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

Christian Healthcare Centers, Inc.

Plaintiff,

v.

Dana Nessel, in her official capacity as Attorney General of Michigan; **John E. Johnson, Jr.,** in his official capacity as Executive Director of the Michigan Department of Civil Rights; **Luke R. Londo, Gloria E. Lara, Richard R. White III, Portia L. Roberson, Zenna Faraj Elhason, Regina Marie Gasco, Rosann L. Barker,** and **Skot Welch,** in their official capacities as members of the Michigan Civil Rights Commission,

Defendants.

Case No. 1:22-cv-00787-JMB-PJG

Honorable Jane M. Beckering
Magistrate Judge Phillip J. Green

Plaintiff's Combined Reply in Support of its Summary Judgment Motion and Response to Defendants' Cross-Motion for Summary Judgment

Oral Argument Requested

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Introduction

Christian Healthcare Centers, Inc. deserves a declaration and injunction that prevents Defendants from enforcing the Elliott-Larsen Civil Rights Act against the ministry's (i) employment policies, including as applied to the Biblical Counselor, Physician, Member Services Receptionist, and Medical Assistant positions; (ii) pronoun policy; (iii) medical care policy; and (iv) publications about those policies.

Michigan tries to dodge most of the merits by ducking under its "permitted by law" exception. But the Sixth Circuit held this exemption "is not so clear that it renders" ELCRA "obviously inapplicable to" the ministry's activities. *Christian Healthcare Centers, Inc. v. Nessel* (*CHC*), 117 F.4th 826, 847 (6th Cir. 2024). Discovery confirms that conclusion. Michigan's witnesses contradicted each other and themselves about how ELCRA applies. Michigan evaded legitimate questions, reversed its discovery answers, and tried to change stipulations while also admitting it had all the relevant information to evaluate the ministry's practices on Day 1. Some of these switches depended solely on the advice of Michigan's litigation counsel. Michigan also refused to follow any formal process to bind future enforcement officials. All this back-and-forth means no issue is moot. Christian Healthcare still faces a credible threat of future enforcement. A declaratory and injunctive order from this Court removes that threat.

Christian Healthcare also succeeds on the merits of its constitutional claims. The First and Fourteenth Amendments protect the ministry's right to employ those who share its faith, use pronouns consistent with its beliefs, and decline harmful medical treatment that violates its conscience. One of Michigan's laws is facially vague and overbroad. Michigan disputes no other element for the ministry's declaratory judgment or permanent injunction, and the ministry satisfies those elements. So the ministry asks this Court to enter judgment in its favor.

Argument

Christian Healthcare deserves summary judgment in its favor because Michigan does not dispute "any material fact." Fed. R. Civ. P. 56. Based on the undisputed facts, Christian Healthcare has standing to challenge ELCRA and to seek relief against each named Defendant. True, Michigan responds that Christian Healthcare's employment decisions on Biblical Counselors and Physicians and the ministry's pronoun and medical-care policies may be "permitted by law." But this late revelation is an "intervening circumstance" and Michigan "bears the burden" to prove the change moots the case. *West Virginia v. EPA*, 597 U.S. 697, 718–19 (2022) (citation modified). It does not. Michigan's non-binding, late-in-the-day assertions come nowhere near meeting Michigan's heavy burden to show mootness.

On the merits, the law invades the ministry's First and Fourteenth Amendment rights up and down. The Employment Clause violates the ministry's religious autonomy, free exercise, expressive association, and assembly. The Accommodation Clause violates the ministry's freedom of speech as applied to its pronoun policy and the ministry's religious autonomy and free exercise as applied to its medical care policy. The corresponding publication clauses impose a content-and-viewpoint based restriction on the ministry's speech about these policies. And Michigan's law fails strict scrutiny. To round things out, the Unwelcome Clause is vague and overbroad.

I. Christian Healthcare has standing to challenge ELCRA and to enjoin each named defendant.

Standing depends on circumstances "at the time" of the "complaint." *Friends of the Earth v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000). The "developed factual record" confirms that the ministry had standing to enjoin the named Defendants from enforcing ELCRA when it sued because the ministry had an injury that Michigan "caused" and that injury is "redressable by a favorable court decision." *CHC*, 117 F.4th at 842, 854 (6th Cir. 2024) (citation modified).

A. Christian Healthcare established its injury-in-fact.

Christian Healthcare suffers an injury-in-fact because it faces a "substantial risk" of being harmed by ELCRA. *CHC*, 117 F.4th at 843 (citation modified). The ministry aces a three-part test to show its "threat of enforcement is sufficiently imminent." *Id.*

First, Michigan "concede[s]" that Christian Healthcare intends to engage in activities "arguably affected with a constitutional interest." *Id.* at 843.

Second, ELCRA "arguably proscribe[s]" Christian Healthcare's activities. *Id.* at 843–48. Michigan points to ELCRA's "permitted by law" exemptions in a luke-warm attempt to contest standing. ECF No. 161, PageID.3376-3383; *id.* at 3353-3363 (referencing "securing civil rights guaranteed by law" and the BFOQ process). But these exemptions are not "so clear that [they] render" ELCRA "obviously inapplicable to" the ministry's "conduct." *CHC*, 117 F.4th at 847. After all, Michigan admits that ELCRA prohibits the ministry's employment, pronoun, and medical care policies, and the ministry's publications about those policies, absent an exemption. *E.g.*, ECF No. 109, PageID.2095-2098; ECF No. 139-2, PageID.2460-2465, 2625-2626, 2706-2707, 2710; ECF No. 139-3, PageID.2855, 2861, 2878-2879. Michigan's only proposed exemption is the First Amendment. But the ministry does not lose standing if the First Amendment protects its activities. If it were, all successful pre-enforcement actions alleging First Amendment violations would end with a dismissal for lack of standing rather than a favorable judgment. And laws that explicitly prohibit the government from "interfer[ing]" with "free speech" do not weaken standing because they do "nothing to ensure" that the government "will not violate First Amendment rights even if that is not their intention." *Dambrot v. Central Michigan University*, 55 F.3d 1177, 1183 (6th Cir. 1995). So Michigan cannot defeat standing here with vague statutory references to "other laws." *CHC*, 117 F.4th at 847.

Third, Christian Healthcare faces a credible threat of enforcement. *CHC*, 117 F.4th at 848–54. Michigan actively investigates and prosecutes ELCRA violations, ECF No. 109, PageID.2093, including against religious employers and businesses, ECF No. 135, PageID.2347-2349; ECF No. 139-5, PageID.3031-3060. Next, any aggrieved "person"—which Michigan defines as practically anyone—may file a complaint. ECF No. 146, PageID.3211 (listing examples). Michigan did not disavow enforcement against the ministry. *CHC*, 117 F.4th at 850–51. And ELCRA imposes burdensome investigations and penalties. ECF No. 139-5, PageID.3037-3060 (investigations); ECF No. 109, PageID.2094 (penalties); *Cath. Charities of Jackson, Lenawee, & Hillsdale Cntys. v. Whitmer*, 162 F.4th 686, 691 (6th Cir. 2025) (considering penalties in standing analysis). To avoid those penalties, the ministry "chilled" its "speech" before the stipulated injunction. *CHC*, 117 F.4th at 848.

