and only St. Vincent) nothing. *Id.*

Indeed, since 2009, the Board has considered 390 requests for Community Agency Grants.⁴ Out of all these requests, the Board has followed

³ Compare Third Harris Decl., Ex. B (FY 2019 grant application) with Third Harris Decl., Ex. C (FY 2020 grant application); *see also* ECF No. 17-16 at PageID.414 (FY 2019 grant, describing same scope of work).

⁴ Ingham County Board Resolutions No. 19-502 (<https://perma.cc/WW4K-AF9U>), No. 18-467 (<https://perma.cc/HV2F-JZB9>), No. 17-436 (<https://perma.cc/CA3B-ELPN>), No. 16-493 (<https://perma.cc/6GLJ->

the Controller’s recommendation—or awarded more—387 times. *Id.* Only three times in ten years did the Board award less than what the County Controller recommended. *Id.* The first was when an agency closed after its application was submitted, so its request was withdrawn.⁵ The second was when an agency’s funding was slightly decreased in order to conform to a rule that no agency receive more than 10% of all grant funding.⁶ The third was St. Vincent’s complete denial in FY 2020.

Denying St. Vincent grant funding was unprecedented. With agency grants—as Commissioner Tennis put it on May 20, 2019—the Board tries “to make everyone happy.” *Id.* at 9:09. Making “everyone happy” might

[YXRH](https://perma.cc/YXRH)), No. 15-435 (<https://perma.cc/H4GH-F7F2>), No. 14-471 (<https://perma.cc/PB6U-NRNA>), No. 13-441 (<https://perma.cc/457B-7BBE>), No. 12-370 (<https://perma.cc/ZHQ9-NE3R>), No. 11-363 (<https://perma.cc/2GWN-Y36Y>), No. 10-364 (<https://perma.cc/6FZM-P3UJ>), No. 09-384 (<https://perma.cc/F6MG-42EY>), No. 08-318 (<https://perma.cc/HJ87-3ZXB>), *See* Second Windham Decl. at 2.

⁵ Human Servs. Comm. Minutes at 4 (Nov. 16, 2015), <https://perma.cc/JM4D-SUTD> (“Oasis Center withdrew their application, so the \$10,000 they would have received could be redistributed.”).

⁶ Human Servs. Comm. Minutes (Nov. 3, 2014), <https://perma.cc/4WTU-E29S> (“If this resolution is approved as recommended, it will need to be amended to eliminate that clause from Resolution #14-222 because collectively, the three Cristo Rey applications are recommended for funding at greater than 10% of the total available.”). Resolution No. 14-222 (<https://perma.cc/MC2G-6SHQ>).

require the Board to “expand” the amount of available grant money. *Id.* The Board “[o]ften” exceeded its budgeted allocation for these grants, “and sometimes we have a resolution to spend a little out of our contingency fund” to ensure “everyone” receives a grant. *See id.* at 9:30.

For FY 2020 grants—when the Board decided not to fund St. Vincent (and only St. Vincent)—the Board authorized up to \$17,300 out of its contingency fund for Community Agency Grants. *See* ECF No. 1-1 at PageID.36. The Board did the same in prior years. *See, e.g.,* ECF No. 17-16 at PageID.411 (authorizing \$8,550); ECF No. 17-15 at PageID.406 (authorizing \$15,650).

While the Board prioritizes “Meeting Basic Needs,” it regularly goes beyond “food, clothing, and shelter.” Resolution 16-235, Third Harris Decl., Ex. A. For example, for FY 2020—the same year St. Vincent received nothing—the County funded services including “emotional support” hotlines, ECF No. 1-1 at PageID.41, “helping clients navigate systems that will reduce barriers that originally brought them to the criminal justice system,” *id.* at PageID.42, and “telephone reassurance services . . . to elderly” people. *Id.* The Board took the same approach in prior years. For example, in FY 2019, the Board gave \$10,000 to “increase the

college attainment rate of students,” ECF No. 17-16 at PageID.412. In FY 2017, it gave the YMCA \$1,000 for the “Y Achievers Program.” ECF No. 17-14 at PageID.404.

C. The Health Center Interpreting Contract

Through a \$40,000 contract with Ingham County, St. Vincent provides interpreting services for refugees at County health centers. ECF No. 5-3 at PageID.115-116; *see also* ECF No.17-2 (the contract). This \$40,000 contract has been renewed annually for four years. ECF No. 5-3 at PageID.115. The contract automatically renews each January 31st contingent upon both funding and approval of a statement of work. *Id.*

2. The Board targets St. Vincent.

A. After St. Vincent files Buck v. Gordon, Commissioners prioritize funding for agencies that conform to their non-discrimination principles.

On April 15, 2019, St. Vincent filed a well-publicized lawsuit challenging a MDHHS policy that would require its foster care and adoption ministry to either close or violate its religious beliefs. Compl., *Buck v. Gordon*, No. 1:19-cv-286 (W.D. Mich. Apr. 15, 2019), ECF No. 1.

At a Human Services Committee meeting on May 20, 2019, Commissioner Sebolt proposed amending the County’s funding criteria for all Community Agency Grants to prioritize grant funding for applicants that

“comply with the County’s non-discrimination policies.” Audio: Ingham Cty. Human Servs. Comm. Meeting at 3:27 (May 20, 2019), <https://perma.cc/WT3Y-6ZA8>. This amendment was supported by Commissioners Naeyaert and Stivers—though it puzzled multiple Commissioners. *Id.* No Commissioner was aware of any noncompliance. *Id.* at 3:32. When asked whether any agencies *didn’t* comply with this policy, Commissioner Sebolt explained that he “just wanted to make sure” this was a priority and followed up by saying he “didn’t want to single anyone out” but that he was doing this “just in case.” *Id.* at 3:45. Jared Cypher, Deputy County Controller, said that he could not think of any noncomplying agency. *See id.* at 3:37. The full Board adopted this amended language on May 28, 2019. *See* Resolution No. 19-243, Third Harris Decl., Ex. F.

B. St. Vincent obtains a preliminary injunction as its Ingham County funding program comes up for renewal.

Just a few months later (in September 2019), this Court entered a preliminary injunction protecting St. Vincent from discriminatory actions taken by the State of Michigan. Opinion, *Buck*, No. 1:19-cv-286 (W.D. Mich. Sept. 26, 2019), ECF No. 69.

Within four months of this decision, all three of St. Vincent's County partnerships would be up for reconsideration. *First*, the Refugee Health Services Contract was up for renewal on October 1, 2019 (though the Board did not make its funding decision until November). *Second*, the Board would award Community Agency Grant funding in November. *Third*, St. Vincent's Health Center Interpreting Contract was up for renewal on January 31, 2020. *See* ECF No. 5-3 at PageID.114-115.

