UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BETHANY CHRISTIAN SERVICES; BETHANY CHRISTIAN SERVICES OF MICHIGAN; and BETHANY CHRISTIAN SERVICES USA, LLC,

Plaintiffs,

v

SUSAN CORBIN, in her official capacity as director of the MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY; and POPPY SIAS HERNANDEZ, in her official capacity as Executive Director of the OFFICE OF GLOBAL MICHIGAN,

Defendants.

Case No. 1:24-cv-0922-JMB-PJG

HON. JANE M. BECKERING

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DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT (ECF NO. 1)

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants move for dismissal of Plaintiffs' Complaint (ECF No. 1). In support of said motion, Defendants state the following:

1. This Court should dismiss Plaintiffs' claims because Plaintiffs have failed state a claim upon which relief can be granted.

2. Plaintiffs have not sufficiently pled a viable claim against Defendants under 42 U.S.C. § 1983 because they have failed to allege actionable conduct by Defendants that proximately caused any of Plaintiffs' rights to be violated.

3. Plaintiffs have also failed to plead facts establishing standing.

4. Finally, Plaintiffs have failed to sufficiently plead a violation of their rights under the First Amendment to the United States Constitution.

5. On November 25, 2024, in accordance with Local Rule 7.1(d)(i), Defendants confirmed that Plaintiffs will oppose this motion.

WHEREFORE, for these reasons and those in the accompanying brief in support, Defendants request that this Court dismiss Plaintiffs' Complaint in its entirety with prejudice, vacate the Stipulated Preliminary Injunctive Order (ECF No. 35), and award Defendants any appropriate costs and fees.

Respectfully submitted,

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Dated: November 26, 2024

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DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT (ECF NO. 1)

ORAL ARGUMENT REQUESTED

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Dated: November 26, 2024

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CONCISE STATEMENT OF ISSUE PRESENTED

1. Have Plaintiffs failed to state a claim upon which relief can be granted?

INTRODUCTION

Bethany Christian Services brings weighty claims of religious animus against Defendants Susan Corbin and Poppy Sias Hernandez—claims ultimately unsupported by factual allegations. Bethany broadly claims that it was excluded from grant funding because of its religiously-motivated hiring practices. From this premise, Bethany claims violations of its rights under the First Amendment.

The alleged facts, however, do not support Bethany's broad claims. Bethany fails to allege facts supporting its initial premise that it has been excluded from receiving grant funding based on its religious practice: by its own admission, Bethany has continued to receive grant funding. Instead, Bethany challenges the decision to award grants to another organization, rather than to Bethany. And while Bethany challenges specific language contained in the bid solicitations, the challenged language is neutral and generally applicable. Finally, Bethany alleges no facts demonstrating actual animus toward Bethany's religious belief.

Aside from Bethany's failure to adequately plead a violation of its First Amendment rights, Bethany's complaint also does not establish threshold pleading requirements. Bethany fails to state a claim under 42 U.S.C. § 1983 against the named Defendants. Bethany also lacks standing, as its complaint establishes neither causation nor redressability.

At bottom, Bethany contests the decision to award certain grants to other organizations, but that decision—which Bethany does not allege was made by the named Defendants—did not violate Bethany's constitutional rights. Thus, this Court should dismiss Bethany's claims.

STATEMENT OF FACTS

Because Defendants bring their motion to dismiss under Rule 12(b)(6), they accept all of Bethany's well-pleaded factual allegations as true. Thus, the facts presented here are taken from Bethany's complaint and supporting documentation.

Bethany has provided refugee services, in part, thorough governmental grants.

Bethany asserts that it has provided different types of refugee services funded by various types of governmental grants. (*See* ECF No. 1, PageID.5–6.) It also asserts that Michigan's Office of Global Michigan (OGM) distributes funds from the federal government for those services. (*Id.*, PageID.6–7, ¶¶ 27, 30.) And Bethany asserts it has had contractual agreements with OGM to provide funding for those services for several years. (*Id.*, ¶¶ 28, 31.)

Bethany requires that individuals agree with and sign a statement of Christian faith as a term and condition of employment.

Affirming a statement of Christian faith, in writing, is a requirement of working at Bethany. (ECF No. 1, PageID.8, 11, ¶¶ 39–40, 53; ECF No. 1-7, PageID.198.) Bethany asserts it has "long required" employees to make this written affirmation. (*Id.*, PageID.8, ¶ 30.) But in late 2023, OGM was made aware of some changes in this practice. (*Id.*, PageID.13, ¶ 67.) Indeed, OGM informed Bethany that had received multiple complaints from current and former staff at Bethany that exceptions to the requirement of signing the statement of faith would no longer be granted. (ECF No. 1-13, PageID.222.) Bethany subsequently acknowledged that

in 2023 it "adjusted [its] employment practices by discontinuing exception requests." (ECF No. 1-12, PageID.214.) A call was scheduled with OGM and Bethany to discuss the changes to the hiring practices and the resulting loss of staff. (ECF No. 1, PageID.13–14, ¶¶ 67–68, 73.) Bethany alleges that Defendant Hernandez told Bethany on the call that the changes to its hiring practices "were 'inconsistent with our state values.'" (*Id.*, PageID.13, ¶¶ 68–69, 71–72.)