Despite this evidence, Michigan suggests Christian Healthcare lacks standing to challenge the Accommodation Publication Clause because Michigan is "unlikely" to enforce the Accommodation Clause against the ministry's medical care policy. ECF No. 161, PageID.3384. That suggestion conflicts with the Sixth Circuit's standing conclusion on the Accommodation Publication Clause. *CHC*, 117 F.4th at 852–53. It also ignores Michigan's admission that Christian Healthcare's desired publication violates that clause. ECF No. 139-3, PageID.2861. Plus, Michigan's mid-litigation intervention triggers mootness; it doesn't undermine standing, which is measured "at the time" of the ministry's suit. *Friends of the Earth,* 528 U.S. at 184.

B. Michigan causes Christian Healthcare's injuries, and a favorable court order redresses them.

Michigan causes Christian Healthcare's injury and a decision in its favor redresses its injury. Causation and redressability are "flip sides of the same coin." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024) (citation modified). "If a defendant's action causes an injury, enjoining the action … will typically redress

that injury." *Id.* Michigan only contests these elements as applied to the Attorney General. But the ministry proved these elements against her.

Michigan's Attorney General only needs "some connection" with ELCRA's "enforcement" to warrant a declaration and injunction against her. *Ex Parte Young*, 209 U.S. 123, 157–58 (1908) (distinguishing *Fitts v. McGhee*, 172 U.S. 516 (1899) because the "officers" there had "no duty at all with regard to the act"). Michigan resists this conclusion by relying on four cases holding that a suit against an Attorney General could not rest on the office's general enforcement authority or "representation alone." ECF No. 161, PageID.3350. But those cases aren't like this one. The Attorney General has specific authority to enforce ELCRA.

For starters, she can file complaints with the Division as an aggrieved "person"—defined to include any "political subdivision," MDCR Rule 37.2(p), and "public official[s]." ECF No. 139-2, PageID.2515. If an official can "cause" an "injury by filing the charges," causation and redressability are met. *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021, 1034 (6th Cir. 2022) (distinguishing Attorney General from district attorney because the latter could "initiate" proceedings); *281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011) (holding standing elements met when Attorney General could "institute a civil complaint").

Michigan's Attorney General also represents the Department and the Commission in administrative enforcement proceedings. ECF No. 109, PageID.2095; ECF No. 139-2, PageID.2663-2664. That fact distinguishes Michigan's Attorney General from the Attorney General in *Nabors* who could only "defend the constitutionality of the statute" but not "prosecute plaintiffs under it." 35 F.4th at 1032. And Michigan's Attorney General enforces compliance with the Department's and the Commission's orders. ECF No. 109, PageID.2095. This gives Michigan's Attorney General more than "'limited'" enforcement authority, which proves

standing. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1175 (10th Cir. 2021), *rev'd on other grounds*, 600 U.S. 570 (2023) (affirming standing).

An injunction preventing the Attorney General from filing a complaint, prosecuting the complaint, or enforcing orders against the ministry will "relieve a discrete injury" suffered by the ministry. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). So Michigan's Attorney General is a proper defendant.

II. No aspect of Christian Healthcare's case is moot because Michigan has not irrevocably eradicated the effects of the violation.

Michigan downplays the enforcement risks against the ministry's Biblical Counselor and Physician positions and pronoun and medical care policies by retreating to the "permitted by law" exemption. ECF No. 161, PageID.3353-3363, 3376-3383. Because the ministry had standing when it filed suit, Michigan's belated retreat is really a disguised mootness argument. *West Virginia*, 597 U.S. at 718–19. But the ministry's claims are not moot. Michigan has not been "absolutely clear" that it will not "return to" its "old ways" after this litigation. *Friends of the Earth,* 528 U.S. at 189 (citation modified).

An "intervening circumstance arising *after* a suit has been filed" can moot a case. *Kentucky v. Yellen*, 54 F.4th 325, 340 (6th Cir. 2022) (citation modified). But a defendant's "voluntary cessation of a challenged" policy does not "ordinarily" support mootness. *Friends of the Earth*, 528 U.S. at 189 (citation modified). A defendant relying on voluntary cessation bears a "heavy," "formidable," and "stringent" burden. *Id.* at 189–90. "Nothing" Michigan "offers here satisfies that formidable standard." *FBI v. Fikre*, 601 U.S. 234, 241, 243 (2024) (holding "governmental defendants" to the same mootness standard as "private ones").

Absent an exemption, the Employment Clause applies to the ministry's Biblical Counselor and Physician positions. *CHC*, 117 F.4th at 847–48; ECF No. 109, PageID.2095-2098. And, absent an exemption, the Accommodation Clause

prohibits the ministry's pronoun and medical care policies. ECF No. 139-2, PageID.2460-2465, 2625-2626, 2706-2707, 2710; ECF No. 139-3, PageID.2855, 2861, 2878-2879. Michigan relies on mid-litigation written discovery responses to suggest an exemption applies and that enforcement is unlikely. ECF No. 161, PageID.3361, 3380.

But those responses cannot moot these issues. Michigan made decisions through "ad hoc, discretionary, and easily reversible actions." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019). And "the totality of the circumstances surrounding the" supposed "voluntary cessation" do not "inspire confidence in [its] assurances regarding the likelihood of recurrence." *Id.* at 768–69.

A. Michigan followed no official process to formalize its litigation position, which leaves the ministry at risk.

Before appeal and on appeal, Michigan never disavowed enforcement as to the Biblical Counselor or Physician positions or the pronoun or medical care policies. *CHC*, 117 F.4th at 850–51. On remand, the State first refused to take *any* position in written discovery on these matters. ECF No. 74-1, PageID.1704-1705; ECF No. 74-2, PageID.1718.

After a court order compelled Michigan to give non-evasive responses, Michigan finally said that Christian Healthcare would not violate the Employment Clause by filling the Biblical Counselor and Physician positions with employees who share its faith. ECF No. 139-3, PageID.2861. Michigan also said that the ministry could decline to use pronouns inconsistent with person's sex. ECF No. 139-3, PageID.2873. Those responses came more than two and a half years after Christian Healthcare filed its complaint but relied exclusively on the complaint's allegations and exhibits. *See* ECF No. 139-3, PageID.2861; ECF No. 139-3, PageID.2873. But Michigan confirmed that the ministry's medical care policy and publication of that

policy violated ELCRA because ELCRA is "neutral and generally applicable" and serves a "legitimate" interest. ECF No. 139-3, PageID.2855, 2861, 2874.

Several months later, Michigan reversed its stance on the ministry's medical care policy. It concluded that the Accommodation Clause did not apply to the ministry's medical care policy "unless and until" new "authority is issued." ECF No. 102-6, PageID.1950, ECF No. 102-7, PageID.1956. Those responses were unclear, so the ministry moved to compel again. This Court granted the motion—again.

Michigan offered its most recent response to the ministry's pronoun and medical care policies in October 2025, over three years after the ministry filed its complaint. ECF No. 139-3, PageID.2878-2879. Michigan now says the ministry's pronoun and medical care policies are "permitted by law." *Id.* As before, Michigan relied exclusively on facts from the complaint. *Id.*

This discovery history is complicated, but its two takeaways are simple.

First, Michigan knew enough about the Biblical Counselor and Physician positions and the ministry's pronoun and medical care policies to disavow enforcement the day the ministry filed suit. *See* ECF No. 146, PageID.3215 (listing testimony); ECF No. 139-3, PageID.2861-2862 (relying on complaint's information). It didn't. Instead, Michigan waited several years before taking any position on these issues. The "timing" of Michigan's multi-year delay "raises suspicions that its cessation is not genuine" because the State had all the relevant information years ago. *Speech First, Inc.*, 939 F.3d at 769.