Publicly available audio recordings demonstrate that, starting on November 4th, several Board members openly stated a desire to terminate St. Vincent's County funding in retaliation for—as Commissioner Sebolt put it—“St. Vincent Catholic Charities’ publicly stated stances and lawsuit against the State of Michigan toward same sex couples.” Audio: Ingham Cty. Human Servs. Comm. Meeting at 1:05:00 (Nov. 4, 2019), <https://perma.cc/NR7G-SRAJ>; *see also* Tr., ECF No. 17-11 at PageID.354.

Those statements were backed up by adverse actions.

C. November 4th: The Human Services Committee tries to cut St. Vincent's Refugee Health Services Contract in half.

On November 4, 2019, St. Vincent's Refugee Health Services Contract was up for reauthorization. It first came before the Board's Human Services committee. At this meeting, multiple Commissioners criticized

St. Vincent's religious beliefs, speech, and its decision to defend those beliefs in *Buck*:

- Commissioner Sebolt stated his belief that St. Vincent would discriminate “based on St. Vincent Catholic Charities’ publicly stated stances and lawsuit against the State of Michigan toward same sex couples.” ECF No. 17-11 at PageID.354.
- Chairman Tennis stated there was “a difference of ideology at times in how we treat our residents and how we view our residents between ourselves and St. Vincent’s Catholic Charities.” *Id.* at PageID.355.
- Anne Scott, Ingham Community Health Centers Executive Director and Deputy Health Officer, stated that LGBTQ refugees receive services from St. Vincent, and “we see the benefit . . . the value of that is high for the people that it benefits. But it’s not without note that there is concern about the stance of the agency.” *Id.*
- Commissioner Stivers said, “I’m sure that not everybody at St. Vincent’s is anti-LGBTQ and that they probably do some great work.” *Id.*
- Commissioner Stivers also stated that she “can’t support working with this group” because of “the anti-LGBTQ stance at the greater organization.” *Id.*
- Commissioner Stivers baselessly claimed “that this charity has been implicated in the separation of families on the border . . . in order to be adopted out to Christian white families.” *Id.*
- Commissioner Sebolt claimed—incorrectly and without any evidence—that other Catholic Charities permit “adoption to same sex couples,” but “St. Vincent’s is simply choosing not to.” *Id.* at PageID.356.
- Chairman Tennis acknowledged that it is “unusual” for the County board to second-guess the health center board, which had recommended renewing the contract, and noted that such distinctions

could be a concern under federal law governing the health center. *Id.* at PageID.359.

- Chairman Tennis further stated that St. Vincent is “the best game in town when it comes to” refugee resettlement, but “I do share concerns with some of the more recent decisions the organization has made.” *Id.*
- Commissioner Stivers stated that she is “not so interested in changing the contract,” but in ending it. St. Vincent is “morally bankrupt, but [she] would like to give time to find alternative services.” *Id.* at PageID.358.

Commissioners also made other demeaning and untrue allegations during this meeting. These statements may all be heard on the County’s November 4, 2019 audio recording. *See* Audio: Ingham Cty. Human Servs. Comm. Meeting at 1:05:00 (Nov. 4, 2019), <https://perma.cc/NR7G-SRAJ>; *see also* ECF No. 17-11.

The Human Services Committee then sought to cancel St. Vincent’s contract “right now,” and pressed the County Health Department to provide them with a list of other potential agency partners. ECF No. 17-11 at PageID.356. County staff, however, stated that only St. Vincent was able do this work. *Id.* at PageID.365-357. The Commissioners then expressed their displeasure to County staff that the County had to continue contracting with St. Vincent and made clear their desire to award the contract to someone else, if currently possible:

- Commissioner Morgan stated: “[W]hat’s up with that? I mean, if there are alternatives, I’d really prefer that staff list them or allude to them at the very least, as opposed to saying in four words that there are none.” ECF No. 17-11 at PageID.356.
- Commissioner Stivers wanted to “temporarily table” the contract resolution to “allow staff some time to give us more alternatives and not necessarily vote it down right now.” *Id.*
- Commissioner Stivers stated it was “a shame” that the lack of alternatives “wasn’t brought” to the Board’s attention before the deadline to renew St. Vincent’s Refugee Health Services Contract passed. *Id.*

The Commissioners then proposed cutting St. Vincent’s contract in half; this would both give St. Vincent time to—as Commissioner Tennis put it—“come around” and change its beliefs, ECF No. 17-11 at PageID.356, and give County staff time to try to find alternative providers:

- Commissioner Tennis expressed his “hope . . . that—my druthers would be that we would approve this, but also ask our staff and health office and our CHC director—executive director to bring us some other options for doing this in the future.” *Id.*
- Commissioner Tennis supported the six-month extension because “at least it would give our staff some time to look for alternatives and not put refugee health in jeopardy.” *Id.*

The Committee thus recommended only a six-month extension for St. Vincent’s Refugee Health Services Contract.

D. November 12th: The Board—with no other options and facing legal pressure—renews St. Vincent’s one-year contract but continues to seek alternatives.

St. Vincent then contacted each member of the Commission to correct these false allegations and explain the important work that St. Vincent does to serve refugees, including LGBTQ refugees. *See* First Windham Decl., Ex. 1, ECF No. 5-4 at PageID.122-123. Every Board member was thus on notice that St. Vincent serves LGBTQ refugees and is, in fact, “a priority destination resettlement site” for LGBTQ refugees. *Id.* On November 12th, Counsel for the Diocese of Lansing sent a letter to the Board’s attorney informing her that, if the Board chose not to renew the Refugee Health Services Contract, it would likely be illegal. *See Id.* at PageID.125.

After receiving both communications, the Board met on November 12th to consider whether to adopt the Health Services Committee’s recommendation. Commissioner Tennis (who chairs the Human Services Committee), made clear that the objections were to St. Vincent’s beliefs—not the quality of its services:

I don’t think anyone on this Board is questioning the quality of services or the wonderful work St. Vincent’s has done for the refugee community. *The issue at hand is regarding other areas of St. Vincent’s work and litigation pending against the*

State that goes against the principles of many of us on this Board.

Audio: Ingham Cty. Human Servs. Comm. Meeting at 10:32 (Nov. 12, 2019), <https://perma.cc/X7EY-X4ZH>; Tr., ECF No. 17-12 at PageID.366 (emphasis added). He further stated it was “truly horrible to be placed in a situation where we have to choose between services to a very vulnerable population, . . . and . . . our own principles of equality and fairness.” ECF No. 17-12 at PageID.366. But with the contract already expired, no other options on the table, and a letter from St. Vincent’s counsel in hand, the Board then narrowly rejected the Committee’s recommendation (by a vote of 8 to 6) and reauthorized the Refugee Health Services Contract for its full term. ECF No. 16-2 at PageID.183.