The changes in hiring practices at Bethany also significantly impacted its employees. According to Bethany, staff began speaking out against Bethany's employment practices. (ECF No. 1, PageID.12, ¶¶ 60–61, 63.) These employees included managers of Bethany's Refugee & Immigrant Services Division who "oversaw and directed" that division. (*Id.*, ¶¶ 61–62.) These managers then left Bethany in December 2023 over the change in practices. (*Id.*, PageID.13, ¶¶ 65–66.)

The departure of these division leaders and "strong partners" was a concern for OGM. (ECF No. 1, PageID.14, ¶ 73; ECF No. 1-13, PageID.223.) OGM also informed Bethany that several community partners had expressed concerns about Bethany's policies, about whether clients would feel safe and welcome, and about the departure of "vital partners" from Bethany's management ranks. (ECF No 1-13, PageID.222–223.) Bethany acknowledges this "unusual staff turnover," at least at its Grand Rapids offices. (ECF No. 1, PageID.219, ¶¶ 99–100.) OGM and the community partners were concerned about replacing the institutional knowledge of these managers, and Bethany employees also shared concerns about replacing these leaders. (ECF No. 1-13, PageID.223.)

In addition to the management-level employees who left Bethany, OGM also received concerns and complaints from Bethany employees and clients. Employees expressed to OGM a desire to leave Bethany due to a culture that reminded them of countries that they themselves fled, or due to fears of being disowned by the communities they served and represented if they signed the statement of faith. (ECF No. 1-13, PageID.223.) These departures and potential additional departures made OGM "concerned about the integrity of the programming and the consistency of services" being delivered by Bethany. (*Id.*)

Following guidance from the United States Department of Health and Human Services, OGM includes language in requests for grant proposals about seeking to employ staff representative of the population served.

Bethany asserts that in 2024, OGM added language to its requests for proposals that required grant applicants to create hiring opportunities for staff that represent the cultures, national origins, and religions of the populations that are to receive refugee services. (ECF No. 1, PageID.1, 20, ¶ 107.) The inclusion of this language followed guidance issued by the United States' Department of Health and Human Services' Office of Refugee Resettlement (ORR) that promoted "inclusivity and equitable access to all services and programming." (Attachment A, Policy Ltr. 24-02, p 1.)[1] As noted by Bethany, ORR provides funding for the refugee services Bethany sought to provide. (ECF No. 1, PageID.5–7, ¶¶ 21, 27, 30.)

[1] This court can take judicial notice of public records under Fed. R. Evid. 201(b) without converting this Rule 12(b)(6) motion to dismiss into a Rule 56 summary judgment motion. *Jackson v. City of Columbus,* 194 F.3d 737, 745 (6th Cir. 1999), *overruled on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

The policy letter contains prohibitions of discrimination, as well as required and recommended actions for grant recipients. (Attach. A, pp. 2–3.) Notably, ORR recommended that all grant recipients "eliminate barriers that may prevent the full participation of eligible individuals and groups," "[r]ecruit people with lived experience to serve as program leadership or staff, on advisory boards or governing structures, or as consultants," ensure that their staffing "include perspectives of those with lived experience," and "[t]rain staff to provide culturally responsive service delivery." (*Id.*)

After not receiving all the grant funding it sought in 2024, Bethany protested its bid denials and filed the present action.

In 2024, Bethany did not receive all the grant funding it sought for refugee services, and some grants went to other refugee-service providers. (ECF No. 1, PageID.21–22, ¶ 116, 118–119.) Bethany acknowledges it was awarded a number of grants for refugee services in 2024, both from OGM and from the federal government on OGM's recommendation. (*Id.*, PageID.23, ¶ 129.) But Bethany protested the grant awards that went to other entities. (*Id.*, PageID.22, ¶¶ 120–122.) This action then also followed.

STANDARD OF REVIEW

A motion to dismiss for "failure to state a claim upon which relief can be granted" is governed by Fed. R. Civ. P. 12(b)(6). Such a motion requires assessment of the facial sufficiency of the compliant. The court accepts the well-pleaded allegations as true, and dismissal under Rule 12(b)(6) is proper only if no relief could be granted under any set of facts consistent with the allegations. *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996). A complaint must contain either direct or inferential allegations establishing all the material elements of a claim to sustain a recovery under some viable legal theory. *Allard v. Weitzman, (In Re DeLorean Motor Corp.)*, 991 F.2d 1236, 1240 (6th Cir. 1993).

Thus, Bethany bears the burden of setting forth sufficient allegations to avoid dismissal. In *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Papasan v. Allain*, 478 U.S. 265, 286 (1986)), the Supreme Court held that Fed. R. Civ. P. 8 requires that pleadings contain a "short and plain statement of the claim showing that the pleader is entitled to relief," and "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." The Court has also noted that a complaint offering "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not suffice if it contains "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557. Finally, a plaintiff must present well-pleaded allegations showing that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676.

ARGUMENT

I. This Court should dismiss Bethany's complaint because Bethany has failed to state a claim upon which relief can be granted.