Second, Michigan officials can flip their stance about the ministry without a formal process—and they have. "A future administration could rescind" Michigan's responses "just as easily as this administration established" them. *Barrios Garcia v. U.S. Dep't of Homeland Sec.*, 25 F.4th 430, 441 (6th Cir. 2022). As proof, the Commission is always "entitled to change [its] mind." ECF No. 139-2, PageID.2721, 2762. And decisions by the Commission or individual Commissioners now do not

bind future Commissions later. *Id.* at PageID.2762; ECF No. 115, PageID.2239–2241 (making same argument). As Michigan wrote in discovery, "the individuals sued in their official capacity are not authorized to speak on behalf of the [Commission] in the absence of an official position taken by the" Commission. ECF No. 74-1, PageID.1704. The State reiterated that "[t]he Commission decides matters as a body pursuant to the ELCRA and its administrative rules and after a formal hearing, speaking through its orders similar to a court." ECF No. 107, PageID.2071. So, in Michigan's own words, any possible concessions here do not bind future enforcement officials. Only a court order can permanently enjoin those officials.

In fact, Michigan did not follow its "formal processes" to adopt its positions. *Speech First, Inc.*, 939 F.3d at 768. Its views on the ministry's Biblical Counselor and Physician positions and pronoun and medical care policies came from "ad hoc, discretionary, and easily reversible actions." *Id.* And Michigan has not taken a formal, official, irreversible position on the ministry's policies which would bind later officials.

For example, the Department's Director of Enforcement was "not involved" in formulating the Department's supplemental discovery responses, ECF No. 139-2, PageID.2741-2744, even though the Department's Director consistently defers to the "enforcement division" to make decisions, *id.* at 2456-2458, 2463-2464, 2466, 2482, 2486. Likewise, the Commission did not follow its "formal mechanisms to approve" its discovery responses "in a meeting or anything like that." *Id.* at 2762. Instead, the Commission's litigation counsel drafted the responses and sent them to the individual Commissioners to approve. *Id.* at 2763-2764, 2766-2767. To complete those responses, Commissioners did not review internal policies, meet as a body, or discuss their responses with others. *Id.* They each independently approved the responses based on their individual judgment. *Id.*

The Department and the Commission also only consulted with their litigation counsel to craft their supplemental interrogatory responses. *Id.* at PageID.2747-2748, 2763, 2766-2767. Parties are expected to consult with counsel in discovery. But Michigan's complete dependence on that advice here, outside the agencies' normal, official decision-making process, proves Michigan did not follow "legislative-like procedures" to adopt its current position. *Speech First, Inc.*, 939 F.3d at 768. *See Harrell v. Fla. Bar,* 608 F.3d 1241, 1267 (11th Cir. 2010) (no mootness when state board "departed from its own procedures" and changed course "at the urging of [its] counsel").

Michigan has no intention of following that process here. The Commission does not plan to adopt a formal statement on pronouns or medical interventions related to gender transitions. ECF No. 139-2, PageID.2716, 2771. Without an official endorsement of non-enforcement, *cf. Yellen*, 54 F.4th at 341 (mootness from a final rule after "notice-and-comment"), Michigan has not "completely and irrevocably eradicated the effects of the alleged violation," *Speech First, Inc.*, 939 F.3d at 767 (citation modified). So Michigan's application of ELCRA to the ministry's Biblical Counselor and Physician positions and pronoun and medical care policies remain active conflicts in need of a court-ordered resolution.

B. The totality of the circumstances disproves mootness.

The "totality of the circumstances" here also forecloses mootness. *Speech First, Inc.*, 939 F.3d at 768–69.

Michigan invokes the First Amendment to justify a "permitted by law" exception. But Michigan sometimes ignores this exception altogether—like it did when it first responded to some interrogatories. ECF No. 139-2, PageID.2774 (noting "analysis was missing"); *id.* at 2775-2777; ECF No. 169, PageID.3464 (admitting Michigan "did not apply" exception). What's more, Michigan routinely

prosecutes other faith-based businesses raising First Amendment defenses against ELCRA. ECF No. 135, PageID.2347-2349. And in an *ongoing* enforcement action against a business owner who raised First Amendment defenses, Michigan ignored those defenses and argued that "the Commission does not have authority to adjudicate constitutional challenges." ECF No. 139-4, PageID.2991, 3005, 3009, 3012. Christian Healthcare has a "personal stake" in avoiding years of administrative proceedings where its constitutional rights may be ignored—and this Court has the authority to issue an injunction to prevent that from happening. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160–61 (2016) (citation modified).

Other undisputed facts specific to the ministry's employment, pronoun usage, and medical care show Michigan has not met its mootness burden.

Employment. Michigan teeter-tottered on employment issues throughout this litigation. During one deposition, a Commissioner reversed himself about whether the ministerial exception covered a janitor. ECF No. 139-2, PageID.2733, 2736. The Department disagreed with a Commissioner about exemptions for the ministry's Member Services Receptionist opening. *Compare* ECF No. 139-2, PageID.2647-2652 *with* PageID.2712-2713. Michigan later tried to repeal a stipulation that ELCRA applied to that position. ECF No. 149, PageID.3264. And Michigan's Attorney General—in open conflict with the Department and the Commission—doubts the ministerial exception applies "to licensed professionals," which includes the Physician position. ECF No. 161, PageID.3351. Her opinion matters because she files complaints and prosecutes ELCRA and the Department and the Commission "ask" her office "for legal guidance on those questions." ECF No. 139-2, PageID.2748. These detours show how easily Michigan is blown off course. Without an injunction here, nothing stops Michigan from steering its ship back towards the ministry's Biblical Counselor or Physician positions later.

Pronouns. The Department's Executive Director and the Department testified that the ministry's pronoun policy violates the Accommodation Clause. ECF No. 139-2, PageID.2415-2416, 2460-2463, 2607, 2614-2618. Michigan later adjusted that opinion. ECF No. 139-2, PageID.2708; ECF No. 139-3, PageID.2878. But Michigan's discretionary pivot does not moot this claim because it does not eliminate the ministry's risk of harm.

After all, Michigan is prosecuting a hair salon owner for an online post stating that she would not "play the pronoun game" and that she would deny requests "to have a particular pronoun used." ECF No. 139-4, PageID.2970, 2972. The Department's Director said the case "has absolutely nothing to do with our First Amendment rights." ECF No. 139-4, PageID.2934. And when the owner raised the First Amendment during the enforcement proceedings, the Department and the Commission's ALJ concluded they had no jurisdiction to consider that defense. ECF No. 139-4, PageID.2991, 3005, 3009, 3012. With this ongoing prosecution of pronoun usage, Michigan's discovery responses here are cold comfort.

Michigan distinguishes the case because the owner "did not cite religious beliefs." ECF No. 161, PageID.3380. But that distinction compounds Michigan's waffling. Two of the three cases Michigan now cites to prohibit compelled pronouns depended entirely on the Free Speech Clause, not the Religion Clauses. ECF No, 161, PageID.3378-3379. So the owner's religious beliefs should be irrelevant. Regardless, Michigan offers a half-hearted embrace of these speech cases. Michigan calls them "distinguishable" four times. ECF No. 161, Page.ID.3378-3380. It says, "reasonable minds may differ" on their interpretation. *Id.* at 3380. And it notes this area of law is "unsettled." *Id.* So why do they prevent future enforcement? Michigan isn't clear.

Michigan even hopes this Court will "reach a different conclusion." ECF No. 161, PageID.3380 n.4. If it did, Michigan could revert to its "old ways" on pronouns.