E. November 18th: The Human Services Committee denies St. Vincent’s Community Agency Grant request.

Less than a week later, St. Vincent again had to go before the Health Services Committee. This time, the Committee was awarding Community Agency Grants. In attendance were representatives from numerous community service organizations across Ingham County who had come to accept their grant funding; St. Vincent was among those invited. ECF No. 17-13 at PageID.392. All the agency representatives were asked to stand and be recognized. *Id.* But immediately before the Committee was

going to vote to approve the recommended funding, the Committee passed a motion denying St. Vincent—and only St. Vincent—grant funding. *Id.* at PageID.393; Second Harris Decl., ECF No. 17-1 at PageID.239-240. The \$4,500 that the controller recommended for St. Vincent was allocated to two other agencies, Refugee Development Center and Haven House. ECF No. 16 at PageID.159. This action was humiliating to St. Vincent’s representative, who was singled out in front of her peers. ECF No. 17-1 at PageID.240. There was almost no discussion at the time, and later Commissioner Randy Schafer said it was “obvious the votes were lined up prior to the meeting.” Second Windham Decl., Ex. A.

The Committee’s amended resolution then proceeded to the Board for approval. Considering the Committee’s recommendation, St. Vincent’s counsel sent a second letter to the Board listing the laws that would be broken if the Board approved the resolution singling out St. Vincent for worse treatment. ECF No. 5-4 at PageID.129. This time, the Board did not heed the letter and instead approved the resolution on November 26th denying St. Vincent a Community Agency Grant. The chart adopted with the Board’s resolution shows that every agency to request a grant received one—except St. Vincent. *See* ECF No. 1-1 at PageID.44.

3. St. Vincent files suit to protect its rights.

A. The Board doubles down on religious hostility.

With the grant denied and one contract reluctantly renewed, St. Vincent feared that its other contract, the Health Center Interpreting Contract—up for renewal on January 31, 2020—would be targeted next. ECF No. 5-3 at PageID.116. After the loss and threatened loss of County contracts, combined with the chilling effect the Board’s conduct imposed on St. Vincent defending itself before the Sixth Circuit in *Buck*, St. Vincent filed suit and requested expedited consideration of a preliminary injunction motion.

The Board reacted to the lawsuit with further hostility. For example:

- The Board has never disavowed any of the statements made by Commissioners about St. Vincent’s religious beliefs or actions. Instead, the Board claims “absolute legislative immunity” such that it cannot be held responsible for its actions. *See, e.g.*, ECF No. 19 at PageID.437; Br. in Opp’n to Prelim. Inj., ECF No. 16 at PageID.171.
- The Board characterized St. Vincent’s lawsuit as “ill-conceived” and done “with a vengeance.” Rebuttal Br. in Opp’n to Prelim Inj., ECF No. 20-1 at PageID.501.
- Twice, the Board referred to St. Vincent as a “predat[or] on the public fisc.” ECF No. 16 at PageID.171; ECF No. 19 at PageID.442.
- The Board demanded that any injunction entered against the Board be conditioned on St. Vincent, a non-profit religious charity, posting a quarter-million-dollar bond. *See* ECF No. 16 at PageID.162.

B. Only an impending preliminary injunction led the Board to acknowledge the \$40,000 contract's existence.

After St. Vincent sought an injunction, the Board did the very thing St. Vincent feared: it stated that the \$40,000 contract would not be renewed. First, the Board denied the existence of the \$40,000 contract. *See* ECF No. 16 at PageID.157 (“There is no \$40,000 interpreter agreement up for renewal in January.”). But when St. Vincent confronted the Board with the \$40,000 contract (signed by the both the Board and counsel representing the Board in this lawsuit), the Board labored to explain the arithmetic underlying the—separate—\$128,000 contract to suggest that, somehow, the \$40,000 contract had been subsumed into it. *See, e.g.*, ECF No. 19 at PageID.432 n.3. Accordingly, the Board claimed, St. Vincent was getting a “deal” by being out \$40,000. *Id.*

Days before the deadline to renew the contract, and with a preliminary injunction motion pending, the Board relented. It blamed the Health Department for the “error.” *See* ECF No.20-1 at PageID.491 n.1 (“Director Scott subsequently realized she was in error—the \$40,000 contract . . . automatically renews.”). It accepted the 2020 Statement of Work, approved the budget, and allowed the automatic renewal to proceed.

C. The Board's ever-changing explanations for denying St. Vincent a Community Agency Grant.

The Board has also shifted theories to explain why St. Vincent was denied a \$4,500 Community Agency Grant. Initially, the Board insisted that it “change[d]” its “priority” for 2020 grants to focus on “Meeting Basic Needs.” *E.g.*, ECF No. 19 at PageID.422, PageID.433, PageID.435 (the Board’s criteria “are revised each year”); ECF No. 16 at PageID.158 (same). The Board still makes this argument. *See* ECF No. 23 at PageID.520 (Def’s. Statement of the Case). But as discussed *supra* pp. 5-6, this has been the “priority” for awarding Community Agency Grants since at least 2016. The only “priority” change came in May 2019, to “prioritize” “non-discrimination” after *Buck* was filed. *Supra* pp. 9-10. Now, the Board even contends funding St. Vincent would have violated the Establishment Clause. ECF No. 19 at PageID.445.

LEGAL STANDARD

Summary judgment must be entered when the pleadings, affidavits, and other summary judgment evidence show that “there is no genuine dispute as to any material fact” and that the moving party “is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden rests on the moving party

to identify record evidence that shows the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322-25. After the moving party has met its burden, the burden shifts to the nonmoving party to demonstrate that summary judgment should not be granted by showing that there exists a genuine fact issue for trial. *Id.* at 321-25.

Minor factual disputes do not preclude summary judgment; instead, “to avoid summary judgment, the factual issues in dispute must be of some consequence.” *Cent. Nat’l. Ins. Co. of Omaha v. Dana Corp.*, 900 F.2d 259 (6th Cir. 1990). For the nonmovant, a “mere scintilla of evidence is insufficient; there must be evidence on which a jury could reasonably find for the non-movant.” *Dominguez v. Correctional Med. Servs.*, 555 F.3d 543, 549 (6th Cir. 2009) (citation and quotation marks omitted).