As contended below, Bethany has failed to state a claim against Defendants upon which relief can be granted. In short, Bethany fails to plead a viable claim against Defendants under 42 U.S.C. § 1983, fails to establish standing, and fails to sufficiently plead a violation of their First Amendment rights. Thus, Defendants ask this Court to dismiss Bethany's complaint.

A. Bethany has failed to plead a viable claim under 42 U.S.C. § 1983 against Defendants.

As will be discussed further below, Bethany's First Amendment rights have not been violated. But Bethany's claims fail at an earlier, threshold, stage because Bethany has failed to plead a viable claim against Defendants under 42 U.S.C. § 1983.

For a claim under § 1983, a plaintiff must allege conduct by a person acting under color of state law that proximately caused a deprivation of a federally protected right. *See Summum v. City of Odgen*, 297 F.3d 995, 1000 (10th Cir. 2002). The plaintiff must "show that the [institutional] action was *taken with the requisite degree of culpability* and must demonstrate *a direct causal link* between the [institutional] action and the deprivation of federal rights." *Bd. of County Comm'rs. of Bryan County, Ok v. Brown*, 520 U.S. 397, 404 (1997) (emphasis added).

And for an official-capacity claim, a plaintiff must generally allege that the deprivation of their rights was attributable to a written custom or policy. *See*

Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 661, 694–695 (1978). But there is a preliminary step in cases where a plaintiff wishes to designate the decision of an official policymaker, as opposed to a formally adopted rule, as the state "custom or policy" that caused their alleged injuries. The plaintiff must identify the policymaker's choice and show that the choice was "a deliberate choice to follow a course of action" that was "made from among various alternatives by the official . . . responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). Determining whether the official had policymaking authority in the relevant area "is a question of state law." *City of St Louis v. Praprotnik*, 485 U.S. 112, 124 (1988).

Even if a plaintiff satisfies his or her burden under *Pembaur*, however, the plaintiff must still plead facts showing both that the institution is at "fault" for the policy or custom and that the policy or custom "caus[ed]" their constitutional injury. See *Brown*, 520 U.S. at 404–405. If a plaintiff cannot establish both, then they cannot maintain their claim. Here, Bethany cannot establish either.

1. Bethany has not expressly identified a written policy or custom attributable to Defendants.

The "policy" challenged by Bethany is one allegedly "requiring all social services providers to create opportunities to hire individuals of the same religion as the population being served."[2] (ECF No. 1, PageID.27, ¶ 155.) But this alleged policy does not, on its face, contain an explicit requirement that Bethany hire anyone of a particular religion. Even overlooking that fact, however, Bethany does not allege that this "policy" was adopted or promulgated by the named Defendants, Susan Corbin and Poppy Sias Hernandez. Nor do they allege that Defendants ordered anyone else to adopt, implement, or enforce this policy. Thus, Bethany has failed to plead that the purported policy it challenges is attributable to Defendants.

2. Bethany has not otherwise identified a policy or custom that proximately caused its rights to be violated.

Bethany also fails to allege that either named Defendant made any deliberate choice from among alternatives to follow a course of action. In fact, Bethany does not allege a decision by either Defendant that caused Bethany's rights to be violated. Bethany does not allege that Corbin or Hernandez made a decision not to select Bethany to receive a grant, or that that either Defendant made a decision to select another entity to receive a grant. Nor do they allege that either Defendant

[2] In its prayer for relief, Bethany also mentions a "policy of requiring and/or pressuring Bethany Christian to abandon its sincerely held religious beliefs." (ECF No. 1, PageID.32.) But aside from this single mention, Bethany otherwise fails to allege or support the existence of such a policy.

ratified or approved any alleged illegal action taken by someone else. *See Thomas v. City of Chattanooga*, 398 F.3d 429, 429 (6th Cir. 2005).

With respect to Defendant Corbin, there is no allegation against her, and she is mentioned only twice—once in the caption and once in the section of the complaint describing the parties. For Defendant Hernandez, Bethany alleges only that she is the Executive Director of OGM and that she made a statement about state values, participated in a call and "contended that [Bethany] had changed its employment policy and eliminated waivers of the Statement of Faith," and did not respond to an e-mail. (ECF No. 1, PageID.1, 3, 13–14, 25, ¶¶ 5, 71–72, 143.) None of these alleged actions, even accepted as true, constitute a deliberate choice to follow a particular course of action that caused Bethany's alleged injuries.

Thus, Bethany has not pled a viable claim because it has not pled facts showing that the Defendants mandated or directed that Bethany's rights be violated. Instead, Bethany seeks to impose liability on Defendants Corbin and Hernandez based on their titles. Bethany does not allege which policy either Defendant set, and it otherwise fails to allege actionable conduct by Corbin or Hernandez. Merely acting in a supervisory capacity or a leadership role is insufficient by itself to give rise to liability. *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999)

Finally, Bethany has not alleged that any practice was so widespread so as to have the force of law. *See Brown*, 520 U.S. at 404. Thus, Bethany has failed to plead facts that would allow the Court to draw a reasonable inference that

Defendants are liable for the alleged violations of Bethany's constitutional rights, and the Court should therefore dismiss the claims. *See Iqbal*, 556 U.S. at 678 (citing *Bell Atlantic Corp.*, 550 U.S. at 556).