Fikre, 601 U.S. at 241. By foreshadowing its future "litigation position," Michigan "cannot overcome the 'formidable burden' imposed" by mootness. *MS Rentals, LLC v. City of Detroit*, 371 U.S. Supp. 3d 404, 415 (E.D. Mich. 2019) (denying mootness when city suggested it would "remove that provision" if successful on the merits).

This hedging is not the "well-reasoned justification[s]" courts expect for mootness. *Harrell*, 608 F.3d at 1266. It leaves the door ajar for contrary future conclusions. ECF No. 139-2, PageID.2762 (Commission agreeing "[n]othing would prevent a new group of commissioners from … read[ing] this body of law differently"). Adding to the uncertainty, Michigan still asserts a "compelling interest" in forcing pronoun usage inconsistent with sex, which gives it wiggle room to later claim that the Accommodation Clause satisfies strict scrutiny and overcomes any First Amendment interests. ECF No. 139-3, PageID.2855.

Medical care. Michigan agreed that the ministry's medical care policy violates the Accommodation Clause. ECF No. 139-2, PageID.2415-2416, 2460-2463, 2611-2614; ECF No. 139-3, PageID.2855, 2874. The State said the clause was "neutral and generally applicable." ECF No. 139-3, PageID.2874. And Michigan said it had a "legitimate" and "compelling interest" in preventing gender-identity discrimination by ensuring equal access to medical services. *Id.*

But months later, Michigan changed its mind. The reason? The "advice of counsel." ECF No. 139-2, PageID.2774; *Id.* at 2772, 2777. That was it. There had been no change in the relevant law or in the facts since the ministry filed suit in 2022. ECF No. 146, PageID.3215 (collecting evidence); ECF No. 139-2, PageID.2766. Indeed, Michigan still thinks it has a "legitimate interest" in enforcing equal "provision[s] of medical services." ECF NO. 139-3, PageID.2874; ECF No. 161, PageID.3371 (a "compelling interest"); ECF No. 139-2, PageID.2766. And Michigan

still admits that Christian Healthcare violates the law if it publishes its medical care policy.[1] ECF No. 139-3, PageID.2861.

Michigan's shift—based solely on "advice of counsel," ECF No. 139-2, PageID.2774—cannot moot this issue. Exclusive reliance on the advice of counsel outside Michigan's formal process gives no assurance that the State will not renew its prior position after this litigation. *See Speech First, Inc.*, 939 F.3d at 767. Nor does the reliance "completely and irrevocably eradicated the effects of the violation." *Id.* A permanent injunction preventing Michigan from backsliding would resolve the issue. So this controversy remains active because it is not "impossible for a court to grant any effectual relief" to Christian Healthcare. *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (citation modified).

Michigan disagrees. It claims, "the change reflects careful analysis of a genuinely difficult first-impression issue." ECF No. 161, PageID.3883. But its legal analysis provides no insight into the reason for the change. And this isn't an issue of first impression.

On the law, Michigan cites two cases to justify its change. ECF No. 161, PageID.3382. Those cases predate Michigan's original view by many years. *Id.* (citing 2014 and 2021 cases). So both cases were well-entrenched when Michigan first said the ministry's medical care policy violates the Accommodation Clause. Michigan never explains why these cases were once consistent with its original response but now compel the opposite conclusion.

Nor is it obvious why these cases affect Michigan. Both dealt with the Religious Freedom Restoration Act (RFRA). But, as Michigan's Attorney General once wrote in a brief, "the RFRA cannot be applied to State Defendants." State Defs.' Resp. to Mot. for Prelim. Inj., *Buck v. Gordon*, No. 1:19-cv-00286, 2019 WL

[1] This admission is not a matter of law. ECF No. 161, PageID.3384 n.5. As Judge Green held, it applies law (ELCRA) to fact (the post). ECF No. 91, PageID.1874.

8633640, at 18 (W.D. Mich. May 29, 2019), ECF No. 34. And Michigan has no comparable statutory exemption. Michigan even acknowledges that RFRA is "broader" than "the Free Exercise Clause." ECF No. 161, PageID.3382. Put differently, to credit Michigan's novel, eleventh-hour argument, Michigan must interpret "permitted by law" to include admittedly inapplicable federal statutes. That conclusion is hard to square with Michigan's asserted interests in enforcing ELCRA and its own interpretation of "law" as limited to "common law and state statutes" and the Constitution—not unrelated federal statutes. ECF No. 161, PageID.3376. Given that Michigan considers this area of law to be "unsettled," *id.* at 3381, and reaches its decision "reluctantly," *id.* at 3371, future officials could easily "read this body of law differently," ECF No. 139-2, PageID.2762, without attributing any "bad faith" to Michigan now, ECF No. 161, PageID.3383.

And this issue isn't novel either. In 2019, Michigan investigated a business for declining to provide hair-removal services—a medical procedure for a gender transition—for a man identifying as a woman because "assisting in the 'transition' process in any way … would cause" the owner "to directly violate her faith and conscience." ECF No. 139-5, PageID.3052, 3060. Michigan told the complainant that the "case may go to the Supreme Court due to the religious aspects of the case," but pursued the case anyway. *Id.* at 3048. Michigan justified its enforcement actions by claiming ELCRA is "neutral and generally applicable." ECF No. 22-4, PageID.696. Michigan prosecuted the case until the business went "out of business." ECF No. 139-5, PageID.3038. There is little daylight between the relevant parts of that case and this one.

But that's not all. Michigan recently received a complaint against a religious healthcare provider. ECF No. 139-4, PageID.3027-3032. And Michigan's Attorney General published a letter to all healthcare providers warning them that declining "services" for "transgender individuals based on their gender identity" violates

ELCRA. ECF No. 139-3, PageID.2925. These examples reveal Michigan's ongoing willingness to enforce ELCRA against comparable activities. So Michigan's change-of-heart at the litigation's twilight cannot moot this issue.

The Accommodation Publication Clause also steers away from mootness. Michigan admits the ministry's medical care policy violates this clause if published. ECF No. 139-3, PageID.2861. But the ministry's constitutional freedom to publish this clause is intertwined with its constitutional freedom to engage in the underlying activity—i.e., the medical care policy. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 581 n.1 (2023) (noting connection of comparable clauses). So this Court must address the merits of the Accommodation Clause to determine whether the ministry has a right to post the publication.

* * *

The ministry's Biblical Counselor and Physician positions and pronoun and medical care policies are not moot. Michigan can always change its mind about enforcement. Nothing it has done here binds future officials. Michigan has shunned formal processes. And Michigan's reasons for potential non-enforcement do not "inspire confidence" that the State will not reverse course again later especially given its historical and ongoing enforcement history. *Speech First, Inc.*, 939 F.3d at 768–69. That leaves Christian Healthcare with the same credible threat of enforcement it faced when it sued. Only a court-ordered injunction resolves that threat and relieves the ministry.

III. The Employment Clause violates the First Amendment by forcing Christian Healthcare to hire employees who disagree with its beliefs.

The Employment Clause forces Christian Healthcare to recruit and hire employees who do not share its religious beliefs. This requirement violates the ministry's rights to religious autonomy, religious exercise, expressive association,

and assembly. The injunction should cover all Christian Healthcare's employment positions because a similar analysis applies regardless of position.

The Employment Publication Clause also bans the ministry from publishing job descriptions outlining its beliefs. ECF No. 109, PageID.2095-2098. Michigan does not dispute that the Employment Publication Clause restricts Christian Healthcare's speech based on content and viewpoint. *See* ECF No. 146, PageID.-3236-3237. The ministry has the freedom to publish its hiring policies because it has the corresponding right to hire employees who agree with its beliefs. *See 303 Creative LLC*, 600 U.S. at 581 n.1, 598 n.5 (adopting this logic).