ARGUMENT

I. The Board violated the Free Exercise Clause.

The Board’s conduct toward St. Vincent violates the Free Exercise Clause because, by targeting St. Vincent, the Board was not neutral toward St. Vincent’s religion. Nor did it apply any generally applicable standard to its handling of St. Vincent’s contracts. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (these are “general principle[s]” of the Free Exercise Clause). Further,

the Board's targeting cannot survive strict scrutiny. For these reasons, St. Vincent is entitled to summary judgment on its free exercise claim.

A. The Board's conduct was not neutral.

There are several “[f]actors relevant to the assessment of governmental neutrality.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018). Those factors include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” *Id.* (quoting *Lukumi*, 508 U.S. at 540); *see also Buck v. Gordon*, No. 1:19-cv-286, 2019 WL 4686425, at *10 (W.D. Mich. Sept. 26, 2019) (this “[e]vidence,” “among others,” should be “consider[ed]”). Taken together, these factors confirm that the Board sought a cost-free means to target St. Vincent for its religious exercise. The Board found one in the Community Agency Grant.

Historical Background. First, there is “the historical background of the decision under challenge.” *Masterpiece*, 138 S. Ct. at 1731. Shortly after *Buck* was filed, the Board changed the “priority” criterion for awarding Community Agency Grants. It was the first such change since at least

2016. *Supra* p. 5-6. Indeed, when Commissioner Sebolt proposed “prioritizing” nondiscrimination, neither he—nor anyone else—could identify a single agency that ever violated his proposal. *Supra* p. 10. But even so, the Board added this new priority “just in case.” *Id.* This “priority” of “nondiscrimination” did not exist until St. Vincent sought to ensure its religious accommodation in *Buck*. See *Ward v. Polite*, 667 F.3d 727, 739 (6th Cir. 2012) (the challenged policy was non-neutral because “no such policy existed—until [Plaintiff] asked for a referral on faith-based grounds”).

St. Vincent serves LGBTQ refugees, and “has been designated as a priority destination resettlement site for LGBTQI refugees.” See ECF No. 5-4 at PageID.123 (letter from St. Vincent to Ingham County Board). Yet after St. Vincent received its well-publicized injunction in *Buck*, Commissioners expressed the belief that “St. Vincent Catholic Charities’ publicly stated stances and lawsuit against the State of Michigan toward same sex couples” disqualified it from contracting with the County. ECF No. 17-11 at PageID.354.

Specific Series of Events. Second, when this “historical background” is considered with “the specific series of events leading to the” denial of

the Community Agency Grant, *Masterpiece*, 138 S. Ct. at 1731, an indisputable conclusion emerges: The Board sought a cost-free way to target St. Vincent for its religious exercise.

Board members considered targeting St. Vincent by eliminating its first contract up for renewal in 2019, the Refugee Health Services Contract. *Supra* p. 11-12. At the November 4, 2019 Human Services Committee meeting, Board members expressed a preference to eliminate St. Vincent's contractual relationship with Ingham County. *Supra* pp. 11-14. Yet that goal was frustrated by the Health Department failing to set forth any alternative refugee services agency to provide the services in St. Vincent's place. *Supra* p. 14. Undeterred, the Committee voted to halve St. Vincent's contract from one year to six months. This would buy the Board time to find alternative providers while sending a message to St. Vincent: "come around." *Id.*

Official Expressions of Hostility. The November 4th meeting also contained "official expressions of hostility to religion in some of the commissioners' comments."⁷ *Masterpiece*, 138 S. Ct. at 1732; *see also Lukumi*,

⁷ At least four Board Commissioners manifested this hostility. *Supra* pp. 12-14; *see also* Second Windham Decl., Ex A (citing Morgan, Tennis,

508 U.S. at 541 (opinion of Kennedy, J.) (“The minutes and taped excerpts” of city council meetings “evidence[d] significant hostility exhibited by . . . members of the city council and other city officials toward the Santeria religion and its practice of animal sacrifice.”); *Buck*, 2019 WL 4686425, at *15 (“government decision-makers” making “disparaging statements . . . regarding particular religious beliefs” evidences non-neutrality). From calling St. Vincent’s religious beliefs “morally bankrupt,” *supra* p. 13, to erroneously asserting it was involved in forcible separation of families at the U.S.-Mexico border, *supra* p. 12, to calling it a “shame” that the Health Department did not provide alternatives to St. Vincent, *supra* p. 14, and, ultimately, recommending to the full Board that St. Vincent’s Refugee Health Services Contract be halved for St. Vincent to “come around” (*supra* p. 14), Board member animus was unvarnished.

Crenshaw, and Polsdofer as hostile to St. Vincent’s position as well). This is double the number of commissioners that made the offending statements in *Masterpiece*, and the same ratio as in *Masterpiece*. Compare 138 S. Ct. at 1729 (offending statements of two Commissioners out of a “seven-member Commission” evidenced non-neutrality) with *supra* pp. 12-14 (at least four members of the fourteen-member Board make offending statements). And, as in *Masterpiece*, these statements have never been disavowed.

Administrative History. The “legislative or administrative history” underlying the reauthorization of the Refugee Health Services Contract and the denial of the Community Agency Grant explain why the latter, not the former, became the Board’s first strike against St. Vincent. *See Masterpiece*, 138 S. Ct. at 1731 (“legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body,” also assessed in neutrality analysis).

The full Board voted on St. Vincent’s Refugee Health Services Contract on November 12th. That morning, Counsel for the Diocese of Lansing sent a letter informing the Board that choosing not to renew the Refugee Health Services Contract on this basis was illegal. *See* ECF No. 5-4 at PageID.125. At the Board meeting that night, Commissioner Tennis explained why the Board was going to—reluctantly—approve extending St. Vincent’s Refugee Health Services Contract. In short, the Health Department was unable to find an alternative to St. Vincent in time. *Supra* p. 14. But Tennis left no doubt that the Board lamented this fact. As Tennis said, it was “truly horrible to be placed in a situation where we have to choose between services to a very vulnerable population and our own principles of equality and fairness.” *Supra* p. 16. Even though this

contract had to be reauthorized—for now—Tennis wanted St. Vincent to know that “areas” of its “work and litigation pending against the State . . . go[] against the principles of many of us on this Board.” *Supra* pp. 15-16.