B. Bethany lacks standing to pursue its claims.

In addition to failing to properly plead a claim under § 1983, Bethany also has not adequately pled facts establishing standing. Bethany has failed to establish standing on two levels. First, Bethany has not pled facts establishing either causation or redressability, two of the three required elements of standing. Second, Bethany lacks standing under well-established Michigan law holding that a disappointed bidder lacks standing to challenge the award of a contract to another bidder. Because Bethany has not established standing, dismissal is appropriate. *See Mackinac Ctr. for Pub. Policy v. Cardona*, 102 F.4th 343, 350–351 (6th Cir. 2024) (affirming district court's order dismissing due to lack of standing).

1. Bethany cannot establish causation or redressability for purposes of standing.

Standing requires three elements: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The plaintiff bears the burden of establishing all three elements, and at the pleading stage, "must clearly allege facts demonstrating each element." *Id.* (cleaned up).

Bethany's complaint is vague as to the injury it alleges. Count I alleges that OGM has infringed on Bethany's free-exercise rights by "conditioning the receipt of funding for refugee programs on whether Bethany Christian abandons its religious practice of hiring other Christians." (ECF No. 1, PageID.26, ¶ 148.) But neither that count, nor the three subsequent counts identify specific grant funding that was withheld based on Bethany's hiring practices. In the "Background" section of its complaint, however, Bethany does allege that OGM denied Bethany's bids for supplemental services contracts in the Kalamazoo, Grand Rapids, and Traverse City areas.[3] (*Id.*, PageID.21–22, ¶¶ 116, 118–119.) To the extent that Bethany alleges an injury in fact, then, the denial of these grants is the injury alleged.

Even accepting that Bethany has adequately pled an injury in fact, Bethany has failed to establish causation. As discussed above, Bethany has not alleged *any* conduct by Defendant Corbin and has alleged only minimal conduct by Defendant Hernandez. Beyond failing to identify a custom or policy for purposes of § 1983, then, Bethany has also failed to establish that Defendants caused Bethany's alleged injuries. As a result, Bethany has not pled facts establishing the second required element of standing.

Bethany also cannot satisfy the third element—redressability. Bethany has not adequately alleged that, even if this Court granted the relief sought in the

[3] While Bethany's complaint uses the term "supplemental services," these grants are referred to as "Refugee Social Services" in the RFPs and contracts. (*See* ECF No. 1-4, PageID.164.) For ease of reference to the complaint, this brief will adopt the terminology used in Bethany's complaint.

complaint, the results of these grant awards would be different. In its prayer for relief, Bethany asks this Court for broad declaratory relief, declaring any restriction on Bethany's hiring practices unconstitutional. (ECF No. 1, PageID.32.) Bethany also seeks injunctive relief prohibiting OGM from pressuring Bethany to change its religious practices and ordering OGM to "re-bid the contracts for refugee services without penalizing, or including any contractual requirement that has the effect of penalizing, Bethany Christian for its sincerely held religious belief that hiring co-religionists is essential to carrying out Bethany Christian's religious mission." (*Id.*, PageID.33.) Assumedly, "the contracts for refugee services" here refers to the grants for refugee supplemental services, the only grants that Bethany alleges it was denied. Nowhere in its complaint, however, does Bethany allege that OGM denied the supplemental services grants because of Bethany's religiously-motivated hiring practices. Nor does the complaint allege that, were the grants to be re-bid without any alleged consideration of Bethany's hiring practices or without any of the challenged language in the RFPs, Bethany would be awarded the grants. In other words, Bethany has not pled redressability.

Bethany bears the burden of "clearly alleg[ing] facts demonstrating each element" of standing. *Spokeo*, 578 U.S. at 338. Because Bethany's complaint does not clearly allege facts establishing redressability, its claims must be dismissed.

2. Bethany lacks standing to challenge the awarding of a grant to another service provider.

Bethany appears to challenge the bidding process for refugee-service grants, the process for awarding a grant to another service provider, or the decision to award a grant to another provider. (ECF No. 1, PageID.1–2, 7, 19–22, 30, ¶¶ 35, 104–105, 109, 116, 118–119, 122, 181.) But Michigan law has long held that disappointed bidders like Bethany lack standing to bring such a challenge to the bidding process. *Groves v. Dep't of Corr.*, 811 N.W.2d 563, 567–568 (Mich. Ct. App. 2011); see also *Walbridge Aldinger Co. v. City of Detroit*, 495 F. Supp 2d 642, 643 (E.D. Mich. 2007) and *St. Augustine's Nat'l. Found., Inc. v. Metcalf*, No. 08-11352, 2008 WL 2546583, at *3–4 (E.D. Mich. June 20, 2008) (each recognizing the same).

C. Bethany has not adequately pled a violation of its First Amendments rights.

Beyond the threshold concerns of Bethany's failure to adequately state a claim under § 1983 and to establish standing, Bethany's complaint also fails to adequately allege a violation of Bethany's First Amendment rights. Bethany fails to allege facts establishing either a free-exercise claim or freedom of association claim.