A. The Employment Clause infringes on the ministry's religious autonomy.

The parties agree that religious entities possess some autonomy over their employment decisions. But the Department and the Commission say this religious autonomy covers only "ministerial" employees. ECF No. 161, PageID.3358-3359. The Attorney General takes an even narrower view. She doubts whether "the ministerial exception" applies to "licensed professionals" at all. *Id.* at PageID.3351.

Neither view is correct. The religious autonomy doctrine protects Christian Healthcare's employment decisions over ministerial *and* non-ministerial roles. ECF No. 146, PageID.3218-3221. For that reason, the ministry's motion requested relief for open positions and "any other positions that come open" because all positions are either ministerial or non-ministerial. ECF No. 145, PageID.3153.

Because the parties dispute the First Amendment's scope, Michigan is wrong to claim that ELCRA incorporates "protections for religious employers' hiring practices," "permits hiring practices consistent" with the "First Amendment," and "already accommodates" the ministry's "hiring practices." ECF No. 161, PageID.-3352, 3354, 3359. Michigan assumes its First Amendment interpretation is right; Christian Healthcare thinks the interpretation is wrong. That's the conflict. The

State cannot escape that conflict with a "circular" argument saying that ELCRA "does not prohibit [Christian Healthcare's] hiring practices" because ELCRA "does not affect ministerial employees." *Seattle Pac. Univ. v. Ferguson*, 104 F.4th 50, 60 (9th Cir. 2024). The ministry applies its policies to ministerial and non-ministerial employees. The religious autonomy doctrine protects that decision. And Michigan's burden on that decision is per se unconstitutional. *See* ECF No. 146, PageID.3218 (noting this application "categorically fails").

1. The ministerial exception protects the ministry's employment decisions for its ministerial employees.

Michigan concedes that the ministerial exception protects the Biblical Counselor and Physician positions. ECF No. 161, PageID.3361. But its concessions do not moot the issue. *Supra* § II. So the appropriate remedy is a court-ordered injunction stating that the ministerial exception prevents Michigan from applying ELCRA to the ministry's Healthcare's Biblical Counselor and Physician positions and other ministerial positions. ECF No. 1, PageID.58 (listing ministers in paragraph 381). This Court should add these two positions and all ministerial jobs to Christian Healthcare's requested injunction.

2. The co-religionist doctrine protects the ministry's employment decisions for its non-ministerial employees.

Beyond the ministerial exception, the co-religionist doctrine protects the ministry's decisions to hire Member Services Receptionists and Medical Assistants, and other non-ministerial positions consistent with its faith. Michigan says the Employment Clause applies to those positions without violating the First Amendment. ECF No. 161, PageID.3361.

Michigan tries to distinguish three of Christian Healthcare's primary cases. ECF No. 161, PageID.3365. But each case embraced the co-religionist doctrine in principle, if not by name. One Supreme Court case held that the First Amendment

prevented Catholic schools from being forced to bargain with "lay teachers." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 493–94 & n.5, 502, 507 (1979). Another Supreme Court case and the Sixth Circuit acknowledged that the co-religionist doctrine animated Title VII's statutory exemption but had no need to apply the doctrine because of the statutory exemption. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) (assuming "that the pre–1972 exemption was adequate in the sense that the Free Exercise Clause required no more."); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 623 (6th Cir. 2000) (Title VII exempted "religious organizations" to recognize "the constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions."). And the Seventh and Ninth Circuits agree that Title VII's exemptions incorporate co-religionist principles. ECF No. 146, PageID.3220 (collecting cases); ECF No. 161, PageID.3366 (noting Title VII is a "'legislative application of the church-autonomy doctrine'").

But Michigan's employment law is unusual. Unlike Title VII and most state employment laws, ELCRA "does not appear" to have any religious-employer exemptions. *Rouch World, LLC v. Dep't of C.R.*, 987 N.W.2d 501, 556 (Mich. 2022) (Viviano, J., dissenting). The First Amendment's co-religious doctrine stands in Michigan's statutory gap to protect the ministry's hiring decisions.

The Ninth Circuit just reaffirmed this principle in *Union Gospel Mission of Yakima v. Brown*, 162 F.4th 1190 (9th Cir. 2026). There, Washington had an employment-discrimination law with an exemption for religious employers. *Id.* at 1198. But the Washington Supreme Court narrowly interpreted the exemption to only protect the hiring of "ministers." *Id.* Afterward, a religious ministry claimed the state law violated its First Amendment rights under the co-religionist doctrine as applied to their hiring of non-ministers. *Id.* at 1198–99.

The Ninth Circuit agreed. The Ninth Circuit reached its conclusion by relying on many cases that Michigan tries to distinguish here. *Id.* at 1201, 1204, 1208–10, (citing *Amos*, *Hall*, and *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002)). That court held that the co-religionist doctrine (i) applies to religious organizations; (ii) "protects sincerely held religious beliefs and acts rooted in religious beliefs"; (iii) applies "only to the extent the hiring of co-religionist non-ministerial employees is based on sincerely held religious beliefs"; and (iv) covers "all" "non-ministerial positions." *Id.* at 1200, 1204–05 (citation modified).

Christian Healthcare meets this test. Michigan conceded the ministry is a religious organization. ECF No. 139-2, PageID.2696. Christian Healthcare has sincerely held religious beliefs about marriage and gender identity. *See*, *e.g.*, ECF No. 1-5, PageID.112-120; ECF No. 1-6, PageID.122; ECF No. 1-8, PageID.126; ECF No. 1-9, PageID.128. By holding to these convictions, the ministry believes that it affirms "the dignity of each individual as we embrace the unchanging and longstanding principles of scriptural truth." ECF No. 1-8, PageID.126. Christian Healthcare believes that only employees who share those beliefs can effectively advance its religious mission. *See* ECF No. 5-2, PageID.181; ECF No. 5-3, PageID.189-191, 193-194; ECF No. 145-4, PageID.3186-3187. And so Christian Healthcare "requires all of its staff to share the organization's faith"—including on the topics of marriage and gender identity. ECF No. 22-3, PageID.668.

Michigan disputes Christian Healthcare's need for a co-religionist in the Member Service Receptionist and Medical Assistant positions. It says anyone—even someone with "no religious conviction"—could "communicate" the ministry's information. ECF No. 161, PageID.3362. It claims that prayer is not a "'vital' religious function," *id.* at 3362, because non-believers can proclaim "Christian sounding prayers," ECF No. 139-3, PageID.2652-2653. And it says that the Medical Assistant's role is "indistinguishable from those of a medical assistant in any other

non-religious medical office." ECF No. 161, PageID.3361. But Michigan's suggestion that the ministry's "hiring policy isn't necessary" to its "mission" raises "inherently religious questions." *Yakima*, 162 F.4th at 1204. The First Amendment bars the State from rewriting Christian Healthcare's sincerely held beliefs about prayer, medical service, and communication.

Michigan tries to distinguish *Yakima*. None of its proposed distinctions work.

Michigan starts with a technicality: *Yakima* applied a likelihood of success standard. ECF No. 161, PageID.3367. Michigan never explains why this matters. The material facts here mirror those in *Yakima*. 162 F.4th at 1198–99.