Not even a week later (November 18th), the Board found an opportunity to target St. Vincent for its religiously motivated “work and litigation pending against the State”: The Community Agency Grant. The same Human Services Committee that campaigned against St. Vincent’s Refugee Health Services Contract ignored the County Controller’s recommendation to grant St. Vincent \$4,500. This is the *same* amount St. Vincent received for the prior fiscal year, based upon its submission of the *same* scope of work and for the *same* proposed budget. *Supra* p. 6. Yet the Human Services Committee passed a motion to deny St. Vincent—and only St. Vincent—a grant. ECF No. 17-13 at PageID.393; ECF No. 17-1 at PageID.239-240. This motion was not debated. As Commissioner Schafer told St. Vincent after, “[i]t is obvious the votes were lined up prior to the meeting.” Second Windham Decl., Ex A. This grant denial was the only such denial out of 390 applications in ten years. *Supra* pp. 6-7; *cf. Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267

(1977) (“Departures from” either “the normal procedural sequence” or “[s]ubstantive departures” can “afford evidence that improper purposes are playing a role.”).

The Board followed this behavior by threatening the \$40,000 Health Center Interpreting Contract—from denying its existence, to claiming it had already been canceled, to accusing St. Vincent of being a “predat[or]” for suggesting otherwise, to demanding St. Vincent post a \$250,000 bond for the privilege of ensuring the Contract was not terminated for an unconstitutional reason (*supra* p. 18). By no measure can this behavior be called “neutral” toward St. Vincent’s religious beliefs.

B. The Board did not act according to any generally applicable standard.

The resolutions passed by the Board confirm that the Board did not act according to any generally applicable standard when it denied St. Vincent’s Community Agency Grant application.

St. Vincent was the one agency out of 32 applicants to receive no funding at all. *Supra* p. 6-7. It received no funding despite receiving a Community Agency Grant for FY 2019, where St. Vincent submitted for approval the *identical* scope of work and proposed budget. *Id.* The

denial was contrary to a decade of Board practice—out of 390 grant applications over ten years, the Board has followed the controller’s recommendation, or awarded more funds, 387 times. *Id.* The treatment of St. Vincent’s grant application was unprecedented. *Id.*

The Board repeatedly insists that St. Vincent was denied funding because it was not meeting “basic needs,” (*supra* pp. 8-9, 20), but this post hoc rationalization fails the straight-face test. The Board funded the *same* services from St. Vincent for FY 2019. Nor can the Board explain why it funded “emotional support” hotlines, “helping clients navigate systems that will reduce barriers that originally brought them to the criminal justice system,” or “telephone reassurance services . . . to [the] elderly” under “basic needs.” ECF No. 1-1 at PageID.41-42. St. Vincent’s program—helping refugees navigate life in America, learn job skills, and purchase homes—is just as much meeting “basic needs” as the 31 funded programs.

As the resolution confirms, the Board authorized over \$17,000 from its contingency fund to ensure these programs received grants. *See id.* This is no surprise in a system where the Board tries “to make everyone happy.” *Supra* p. 7.

The only changes between the FY 2019 and FY 2020 Community Agency Grant processes were (1) the Board's change in "priority" on "non-discrimination" in *Buck's* wake (*supra* p. 20), and (2) the Board's manifest desire to punish St. Vincent so long as it could divert funding elsewhere. Unlike the Refugee Health Services Contract, the Board found grant-applying agencies for which it could "increase[] funding" "[i]n lieu of awarding \$4,500 to St. Vincent." ECF No. 16 at PageID.159. And with that, any obstacle to punishing St. Vincent for its religious beliefs was removed. No generally applicable policy guided the Board's decision, only the policy that the Board would not fund St. Vincent.⁸

C. The Board cannot satisfy strict scrutiny.

Because the Board's conduct against St. Vincent's religious exercise was neither neutral nor generally applicable, "the law satisfies the First

⁸ Even if St. Vincent's free exercise claim did not require strict scrutiny for these reasons, "individualized governmental assessment of the reasons for the relevant conduct" also warrants strict scrutiny under the Free Exercise Clause. *Emp't. Div. Dep't. of Human Res. v. Smith*, 494 U.S. 872, 884 (1990); *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir. 2004) ("[G]reater discretion in the hands of governmental actors makes the action taken pursuant thereto more, not less, constitutionally suspect."). The individualized assessments in the grantmaking process are thus subject to strict scrutiny.

Amendment only if it ‘advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests.’” *Buck*, 2019 WL 4686425, at *10 (quoting *Ward*, 667 F.3d at 738) (alterations in *Buck*). The Board has yet to bother with meeting this standard, preferring instead to insist that its “discretion” trumps all else. *See, e.g.*, ECF No. 16 at PageID.159, 169. This is not the law—the Board’s non-neutral and not-generally-applicable conduct must face strict scrutiny. *Lukumi*, 508 U.S. at 546-47.

“It follows from what we have already said that [the Board’s actions] cannot withstand this scrutiny.” *Id.* at 546. The Board has no valid interest, much less a compelling one, in penalizing St. Vincent for actions that are protected by law. *See Buck*, 2019 WL 4686425, at *16. Nor can there be a compelling interest when that interest is not consistently applied. The Board denied St. Vincent a Community Agency Grant for FY 2020 after approving an *identical* request for FY 2019. As for any interest in assuring services for LGBTQ refugees, Defendant’s “proposed action here actually undermines that goal.” *See Buck*, 2019 WL 4686425, at *12. The Board has denied funding to what it concedes is “the best game in town”

for serving refugees (*supra* pp. 4, 13)— “a priority destination resettlement site” for LGBTQ refugees.⁹ ECF No. 5-4 at PageID.123. Even if the Board had a compelling interest, denying funding to St. Vincent could not have been the least restrictive way to achieve it. St. Vincent is therefore entitled to summary judgment on its free exercise claim.

* * *

None of these facts are in material dispute. Indeed, many are express admissions from Board members, Board resolutions, and the Board’s own litigation papers. Because these facts confirm the Board’s conduct was neither neutral nor generally applicable toward St. Vincent’s religious exercise, the Board violated the Free Exercise Clause. St. Vincent is entitled to summary judgment.

II. St. Vincent is entitled to summary judgment on its First Amendment Retaliation and Section 1983 Retaliation Claims.

This is as clear a retaliation case as this Court is ever likely to see. “The law is well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional”

⁹ To the extent the Board argues that it had a compelling interest in avoiding an Establishment Clause violation by denying St. Vincent a grant, that argument is specious, as discussed below.

Thaddeus-X v. Blatter, 175 F.3d 378, 386 (6th Cir. 1999) (en banc) (quoting *Zilich v. Longo*, 34 F.3d 359, 365 (6th Cir. 1994)). And that is precisely what the Board did here.

To prove a claim of First Amendment retaliation, St. Vincent must show that St. Vincent “engaged in protected conduct”; that “an adverse action was taken against [St. Vincent] that would deter a person of ordinary firmness from continuing to engage in that conduct”; and finally that “there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by [St. Vincent’s] protected conduct.” *Id.* at 394. St. Vincent has demonstrated them all.