1. Bethany's complaint does not adequately state a free-exercise claim.

Counts I through III of Bethany's complaint each relate to an element of the same claim—a violation of the First Amendment's Free Exercise Clause. Count I alleges that OGM burdened Bethany's free-exercise rights by excluding Bethany from an otherwise available government benefit based on Bethany's religious

practice. (ECF No. 1, PageID.26, ¶¶ 148–149.) Count II alleges that OGM's purported policy—the bid-solicitation language regarding employment opportunities—is not neutral and generally applicable. (*Id.*, PageID.27–28, ¶¶ 155–169.) Finally, Count III alleges that OGM's purported policy is not neutral because it is specifically targeted at Bethany's religious practice. (*Id.*, PageID.29–30, ¶¶ 177–184.)

Even accepting Bethany's factual allegations as true, Bethany's complaint fails to plead a violation of its free-exercise rights. Looking first to Count I, Bethany has failed to adequately allege that either named Defendant, or OGM generally, placed a burden on its religious expression. As to Count II, the RFP language that Bethany challenges is neutral and generally applicable. And as to Count III, Bethany has not pled facts demonstrating that OGM's purported policy was motivated by animus toward Bethany's religious beliefs or practices.

a. Bethany has not sufficiently alleged a burden on the free exercise of its religious beliefs.

To succeed on a free-exercise claim, Bethany must satisfy the "preliminary inquiry" of showing that the government has burdened the free exercise of its religious beliefs. *See United States v. Lee*, 455 U.S. 252, 256 (1982). Bethany, in its complaint, has not made this showing.

According to Count I of Bethany's complaint, Bethany's claim is predicated on the alleged withholding of an otherwise-available government benefit based on religious identity or practice. (ECF No. 1, PageID.26, ¶ 146 (*quoting Trinity*

Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 458 (2017)).) In other words, Bethany does not allege that state law or policy either bans its religiously-required actions or mandates religiously-prohibited actions. *Cf. Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533–534 (1993) (banning ritual animal sacrifice); *Lee*, 455 U.S. at 254 (requiring compliance with social security). Instead, Bethany claims that OGM has withheld otherwise-available benefits—grant funding—based on Bethany's religiously-motivated hiring practices. (ECF No. 1, PageID.26, ¶¶ 148–149.)

Bethany's complaint, however, does not contain factual allegations establishing that any grant funding has been withheld based on Bethany's religious identity or practices. Bethany concludes, based on the challenged RFP language, that "OGM is conditioning the receipt of funding for refugee programs on whether Bethany Christian abandons its religious practice of hiring other Christians." (*Id.*) But the factual allegations do not support this conclusion.

Bethany, throughout its complaint, discusses three categories of grants: (1) grants for reception and placement services, (2) grants for supplemental services, and (3) grants for services to Unaccompanied Refugee Minors (URM). (*Id.*, PageID.5–6, ¶¶ 19–29.) As to the reception and placement grants, Bethany admits that it received the federal contracts it sought, with the support of OGM. (*Id.*, PageID.21, ¶¶ 113–114; ECF No. 1-5, PageID.194.) Similarly, as to the URM

grants, Bethany admits that OGM awarded Bethany the six URM contracts it sought.[4] (*Id.*, PageID.23, ¶ 129.)

Per the facts pled in Bethany's complaint, then, Bethany has continued to receive grant funding from OGM. Under these alleged facts, OGM has clearly not instituted a policy which bars Bethany from grant funding based on its religious beliefs and practice.

Bethany emphasizes, however, that OGM did not award Bethany the supplemental services grants for which it also bid. (ECF No. 1, PageID.21–22, ¶¶ 116, 118–119.) But Bethany does not allege facts establishing that its religiously-motivated hiring practices were the reason that OGM did not award Bethany these grants. Bethany points to the RFP language relating to employment practices, (*id.*, PageID.20, ¶ 107), but Bethany makes no factual allegation supporting the conclusion or inference that Bethany's employment practices were the reason that it lost its bids. Indeed, the fact that Bethany *was* awarded other grants refutes the allegation that language was added to the RFPs to exclude Bethany from receiving grants, and it would indicate that Bethany's hiring practices were *not* the basis for the denial of the supplemental services contracts. (*See id.*, PageID.30, ¶ 182.)

Bethany also alleges that OGM issued bids "off-cycle," changed its bid-submission process, and did not immediately respond to its appeal. (*Id.*, PageID.30,

[4] As to the URM grants, Bethany alleges that OGM continues to "target" Bethany by including the challenged RFP language in the URM contracts and by not yet sending three of the six contracts to Bethany for signing. (ECF No. 1, PageID.23–24, ¶¶ 130–132.) But these alleged actions do not demonstrate the withholding of funding—Bethany was awarded the grants.

¶ 181.) While these allegations are indicative of Bethany's various suspicions, however, they do not establish that Defendants, or OGM, denied Bethany grant funding based on its hiring practices. *See Bell Atlantic Corp.*, 550 U.S. at 555 ("The pleading must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action.") (cleaned up).