Next, Michigan says that Washington's law was "unique" and unlike "Title VII and most state laws" because it only covered "ministerial employees." *Id.* That is a resemblance, not a difference. Michigan's law, like Washington's, only covers ministerial employees. Michigan reiterates this interpretation throughout its brief and past BFOQ decisions. ECF No. 161, PageID.3358, 3362-3364; ECF No. 139-5, PageID.3111-3118. Because Michigan, like Washington, "narrowly limit[s]" religious "exemption[s] to ministers," the "church autonomy doctrine protects" Christian Healthcare's hiring of co-religionists. *Yakima*, 162 F.4th at 1201.

Finally, Michigan says the Ninth Circuit didn't address "entities under the umbrella of a religious organization, such as commercial businesses or hospitals." *Id.* at 1205. But Christian Healthcare isn't a for-profit corporation operated by a religious organization. It *is* the religious ministry, as Michigan conceded. ECF No. 139-2, PageID.2696. So that line from *Yakima* is inapplicable here. Even so, Michigan says the ministry's "primary purpose is medical treatment." ECF No. 161, PageID.3367. That misstates the undisputed evidence. As the ministry disclosed in discovery and no record evidence contradicts, its "primary purpose is to emulate Jesus Christ." Ex. A at 11. It does that "by caring for its patients' medical, emotional, and spiritual needs in accordance with its religious beliefs." *Id.* The same

order of priorities motivated *Yakima*'s religious organization—it fulfilled its mission to "'spread the Gospel'" by operating "a homeless shelter, faith-based recovery programs, health clinics, and meal services." 162 F.4th at 1198. ECF No. 146, PageID.3222 (collecting history of religious ministries caring for others as a form of religious exercise).

Accepting the co-religionist doctrine does not make "the ministerial exception nugatory." ECF No. 161, PageID.3364. The doctrines "differ[] in some important respects" and serve unique functions. *Yakima*, 162 F.4th at 1205 (explaining the differences). Nor does following *Yakima* require this Court to undermine its *Bethany Christian Services v. Corbin* decision. Michigan quotes a summary of the *defendants'* argument in that case, not the Court's holding. No. 1:24-cv-922 (W.D. Mich. June 20, 2025), ECF No. 52, PageID.950. The opinion held that a social worker didn't qualify for the ministerial exception. *Id.* at PageID.952-953. But the Court never addressed the co-religionist doctrine—the doctrine at issue here.

That doctrine covers all the ministry's non-ministerial employees equally. *See Yakima*, 162 F.4th at 1200, 1210 (granting injunction for all non-ministerial positions). The ministry requests that the injunction protects all its non-ministerial employees. ECF No. 145, PageID.3153.

B. The Employment Clause violates Christian Healthcare's religious exercise because it lacks general applicability.

The test from *Employment Division v. Smith*, 494 U.S. 872 (1990) does not apply to Christian Healthcare's employment decisions because the church autonomy doctrine protects those decisions. But even if it did, the Employment Clause lacks general applicability because it allows individualized exemptions and it treats comparable secular employment decisions more favorably than Christian Healthcare's religious employment choices.

1. The clause allows individualized exemptions.

Christian Healthcare identified three ways the Employment Clause gave Michigan "sole discretion" to authorize "individualized exemptions," *Fulton v. City of Philadelphia*, 593 U.S. 522, 533, 537 (2021): (1) the BFOQ process; (2) declaratory rulings; and (3) the case-by-case adjudication of "legitimate non-discriminatory" reasons for adverse employment actions, *see* ECF No. 146, PageID.3229-3231. Michigan never mentions the latter two exemptions. But both prove the Employment Clause lacks general applicability.

Declaratory rulings like the Contraceptive Equity Ruling show that Michigan can modify ELCRA without a textual basis. *See id.* at PageID.3230-3231 (explaining this point); ECF No. 139-2, PageID.2695-2696 (Commissioner disagreeing with former Commission's analysis). And the Department has "very broad" discretion to decide whether an employer's reason for an adverse action is a "legitimate non-discriminatory" reason. ECF No. 139-2, PageID.2590-2591; ECF No. 135, PageID.2349-2350 (examples); ECF No. 146, PageID.3231 (describing evidence). The "legitimate non-discriminatory" reasons act as an exemption from the Employment Clause because the Department only considers those reasons after it finds discrimination occurred. ECF No. 139-2, PageID.2590-2591. These examples suffice to show that the Employment Clause is not generally applicable because they reveal Michigan "evaluates whether to grant religious exemptions 'on an individual basis.'" *Dahl v. Bd. of Trs. of W. Michigan Univ.*, 15 F.4th 728, 734 (6th Cir. 2021).

The BFOQ process adds more proof. The Department and the Commission decide BFOQ requests case-by-case, after weighing the facts and consulting personal perspectives. ECF No. 146, PageID.3229-3230 (listing testimony). The analysis is so subjective that the Department and a Commissioner reached opposite conclusions about the same position. *Compare* ECF No. 139-2, PageID.2647-2649

(testimony on Member Services Receptionist) *with id.* at PageID.2712-2713 (contrary testimony). And a Commissioner flipped his opinion about whether a different position qualified for a BFOQ during his deposition. ECF No. 146, PageID.3230 (citing testimony).

Even so, Michigan says the BFOQ is "controlled by law" and not discretion. ECF No. 161, PageID.3356-3357. To be sure, the BFOQ application asks for "conclusions of law." ECF No. 109-1, PageID.2101. But other features of the BFOQ process empower the Commission with significant discretion.

For example, applicants must make a "sufficient showing." MCL 37.2208. The Commission decides what that means. ECF No. 139-2, PageID.2699-2700. The "sufficient showing" standard sounds eerily like "'good cause'"—a "standard" that "permit[s] the government to grant" individualized "exemptions" depending on "the circumstances." *Fulton*, 593 U.S. at 534 (citation modified). And in reaching a "sufficient showing" analysis, the Commission evaluates "reasonable alternatives," "compelling reasons" for the exemption, and other subjective criteria. ECF No. 109-1, PageID.2101-2103. Those conclusions depend on the Commission's discretion—Commissioners can even "consult their own perspectives." *Id.* at PageID.2700.

Consider a recent example. Seniors Helping Seniors provides affordable, professional in-home care services and companionship for seniors by providing them with caretakers who are seniors themselves. Mich. Dep't of Civil Rights, *Michigan Civil Rights Commission meeting 1/26/2026*, YouTube, at 1:15:00–40:28, https://bit.ly/4qyd8Ma (Jan. 30, 2026). Its business model depends on assigning senior caretakers to their senior clients with similar interests and life experiences. So Seniors Helping Seniors applied for a limited age-based BFOQ for caretakers. During the BFOQ hearing, a commissioner raised concerns well beyond the Commission's and ELCRA's jurisdiction—like whether the company might function as a "dating platform." *Id.* at 1:30:50–31:38. Another Commissioner asked about

race discrimination—an irrelevant category for the requested BFOQ—based on her personal background "on various healthcare organization boards." *Id.* at 1:35:38–36:48. Based on these subjective concerns, which Seniors Helping Seniors debunked at the hearing, the Commission denied the request.

Also consider an illuminating comparison. The ministry's Member Services Receptionist must "offer to pray" with members when appropriate. ECF No. 139-2, PageID.2651-2653. But Michigan concluded this position did not qualify for a BFOQ because the employee's beliefs were irrelevant "[a]s long as" the employee "can pray in the way that it needs to be done." *Id.*; ECF No. 109, PageID.2097-2098. By contrast, the Commission accepted a different ministry's claim that "only an active, believing Christian could effectively proselytize and propagate the faith" as a counselor. ECF No. 161-2, PageID.3394. The Commission acknowledged that if the counselor "himself did not believe, the effect would be to raise doubts in the minds of the clients." *Id.* The divergent outcomes highlights Michigan's discretion.