A. St. Vincent engaged in First Amendment conduct.

The Board concedes that St. Vincent has engaged in First Amendment conduct. ECF No. 16 at PageID.163. This Court has recognized that St. Vincent’s actions in adhering to its sincere religious beliefs regarding marriage are not only First Amendment conduct, but likely to succeed. *See Buck*, 2019 WL 4686425, at *1. In addition, St. Vincent may not be subjected to retaliation for “the constitutionally protected activity of accessing the courts.” *Thaddeus-X*, 175 F.3d at 386. “The Board does not

dispute that St. Vincent engaged in protected conduct when it initiated the *Buck* lawsuit.” ECF No. 16 at PageID.163.¹⁰

B. The Board’s conduct with respect to the grant, and targeting of St. Vincent’s other contracts, would chill an ordinary person from asserting his rights.

St. Vincent has lost a \$4,500 contract it relied upon to help fund its “Living in America” program for refugees. *See* Compl. Ex. A at PageID.12. The \$128,000 contract St. Vincent depends upon to serve refugees was continued only because the Board could not find an alternative in time.

¹⁰ In free speech cases concerning government contractors, courts apply the *Pickering* test. *See Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 678 (1996); *see also Thaddeus-X*, 175 F.3d at 390 (noting test is often applied to Speech and Petition Clause retaliation claims). This case, however, involves retaliation for rights exercised under the Free Exercise Clause, so the *Pickering* test would be an odd fit. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (applying Free Exercise Clause to discriminatory grant denial with no mention of *Pickering* test). But, if the Court applied this test, it would be easily satisfied. St. Vincent satisfies *Pickering*’s adverse action and retaliatory motivation prongs for the same reasons it satisfies them in the retaliation analysis. St. Vincent satisfies the public concern prong: it engaged in speech and litigation on a matter of public concern, as the considerable public comment, legislation, litigation, and executive action on the rights of religious child-placing agencies makes clear. *See Buck*, 2019 WL 4686425, at *6-9 (recounting history). The balancing prong strongly favors St. Vincent, which is vindicating its First Amendment rights and ability to serve those in need. *See id.* By contrast, the Board’s interest in ensuring efficient and effective refugee services would be undermined by cutting off contracts and grants to St. Vincent.

Supra pp. 14-16. St. Vincent also faces the potential future loss of a \$40,000 contract to provide interpretation services, which the Board allowed to renew only under threat of an injunction.

It is well established that the termination of a contract or other public funding satisfies this prong. *See Bd. of Cty. Comm'rs*, 518 U.S. at 685 (non-renewal of waste management contracts was sufficient to state claim for First Amendment retaliation); *see also Thaddeus X*, 175 F.3d at 386 (citing *Umbehr*); *Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378, 380 (5th Cir. 2006) (“[T]he First Amendment protects a contractor whose bid has been rejected by a city in retaliation for the contractor’s exercise of freedom of speech” even when “the contractor had no pre-existing relationship with that city.”). The Fifth Circuit, sitting en banc, held that criminal justice professors stated a claim for retaliation—serious enough to deny qualified immunity—where police “deprived [plaintiffs] of the benefit of continued enrollment in their courses—a form of public patronage.” *Kinney v. Weaver*, 367 F.3d 337, 357 (5th Cir. 2004).

Here, St. Vincent, a non-profit charity serving the vulnerable, has demonstrated that it lost a County grant, and presented evidence that this occurred as an act of retaliation. This alone meets the second prong.

But that is not all. St. Vincent has been threatened with the loss of other County contracts. Board members openly stated their preference not to work with St. Vincent, deeming it “morally bankrupt,” and proposing a six-month contract period to give it the opportunity to “come around.” ECF No. 17-11 at PageID.356, PageID.358. Only after St. Vincent threatened the Board with litigation did it relent and renew the \$128,000 contract, while decrying the lack of alternatives. ECF No. 17-12 at PageID.366. At the same meeting, Board members instructed the Health Department to find alternatives. *See supra* pp. 14-16.

The Sixth Circuit holds mere encouragement to terminate a contract sufficient to meet this prong: “A person of ordinary firmness would be deterred from engaging in protected conduct, if as a result, a public official encouraged her employer to terminate the person’s contract or to have her change her behavior.” *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 726 (6th Cir. 2010) (holding the facts were sufficient to state a claim for First Amendment retaliation); *see also Harris v. Bornhorst*, 513 F.3d 503, 519 (6th Cir. 2008) (holding that a public official’s comments to plaintiff’s prospective employer regarding the official’s own opinion as to whether plaintiff was guilty of a crime “would likely deter a person of

ordinary firmness from” protected activity); *Davis v. Robert*, 192 F. Supp. 3d 847, 858 (E.D. Mich. 2016) (“[A] person of ordinary firmness would likely be deterred from participating in protected activity by the prospect of an influential public official endangering his or her economic livelihood, irrespective of whether a third party was necessary to, or even did, pull the proverbial trigger.”). So long as those chilling the exercise of St. Vincent’s rights “have the power to substantially affect” St. Vincent’s “ability to” exercise those rights, the threats meet this prong. *Fritz*, 592 F.3d at 726.

Here, St. Vincent has demonstrated that the Board openly stated its desire to find some other party to provide refugee services. These are not empty words: The Board terminated the \$4,500 grant that it funded the year before. It only narrowly approved the \$128,000 contract renewal after the Human Services Committee voted to cut the contract short. And the Board has since denied that the \$40,000 contract even exists—that contract was renewed only belatedly and under threat of a potential injunction. Since St. Vincent must continue to contract with the Board and seek approval twice each year (once for the Refugee Health Services Con-

tract, once for the scope of work for the Health Center Interpreting Contract), such threats are enough to chill an ordinary person’s exercise of her constitutional rights.

C. The circumstances surrounding the denial of St. Vincent’s grant request confirm the Board’s decision was retaliatory.

Finally, there is a causal connection between the adverse action and the assertion of St. Vincent’s rights. “[R]etaliation [claims] ‘rarely can be supported with direct evidence of intent.’” *Harbin-Bey v. Rutter*, 420 F.3d 571, 580 (6th Cir. 2005) (quoting *Murphy v. Lane*, 833 F.2d 106, 108 (7th Cir. 1987)). So “temporal proximity and disparate treatment[] have been explicitly recognized by this court as being capable of proving a retaliatory motive,” in addition to “direct evidence.” *Hill v. Lappin*, 630 F.3d 468, 476 (6th Cir. 2010); *see also Thaddeus X*, 175 F.3d at 399 (“Circumstantial evidence, like the timing of events or the disparate treatment of similarly situated individuals, is appropriate.”); *Randolph v. Ohio Dep’t of Youth Servs.*, 453 F.3d 724, 737 (6th Cir. 2006) (plaintiff “satisf[ie]d her *prima facie* burden for retaliation” by showing “a temporal connection coupled with other indicia of retaliatory conduct”). All these forms of evidence are present—and dispositive—here.