Thus, Bethany's complaint does not adequately allege that OGM withheld otherwise-available government benefits on the basis of Bethany's religious identity, beliefs, or practices. As a result, Bethany's free-exercise claim fails at the initial, threshold inquiry because it has not shown a burden on its religious expression. Because a free-exercise claim requires, at a minimum, "that defendants burdened their religious exercise," *see Dahl v. Bd. of Trustees of W. Mich. Univ.*, 15 F.4th 728, 731 (6th Cir. 2021), Bethany's claim fails.

b. The bid-solicitation language Bethany challenges is neutral and generally applicable.

Even if Bethany had adequately pled a burden on its free-exercise rights, its claim still fails because the language it challenges is neutral and generally applicable. Bethany specifically challenges the following language included in RFPs issued by OGM in July 2024:

> When developing and implementing hiring policies, the grantee will create opportunities to employ staff that represent the cultural, national origin, and religions of the newcomer populations being served under this agreement. [(ECF No. 1-1, PageID.65.)]

Bethany, in Count II of its complaint, alleges that this language constitutes a policy created by OGM and asserts that this policy is not neutral or generally applicable.[5] (ECF No. 1, PageID.27, ¶¶ 155, 157.)

The free-exercise clause does not provide an absolute right to engage in religiously-motived conduct. *See Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). This is because the right to free exercise "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (cleaned up). "[P]ublic authorities may enforce neutral and generally applicable rules and may do so even if they burden faith-based conduct in the process." *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012).

Here, the language that Bethany challenges is facially neutral and generally applicable. As noted earlier, this language was included following the issuance of policy guidance from ORR that promoted "inclusivity and equitable access to all services and programming." (Attach. A, Policy Ltr. 24-02, p 1.) Such guidance carries weight because, as Bethany notes, ORR provides funding for the refugee

[5] Bethany makes various references to the Elliot Larsen Civil Rights Act (ELCRA), Mich. Comp. Laws § 37.2101, *et seq.*, throughout its complaint. For example, Bethany asserts that ELCRA's anti-discrimination provisions would not survive strict scrutiny as applied to Bethany's hiring practices, (ECF No. 1, PageID.17, ¶ 87), that ELCRA does not prohibit Bethany's hiring practices, (*id.*, PageID.29, ¶ 178), and that OGM has not applied ELCRA "in a faith-neutral manner," (*id.*, PageID.28, ¶ 163). Despite these references to the ELCRA, Bethany does not ultimately challenge any specific provision of the ELCRA, nor does Bethany ask this Court to declare any portion of the ELCRA unconstitutional. Accordingly, this brief also does not discuss the constitutionality of the ELCRA.

services Bethany sought to provide. (ECF No. 1, PageID.5–7, ¶¶ 21, 27, 30.) Moreover, the RFP language tasks *all* grantees with creating employment opportunities for staff that are representative of the populations served. To the extent it makes any express mention of religious belief or practice, it warns *against* religious discrimination by asking grantees to create employment opportunities for staff that represent the religious make-up of the populations they serve. Notably, the language does not require a grantee to hire a person of a particular religion. While Bethany argues that this language requires it to go against its religious beliefs, that alone does not establish a free-exercise violation. *See Employment Div.*, 494 U.S. at 879. Because this language does not "prohibit[] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," it is permissible under the free exercise clause. *See Fulton v. City of Phila.*, 593 U.S. 422, 534 (2021).

Despite its facial neutrality, Bethany alleges that this language is not neutral and generally applicable in practice. (ECF No. 1, PageID.27–28.) Bethany sets forth two arguments in support. First, Bethany asserts that the RFP language violates the rule expressed in *Fulton* that "a mechanism for individualized exemptions" renders a law not generally applicable if the government refuses to apply that exemption in cases of religious hardship. (*Id.*, PageID.27, ¶ 161 (*quoting Fulton*, 593 U.S. at 533).) Second, Bethany alleges that OGM has not applied its purported policy in a faith-neutral manner. (*Id.*, PageID.28, ¶ 163–169.)

In support of its first argument, Bethany identifies various exemptions to the anti-discrimination provisions of Michigan's Elliott-Larsen Civil Rights Act (ELCRA), asserting that these exemptions run afoul of *Fulton*. (*Id.*, PageID.27–28, ¶¶ 159–160, 162.) Exceptions to the ELCRA, however, are not relevant to whether the RFP language is neutral and generally applicable. Bethany attempts to form a connection between the two by alleging that "OGM apparently believes that this policy is required or supported by ELCRA." (*Id.*, PageID.27, ¶ 156.) But Bethany provides no support for its legal conclusion that an exemption to the ELCRA would also be an exemption to the language included in the OGM RFPs. Indeed, Bethany later asserts that "[n]o law or regulation" required the challenged language. (*Id.*, PageID.28, ¶ 166.) The ELCRA or its exemptions are simply not relevant. Because the RFP language itself contains no exemptions, Bethany's reliance on *Fulton* is misplaced.