Michigan defends its BFOQ framework by citing *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). That case is irrelevant. It deals with abstention; a religious school tried to stop an ongoing state investigation by filing a federal lawsuit challenging the investigation itself. *Id.* at 625–29. But there are no abstention issues here. And the ministry challenges the Employment Clause itself, not Michigan's investigative authority.

2. The Clauses treats comparable secular employment activities better than the ministry's religious employment activities.

Michigan never confronts Christian Healthcare's claim that the Employment Clause fails general applicability by treating comparable secular employment activities better than the ministry's religious employment activities.

Comparability turns on the government's asserted interests in regulating the at-issue religious activities, and whether the government exempts secular activities that undermine those interests. ECF No. 146, PageID.3232. In *Tandon v. Newsom*, for example, California tried to limit the spread of COVID-19. 593 U.S. 61, 63 (2021). It restricted "at-home religious" gatherings, but exempted groupings in "hair salons," "movie theaters," and elsewhere. *Id.* The restriction lacked general applicability because California did not show that the exempted "activities pose a lesser risk of transmission than *applicants'* proposed religious exercise at home." *Id.*

Michigan claims an "interest of eradicating employment discrimination based on protected characteristics." ECF No. 161, PageID.3356. But Michigan allows sports leagues, schools, landlords, and private clubs to discriminate. ECF No. 146, PageID.3233 (collecting examples). Michigan undermines its interests by granting BFOQs to otherwise-discriminatory hiring practices. Michigan granted two health departments sex-based BFOQs for "privacy" reasons, ECF No. 139-5, PageID.3121-3122, and "privacy and experience in breast feeding," *Id.* at 3119-3120. Michigan also approved other BFOQ requests based on protected characteristics for a probate court, a spa, a civil service commission, and a county. *Id.* at 3104-3106.

These secular exemptions are comparable to the ministry's employment practices because they would be illegal status-based discrimination without an exemption. For that reason, the exemptions undermine Michigan's asserted interests. Michigan has no evidence that a similar exemption for any of the ministry's positions would disturb its interests more than the secular exemptions. So the Employment Clause lacks general applicability.

IV. Michigan's law co-opts Christian Healthcare's expressive association and undermines its freedom of assembly.

The Employment and Employment Publication Clauses burden Christian Healthcare's rights to expressive association and assembly.

A. Michigan's law co-opts Christian Healthcare's expressive association.

The right of expressive association protects the ministry's employment decisions because hiring employees who disagree with its beliefs would significantly burden its expression.

Michigan says the "Supreme Court has rejected" expressive association claims "in the employment context." ECF No. 161, PageID.3369. That is wrong. Sixty years ago the Supreme Court held that "the activities of" an expressive association's "staff" are "modes of expression and association" protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 428 (1963). Michigan claims two cases support the opposite conclusion. But neither are so broad or overruled *Button*.

The first case dealt with student groups—not employers. The second case, *Hishon v. King & Spalding*, 467 U.S. 69 (1984), did not categorically exclude employers from expressive-association protection. It simply held that a for-profit law firm hadn't shown that extending partnership to a woman would "inhibit[]" expression of its "ideas and beliefs." *Id.* at 78. If the expressive-association analysis didn't apply to employers at all, it would have been unnecessary for the Supreme Court to evaluate the burden on the firm's expression.

Shifting gears, Michigan claims that *Dale* distinguished between "membership and employment." ECF No. 161, PageID.3369. Not so. The Supreme Court addressed membership because the Boy Scouts revoked the plaintiff's "adult membership." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 645 (2000). But the thrust of the opinion protected expressive associations from governments' attempts to coerce groups "to accept" those who "may impair" their "ability" to "express [their] views." *Id.* at 648. An adverse employee would have burdened the Boy Scouts' views just as much as or more than a volunteer leader. The Boy Scouts' own policies said so. *Id.* at 672 (Stevens, J., dissenting) ("It is [the Boy Scouts'] position" that "homosexuality

and *professional or non-professional employment* in Scouting are not appropriate." (emphasis added)).

Since *Dale*, many courts, including this one, have protected the expression association nonprofit employers and their employees. *See CompassCare v. Hochul,* 125 F.4th 49, 62 (2d Cir. 2025) (applying expressive association right to "specific employment decisions"); *Slattery v. Hochul*, 61 F.4th 278, 288 (2d Cir. 2023) (similar); *Bethany Christian Servs. v. Corbin*, No. 1:24-cv-922 (W.D. Mich June 20, 2025), ECF No. 52, PageID.949 (holding religious nonprofit pled plausible expressive-association claim when challenged contract clause required "it to employ—and therefore associate—with" employees with contrary religious beliefs); *Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 822 (E.D. Mo. 2018).[2]

On the merits of the three-part *Dale* test, Michigan does not dispute that Christian Healthcare "engage[s] in some form of expression." *Dale* at 648. But Michigan disagrees that hiring "a non-Christian" in some positions "would burden" the ministry's expression. ECF No. 161, PageID.3370. Michigan's disagreement fails to "give deference to" the ministry's "view of what would impair its expression." *Dale*, 530 U.S. at 653. All along, Christian Healthcare has been clear that it requires its employees to share its beliefs "to fulfill its religious mission." ECF No. 22-3, PageID.668. Hiring "an employee who did not share the ministry's faith … would severely infringe on the ministry's religious expression." ECF No. 145-4, PageID.3186. This includes the Medical Assistant and Member Services Receptionist position. *Id.* at PageID.3187-3188.

[2] These cases track other decisions holding that different First Amendment rights override Title VII when it infringes on those rights. *See* ECF No. 161, PageID.3370 (collecting cases involving the Religion Clauses); *Moore v. Hadestown Broadway Ltd. Liab. Co.*, 722 F. Supp. 3d 229, 242, 259–63 (S.D.N.Y. 2024) (holding Title VII and other anti-discrimination laws violated a production company's free speech rights when applied to regulate the company's casting decisions). Expressive association should not be relegated to a second-class First Amendment freedom.

Michigan suggests that the ministry could hire people who disagree with its religious beliefs because they could still "provide [a] basic overview" of the ministry, ECF No. 193-2, PageID.2650, "pray with people" without agreeing with the prayer, *id.* at PageID.2638, and offer "Christian sounding prayers," *id.* at PageID.2652-2653. Employees could do that, Michigan says, without "religious conviction." ECF No. 161, PageID.3362. Michigan fundamentally misunderstands the ministry's expression. Following Michigan's suggestion would be "abhorrent" to the ministry, violate "the ministry's faith," and cause the ministry to sin "by bearing false witness with its members." ECF No. 145-4, PageID.3186.

Michigan ends with a flood-gates argument. It says that accepting the expressive-association claim would "hamstring Defendants' ability to ensure equal employment opportunities." ECF No. 161, PageID.3371. Michigan has no evidence for this assertion. And Christian Healthcare isn't an ordinary, largely non-expressive for-profit employer like the law firm in *Hishon*. It is a religious non-profit that easily satisfies the *Dale* test as an expressive association. That test is well-suited to separate the expressive wheat from the discriminatory chaff.

B. Michigan's law undermines Christian Healthcare's freedom of assembly.

Michigan never contests Christian Healthcare's rights to hire employees consistent with its beliefs under the Assembly Clause. By not "properly respond-[ing]," Michigan "abandoned" this argument. *Clark v. City of Dublin*, 178 F. App'x 522, 524–25 (6th Cir. 2006). The ministry also wins on the merits.