Direct evidence. On November 4, 2019, multiple Commissioners stated that they had retaliatory intent. *See supra* pp. 12-15. On November 12, Commissioner Tennis and five other Commissioners voted against renewal of the contract, even after being informed that doing so would violate an existing injunction. Tennis reiterated the motive:

I don't think anyone on this board is questioning the quality of services or the wonderful work St. Vincent's has done for the refugee community. The issue at hand is regarding other areas of St. Vincent's work and litigation pending against the State that goes against the principles of many of us on this board.

ECF No. 17-12 at PageID.366.

Temporal evidence. Just one week later, the Human Services Committee voted to strip grant funding from St. Vincent. ECF No. 17-13 at PageID.393; ECF No. 17-1 at PageID.239-240. A week after that, the full Board voted to approve that recommendation. ECF No. 1-1 at PageID.36-PageID.45.

Disparate Treatment. St. Vincent was singled out as the lone agency among 32 agencies that did not receive a Community Agency Grant. *See id.* It was the only one of 390 applicants in 10 years who received less than the controller recommended, absent extenuating circumstances. And the Board approved an *identical* grant for St. Vincent the prior year.

Compare Third Harris Decl., Ex. B (2019 grant application) *with* Third Harris Decl., Ex. C (2020 grant application). This evidence easily establishes a *prima facie* case of retaliation.

“Once the plaintiff has met his burden of establishing that his protected conduct was a motivating factor behind any harm, the burden of production shifts to the defendant. If the defendant can show that he would have taken the same action in the absence of the protected activity, he is entitled to prevail on summary judgment.” *Thaddeus-X*, 175 F.3d at 399 (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). The burden thus shifts to the Board to show that it would have taken the same actions but for St. Vincent’s religious beliefs and the *Buck* litigation. The Board cannot hope to make that showing.

Previously, the Board has asserted three different reasons that it claims justified the grant denial. First, the Board claimed that it denied the grant because St. Vincent sought funds for “overhead” (i.e. staff salaries). ECF No. 16 at PageID.159. But the Board reallocated the funding to another organization (Refugee Development Center) which also planned to spend it on staff salaries. Ex. 7, ECF No. 16-7 at PageID.207 (RDC proposed to spend only \$1,000 out of \$12,250 on “direct services”

and the remainder on salaries and benefits). And the Board approved the same grant last year to St. Vincent—even though the entire grant was proposed for staff salaries and benefits. *Compare* Third Harris Decl., Ex. B (2019 grant application) *with* Third Harris Decl., Ex. C (2020 grant application). Nor were staff salaries discussed at the Committee meeting where St. Vincent’s grant was reallocated.¹¹

The Board avoided this conundrum by claiming that the Establishment Clause prohibited a grant to St. Vincent. ECF No. 19 at PageID.445 Yet the Supreme Court “has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.” *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). Rather, excluding a religious charity from a government grant program because of its religious beliefs violates the Free Exercise Clause. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

¹¹ The Board’s claim to prioritize “basic needs” is also irreconcilable with its actions, as discussed above. *See supra* pp. 21-32.

Even if the Board's Establishment Clause argument were somehow plausible, the Board's prior actions (funding St. Vincent) and current actions (funding other religious charities) prove it is pretextual. *See* ECF No. 1-1 at PageID.37-38 (giving grants to religious agencies, including Advent House and Cristo Rey). St. Vincent is entitled to summary judgment on its retaliation claim based upon the Community Agency Grant denial alone.

Although it is unnecessary, St. Vincent can also establish that the treatment of its other contracts was retaliatory. The Board openly denigrated St. Vincent's religious conduct and involvement in the *Buck* litigation and expressed a desire to stop working with St. Vincent, or at least to give it time to "come around." Board members asked the Health Department to explore other alternatives to working with St. Vincent. Chairman Tennis even acknowledged taking the "unusual" step of contravening the recommendations of the County Health Board, despite the fact it might have legal consequences. ECF No. 17-11 at PageID.359. This is the rare "direct evidence" case of retaliation—the Board stated its reasons for threatening St. Vincent's contracts. Thus, the burden moves to

the Board to prove that St. Vincent's protected expression was not the but-for cause of these threats.

The Board cannot demonstrate that it would have put St. Vincent's contracts at risk for any other reason. The Board approved the Refugee Health Services contract only after being told (1) it had no immediate alternative and (2) might be violating an existing injunction. *See supra* pp. 15-16. The Board then renewed the scope of work for the Health Center Interpreting contract only under threat of injunction. *See supra* p. 19. All these facts demonstrate that St. Vincent's contracts were put at risk, and continue to be at risk, because of the Board's disagreement with St. Vincent's religious policies and the *Buck* litigation. St. Vincent has satisfied all three prongs of the retaliation test.

III. St. Vincent is entitled to relief.

Damages, declaratory relief, and a permanent injunction are necessary to remedy St. Vincent's constitutional injuries, and this Court can award all three. *See, e.g., Cole v. City of Memphis*, 108 F. Supp. 3d 593, 608 (W.D. Tenn. 2015), *aff'd sub nom. Cole v. City of Memphis*, 839 F.3d 530 (6th Cir. 2016) (awarding damages, declaratory relief, and a permanent injunction under § 1983).

A. St. Vincent is entitled to declaratory relief.

When determining whether declaratory relief is appropriate, the Sixth Circuit applies the five *Grand Trunk* factors. *See Grand Trunk W. R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984). These factors are:

(1) [W]hether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of “procedural fencing” or “to provide an arena for a race for res judicata”; (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

Savoie v. Martin, 673 F.3d 488, 495-96 (6th Cir. 2012). “Although the above formulation indicates the court should balance the five factors, we have never indicated the relative weights of the factors. Instead, the relative weight of the underlying considerations of efficiency, fairness, and federalism will depend on facts of the case.” *United Specialty Ins. Co. v. Cole’s Place, Inc.*, 936 F.3d 386, 396 (6th Cir. 2019) (cleaned up) (citing *W. World Ins. Co. v. Hoey*, 773 F.3d 755, 759 (6th Cir. 2014)). “The essential question is always whether a district court has taken a good look at

the issue and engaged in a reasoned analysis of whether issuing a declaration would be useful and fair.” *Hoey*, 773 F.3d at 759-60.