As to its argument that OGM has not applied this purported policy in a neutral and generally applicable manner, Bethany asserts that OGM was not required to include this language and has discretion to waive it. (ECF No. 1, PageID.28, ¶¶ 164–167.) Bethany provides no support for its legal conclusion that any policy not required by law is not neutral or generally applicable. *See Iqbal*, 556 U.S. at 678 (holding that courts are not bound to accept legal conclusions as true when reviewing a complaint). To the extent that Bethany relies on the fact that OGM could choose to revoke the alleged policy, that is true of any virtually all policies and does not render the policy discretionary within the meaning of *Fulton*.

Bethany finally asserts that OGM "has a practice of allowing other groups to receive grants even though the latter discriminate on the basis of protected categories in their hiring practices and in the client groups they serve." (ECF No. 1, PageID.28, ¶ 169.) Again, however, Bethany provides no factual support for this conclusory statement. *See Iqbal*, 556 U.S. at 678 (explaining that "naked assertions devoid of further factual enhancement" are not sufficient to state a claim) (cleaned up). Ultimately, Bethany has failed to adequately allege that the RFP language it challenges is not neutral and generally applicable.

c. Defendants' alleged actions do not demonstrate religious animus.

Finally, in Count III of its complaint, Bethany argues that the challenged language, and OGM's actions generally, specifically target Bethany's religious practices and beliefs. Again, however, Bethany's complaint fails to provide factual support for this assertion.

Bethany is correct that a policy is not neutral if its intent is the "covert suppression of particular religious beliefs." *Lukumi*, 508 U.S. at 534. A facially-neutral policy cannot be "a veiled cover for targeting a belief or a faith-based practice." *Ward*, 667 F.3d at 738. To determine whether a policy lacks neutrality, a court must ask whether "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 534. This analysis requires consideration of "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.* at 540.

An intent to target religious beliefs or practices can be evidenced in various ways. Like in *Lukumi*, a regulation can be carefully tailored so as to prohibit religious conduct while permitting similar, secular conduct. *See id.* at 535–536 ("[C]areful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished."). Or statements made by the decision-making body may evidence religious animus, even when the text of the policy does not. *See, e.g., Ward*, 667 F.3d at 737 (noting that the comments and questions of the formal review committee were antagonistic toward the plaintiff's "beliefs and her religious objection"); *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n.*, 584 U.S. 617, 634 (2018) (finding that the Civil Rights Commission displayed "a clear and impermissible hostility toward the sincere religious beliefs that motivated [the plaintiff's] objection").

Here, the facts pled in the complaint do not support Bethany's assertion that Defendants have targeted Bethany based on religious animus. Again, as an initial matter, Bethany's complaint does not establish that Defendants placed any burden on Bethany's religious practice by withholding grant funding based on Bethany's religiously-motived hiring practices. Regardless, Bethany points to no facts demonstrating that the RFP language that Bethany challenges was a covert attempt to target Bethany's faith-based practice due to its religious motivation.

Unlike the law at issue in *Lukumi*, the RFP language is not carefully crafted to prohibit religiously-motivated conduct while permitting similar, secular conduct. The language requires *all* grantees to create hiring opportunities for staff who are representative of the populations served. Bethany alleges that "[t]he addition of the religious employment language only affects Bethany Christian because it is the only social-service provider that provides refugee-related services for OGM in West Michigan that has a policy limiting employment to individuals who affirm a statement of faith." (ECF No. 1, PageID.30, ¶ 184.) But the challenged language is not limited to requiring employment opportunities based on religion: it requires employment opportunities for staff who represent the cultures, national origins, and religions of the population served. Thus, even accepting Bethany's factual allegation as true, it falls well-short of demonstrating that the challenged language affects only its own hiring practices.

Nor does Bethany allege that either Defendant displayed animus toward Bethany's religious beliefs. Bethany particularly emphasizes Defendant Hernandez's alleged statement that Bethany's hiring practices were against state values. (ECF No. 1, PageID.1, 14 ¶ 72.) But recall the context in which Bethany alleges the statement was made: Bethany had changed its practice to no longer allow any waivers to the requirement of signing the Statement of Faith, effectively barring followers of other religions, or non-believers entirely, from employment. (*Id.*, PageID.13–14, ¶¶ 71–72.) Allegedly saying that this new no-exceptions policy is against state values is not an objectively unreasonable, clearly unconstitutional,

or hostile action. Bethany itself illustrated the legal complexities surrounding such a policy, devoting several pages of constitutional analysis to supporting its theory for why its practices are appropriate. (ECF No. 1, PageID.2, 16–17, ¶¶ 83, 85–88; ECF No. 1-14, PageID.225–230.) Most importantly, the alleged statement in no way "suggest[s] whether the religious ground for [Bethany's hiring practices] is legitimate or illegitimate." *See Masterpiece Cakeshop*, 584 U.S. at 639.

So, accepting the allegation as true, it at most shows that Defendant Hernandez said that potential hiring discrimination is against state values, without expressing an opinion on any religious motivation underlying such discrimination. Bethany's complaint, therefore, simply does not establish that she took any actions motivated by animus toward Bethany's religious beliefs.

Ultimately, the thrust of Bethany's complaint is that the challenged RFP language was *prompted* by Bethany's hiring practice based on Bethany's timeline of disparate events. Bethany lays out the alleged sequence of events in detail, asserting that OGM first held a meeting to discuss Bethany's hiring practices, (ECF No. 1, PageID.13–14), then sent a letter laying out its concerns, (*id.*, PageID.14–15), and subsequently issued RFPs "off-cycle" and added the challenged language to the RFPs, (*id.*, PageID.19–21).