Applied to this case, the *Grand Trunk* factors favor declaratory relief. Regarding the first two factors, declaratory relief would settle the key legal dispute between the parties: whether the Board’s actions constitute unconstitutional religious targeting. *See Cole*, 108 F. Supp. 3d at 604 (finding declaratory relief appropriate when “a single declaration” that the challenged conduct is “unconstitutional . . . would provide a common answer” to all the legal claims brought in a class action). And even when damages are also appropriate, declaratory relief can be useful to simplify the case. *Id.* at 605 (“Although each class member must still prove his or her own individual damages, issuance of declaratory relief determines the outcome of the preceding elements and settles the controversy . . . for all class members.”).

“The third [*Grand Trunk*] factor is meant to preclude jurisdiction for ‘declaratory plaintiffs who file their suits mere days or weeks before the . . . ‘natural plaintiff’ and who seem to have done so for the purpose of acquiring a favorable forum.” *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 558 (6th Cir. 2008) (quoting *AmSouth Bank v. Dale*, 386 F.3d 763,

788 (6th Cir. 2004)). Here, there is no “race to the courthouse”: this is the only lawsuit and St. Vincent *is* the natural plaintiff. *See Cole*, 108 F. Supp. 3d at 605.

The fourth factor—friction with state courts—is similarly a non-issue. There are no state law claims and no competing state case. *See Am. Home Assur. Co. v. Evans*, 791 F.2d 61, 64 (6th Cir. 1986).

Finally, the fifth *Grand Trunk* factor (whether there is a better and more effective alternative forum) also favors declaratory relief. “[T]he federal forum is well-suited to declare the constitutionality” of the Board’s conduct and “[t]his is not a case where a state court judgment or indemnity action would provide a ‘better or more effective’ remedy for the City’s constitutional violations.” *Cole*, 108 F. Supp. 3d at 606 (citation omitted).

For the reasons above, declaratory relief would be an appropriate remedy.

B. St. Vincent is entitled to \$4,500 in damages.

“The basic purpose of the § 1983 damages is to compensate injured persons for their actual harm.” *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 601 (6th Cir. 2006) (cleaned up); *Memphis Cmty. Sch. Dist. v. Stachura*,

477 U.S. 299, 305-07 (1986) (“Accordingly, when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.”). Here, St. Vincent suffered the direct loss of \$4,500 (the value of the Community Agency Grant) due to the Board’s unconstitutional targeting, and requests that the Court award damages in that amount.¹²

C. St. Vincent is entitled to permanent injunctive relief.

The Sixth Circuit has made clear that “[u]nder well-settled law, a party is entitled to a permanent injunction if it can establish that [1] it suffered a constitutional violation and [2] will suffer continuing irreparable injury for which there is no adequate remedy at law.” *Women’s Med. Profl Corp. v. Baird*, 438 F.3d 595, 616 (6th Cir. 2006) (cleaned up); *Am. Civil Liberties Union of Ky. v. McCreary Cty.*, 607 F.3d 439, 445 (6th Cir.

¹² Although St. Vincent could seek additional damages, such as for diverted staff time and reputational damage, at this juncture it merely asks for the value of the grant it was unconstitutionally denied. See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305-07 (1986) (Section 1983 compensatory damages may include “not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation . . . personal humiliation, and mental anguish and suffering.” (cleaned up)).

2010) (same); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998) (same).

1. The Board violated St. Vincent's First Amendment rights.

Above, St. Vincent showed actual success on the merits of its constitutional claims. As explained above, the Board acted against St. Vincent—and threatened further action—on account of St. Vincent's sincere religious beliefs, and its decision to protect those beliefs. These actions violated the First Amendment. *Supra* pp. 21-43.

2. The Board's threats to defund St. Vincent and find a different provider make permanent injunctive relief necessary.

Permanent injunctive relief is appropriate when “Plaintiffs . . . will suffer continuing irreparable injury if the violation continues.” *McCreary Cty.*, 607 F.3d at 449; *Kallstrom*, 136 F.3d at 1070 (“[B]ecause the City’s decision . . . places the officers and their families at risk of irreparable harm that cannot be adequately remedied at law, the officers are entitled to injunctive relief.”). A plaintiff must thus show (1) irreparable harm, (2) the ongoing “risk of [further] irreparable harm,” and (3) no adequate remedy at law. *Id.*

First, as the Sixth Circuit has held, the loss of First Amendments rights is always an irreparable harm. *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014).

Second, the Board's threat to take future action against St. Vincent—by seeking to find a new refugee services provider, by continuing to disparage St. Vincent, and by keeping open the possibility that St. Vincent will continue to be denied funding in the future—all confirm that absent permanent injunctive relief, St. Vincent will continue to suffer irreparable harm. The Board's actions create a cloud of uncertainty over the future of St. Vincent's partnership with the County to serve refugees.

Third, St. Vincent does not have an adequate remedy at law. Monetary relief is insufficient. Irreparable injuries are “by definition, not compensable” by money. *United States v. Miami Univ.*, 294 F.3d 797, 819 (6th Cir. 2002) (“[M]oney damages are insufficient relief.”). Similarly, while declaratory relief will resolve the legal questions surrounding the Board's past conduct, the threats of future irreparable harm are likely to continue. Indeed, even after multiple letters to the Board pointing out all the ways in which its conduct violated state and federal law, it took the filing of this lawsuit—and the threat of a potential preliminary injunction—for

the Board to even admit that the Health Center Interpreter Contract *exists*. *Supra* p. 19. *See Miami Univ.*, 294 F.3d at 820 (finding a cease and desist order inadequate because it “requires new enforcement measures each time a violation occurs” and is “inadequate” because such “piecemeal enforcement leads to intermittent [constitutional violations] that would otherwise be protected by permanent injunctive relief”).

In short, the Board’s targeting of St. Vincent’s refugee services programs will continue to chill the agency’s religious exercise as additional contracts come up for renewal, and as litigation continues in *Buck*. Only injunctive relief will ensure that the Board will not continue doing what it instructed the Health Department to do: find an alternative to St. Vincent and stop contracting with what the Board considers a “morally bankrupt” religious charity.

CONCLUSION

The Board violated the Constitution and federal statutes. It harmed St. Vincent. It announced plans to continue doing so. Declaratory, injunctive, and monetary relief are needed to prevent further violations and safeguard critical services for refugees in Ingham County. This Court should grant St. Vincent’s motion.

Dated: March 31, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This memorandum complies with the word limit of L. Civ. R. 7.2(b)(i) because, excluding the parts exempted by L. Civ. R. 7.2(b)(i), it contains 10,493 words. The word count was generated using Microsoft Word 2019.

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