Ultimately, Bethany has not adequately supported a conclusion that the language added to the RFPs was prompted by Bethany's hiring practice. But even if this inference were accepted as true, Bethany would *still not have shown* that OGM impermissibly targeted Bethany based on Bethany's religious beliefs or

practices. Per Bethany, OGM learned that Bethany was potentially engaging in hiring discrimination and, in response, added generally applicable language to its RFPs indicating that all grantees must create hiring opportunities for staff who are representative of the populations served. Taking steps to prevent potential hiring discrimination does not demonstrate "animosity to religion or distrust of its practices." *See Lukumi*, 508 U.S. at 547. Again, religious belief does not exempt Bethany from compliance with a neutral and generally applicable policy. *See Employment Div.*, 494 U.S. at 879. Because the language that Bethany challenges is neutral and generally applicable, Bethany has not adequately alleged a free-exercise violation.

2. Bethany's complaint also does not adequately state a freedom of association claim.

Finally, in Count IV of its complaint, Bethany claims that the challenged RFP language infringes on Bethany's First Amendment right to freedom of association. Again, however, Bethany fails to adequately plead such a claim.

As Bethany correctly recognizes, the right to freedom of expressive association "presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Accordingly, the First Amendment protects a group's right to discriminate when the group is engaged in expressive association and the forced inclusion of unwanted persons "affects in a significant way the group's ability to advocate public or private viewpoints." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

When analyzing an expressive association claim, the Sixth Circuit uses a three-part inquiry. *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010). First, a court must determine whether the group "is entitled to protection," meaning that it "engages in expressive activity that could be impaired." *Id.* (cleaned up). Second, the court must "ask whether the government action in question significantly burdens the group's expression, affording deference to an association's view of what would impair its expression." *Id.* (cleaned up). Third, the court must weigh "the government's interest in any restriction . . . against plaintiff's right of expressive association." *Id.* Bethany's claim, as pled, fails at each level of the inquiry.

To begin, Bethany has not adequately pled facts establishing that it is an expressive association. Per Bethany's website, which Bethany references in its complaint, Bethany is a nonprofit that provides a variety of social services, primarily to children and families. *About Us*, Bethany Christian Services, available at https://bethany.org/about-us; (ECF No. 1, PageID.4, ¶ 14). Thus, Bethany self-identifies as primarily a service provider, rather than a group formed "to speak, to worship, [or] to petition the government for the redress of grievances." *See Roberts*, 468 U.S. at 622. Further, as a recipient of federal DHHS funding, federal law precludes Bethany from using those funds for "explicitly religious activities," including "worship, religious instruction, or proselytization." 45 C.F.R. § 87.3(d). Nonetheless, Bethany asserts that it is an expressive association because it "has a communicative purpose—to demonstrate the love and compassion of Jesus Christ."

(ECF No. 1, PageID.31, ¶ 190.) But by this measure, any business that embraces religious values, regardless of the actual functions performed, would be an expressive association. Beyond merely assigning a "communicative" label, Bethany does not allege facts regarding how Bethany engages in expressive activity protected by the First Amendment.

Similarly, Bethany has not adequately alleged how its purported expressive activity is impaired by the RFP language about creating hiring opportunities for persons representative of the cultures, national origins, and religions of the populations it serves. Again, Bethany's sole allegation is conclusory, noting its belief "that only Christians can demonstrate the love and compassion of Jesus Christ." (ECF No. 1, PageID.31, ¶ 191.) But while a group's "view of what would impair its expression" is entitled to deference, there still must be some showing in that regard. *See Boy Scouts of America*, 530 U.S. at 653. "[A]n expressive association [cannot] erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Id.* Bethany has not made such a showing.

Finally, any burden placed on Bethany is outweighed by the governmental interests at issue. Importantly, "the freedom of expressive association is not absolute; it can be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Boy Scouts of America*, 530 U.S. at 640–641. Further, the Supreme Court has noted that a policy

preventing discrimination is both "unrelated to the suppression of expression" and "plainly serves compelling state interests of the highest order." *Roberts*, 468 U.S. at 624. Here, the challenged RFP language, according with guidance from ORR, not only encourages against discrimination and promotes access to services, but also seeks to ensure that organizations receiving governmental funding are best equipped to aid refugees through staff that are representative of the populations served. This compelling state interest outweighs the ephemeral burden pled in Bethany's complaint.

Because Bethany has not adequately pled a violation of its freedom of association rights, this claim too should be dismissed.

CONCLUSION AND RELIEF REQUESTED

Because Bethany has failed to state a claim on which relief can be granted, Defendants respectfully request that this Court dismiss Bethany's complaint pursuant to Fed. R. Civ. P. 12(b)(6), vacate the Stipulated Preliminary Injunctive Order (ECF No. 35), and award Defendants any appropriate costs and fees.

Respectfully submitted,

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Dated: November 26, 2024

CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2024, I electronically filed the above documents with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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