Although the Supreme Court has not recently addressed the Assembly Clause, it would most likely apply a text-and-history approach. *See Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 619–620 (2021) (Thomas, J., concurring) (considering "text and history of the Assembly Clause" to analyze "the right to associate anonymously"). That approach comes from the two-step *Bruen* framework,

which drew on First Amendment jurisprudence. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24–25 (2022) (collecting cases); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 535 (2022) (applying historical approach).

Under *Bruen*, an amendment's "plain text" must first "cover[] an individual's conduct." 597 U.S. at 24. History shepherds that analysis. *Id.* at 20–21. If covered, the "Constitution presumptively protects that conduct." *Id.* at 17. Next, under *Bruen*, a state can "justify" its regulation "only if [the] regulation is consistent with this Nation's historical tradition." *Id.* To meet that standard, a state must "identify a well-established and representative historical analogue." *Id.* at 30.

Applying *Bruen*'s first prong, the Assembly Clause covers the ministry's freedom to gather with like-minded employees. This clause has protected a group's right to meet—and prohibited direct and indirect regulations on gatherings—for over two centuries. *See* John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 20–62 (2012), *available at* https://bit.ly/4qZLgBx (surveying the Assembly Clause's history); Nathan J. Ristuccia, *"Dangerous to the Liberties of A Free People": Secret Societies and the Right to Assemble*, 4 J. Free Speech L. 139, 153–94 (2023) (similar). By the mid-to-late nineteenth century, state courts understood a "right to assemble" with "those persons who had thus agreed and associated," "and no others." *Leavitt v. Truair*, 30 Mass. 111, 113 (1832). This was especially true for assemblies that "inculcate[d]" their values. *People ex rel. Rice v. Bd. of Trade of Chicago*, 80 Ill. 134, 136 (1875).

Christian Healthcare's conduct aligns with this history. The ministry is a religious organization dedicated to sharing the Gospel by serving others. ECF No. 5-2, PageID.181. The ministry accomplishes these goals through its employees—including the Biblical Counselor, Physician, Medical Assistant and Member Services Receptionist. ECF No. 54-2, PageID.1468-1469; ECF No. 145, PageID.-

3186-3188. For that reason, the Assembly Clause protects all the ministry's hiring decisions.

But Michigan falls short of *Bruen*'s second prong. It has not identified "a well-established and representative historical analogue" or "historical precursors" to justify regulating the ministry's assembly. *Bruen*, 597 U.S. at 30. Without such evidence, Michigan cannot apply its law to interfere with the ministry's assembly. *Id.* at 30.

V. The Accommodation Clause violates the First Amendment by forcing Christian Healthcare to contradict its beliefs.

The Accommodation Clause forces Christian Healthcare to participate in medical interventions and to use pronouns that contradict its beliefs about the immutability of sex. These requirements violate Christian Healthcare's rights to religious autonomy, speech, and religious exercise. The Accommodation Publication Clause also bans the ministry from publishing its medical care and pronoun policies based on the policies' content and viewpoint. *See* ECF No. 146, PageID.3237-3238. Michigan does not contest the merits of the latter point. And because the ministry has a right to decline controversial, non-emergent medical interventions and pronoun usage that conflicts with its beliefs, it has a right to post materials explaining its decision on those topics. *See 303 Creative LLC*, 600 U.S. at 581 n.1, 598 n.5 (following this logic).

A. The Accommodation Clause violates Christian Healthcare's religious autonomy and compels its speech.

Michigan does not currently dispute that the religious autonomy doctrine protects Christian Healthcare from being forced to provide contentious, non-emergent medical treatment that contradicts its religious beliefs. ECF No. 146, PageID.3221-3226. And Michigan now concedes that the First Amendment protects the ministry's decision to use pronouns consistent with a member's sex. ECF No.

161, PageID.3361. But the ministry's medical care and pronoun policies remain live controversies because Michigan has not met its heavy burden to show mootness. *Supra* § II. So Christian Healthcare needs a court-ordered judgment preventing Michigan from forcing the ministry to provide medical services that violate its beliefs under the church autonomy doctrine and from compelling the ministry to use pronouns inconsistent with its faith under the compelled-speech doctrine.

B. The Accommodation Clause is not generally applicable.

The test from *Employment Division v. Smith*, 494 U.S. 872 (1990) does not apply to Christian Healthcare's medical care policies because the church autonomy doctrine protects that decision. Alternatively, the Accommodation Clause lacks general applicability because it allows individualized exemptions and treats comparable secular activities better than Christian Healthcare's religious activities.

1. The clause allows individualized exemptions.

Michigan claims the Accommodation Clause does not authorize individualized exemptions because it is "governed by law, not discretion." ECF No. 161, PageID.3373. The undisputed facts tell a different story. The Department exempts public accommodations if they have a "legitimate non-discriminatory reason" for denying a service. ECF No. 139-2, PageID.2580-2581; ECF No. 139-3, PageID.2898; ECF No. 139-5, PageID.3068, 3079. That reason "could be anything"—not just the law—and the Department "has discretion to consider all the circumstances." ECF No. 139-2, PageID.2580-2581. The legitimate-and-non-discriminatory standard acts like an exemption from ELCRA because Michigan only considers the standard *after* concluding a claimant was denied services "because of protected class status." ECF No. 139-3, PageID.2898; ECF No. 139-2, PageID.2580-2581.

The Commission is similar. It exempts public accommodations "on a case by case basis" after "analyz[ing] the totality of the situation." ECF No. 139-2, PageID.-

2708. Even then, the Commission's conclusions are not set in stone. Future Commissioners may "change" the Commission's "mind," *Id.* at PageID.2721, "make a different decision," *id.* at PageID.2762, and "read" a "body of law differently," *id.*

All told, the Accommodations Clause models "a system of individual exemptions" by "invit[ing]" Michigan to consider "the particular circumstances behind" a public accommodations' service denial. *Smith*, 494 U.S. at 884 (describing precedent).

2. The clause treats comparable secular conduct better than the ministry's religious activities.

Michigan also treats secular actors better than the ministry. Michigan claims an "interest in eradicating discrimination." ECF No. 161, PageID.3383. *See also* ECF No. 139-3, PageID.2874-2875. But the Accommodation Clause is not generally applicable because it "fail[s] to prohibit nonreligious conduct that endangers" the State's asserted interests. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543. *Supra* § III.B.2 (explaining comparability analysis).

For example, Michigan allows sports leagues, single-sex schools, and some landlords to discriminate based on sex and gender identity. ECF No. 146, PageID.-3233 (listing examples). Employers can discriminate with a BFOQ. Medical professions can decline to participate in an abortion, even though Michigan asserts an equal interest in ensuring access to cross-sex hormones and abortions. *Id.*; ECF No. 139-3, PageID.2857. And Michigan allows "private clubs" to discriminate, including country, golf, boating, and athletic clubs, and the Elks Lodge. MCL 37.2301; ECF No. 139-5, PageID.3088. These examples resemble Christian Healthcare's pronoun and medical care activities because they exempt otherwise discriminatory conduct.

Michigan contests the comparability of these examples for two reasons. *First*, it says that some examples are "outside" the "public accommodations

context." ECF No. 161, PageID.3374. But comparability turns on the government's interests, not on the similarities of the entities. This principle explains why courts compare "activities that are in other ways very different"—like religious schools to "gyms, tanning salons, office buildings," and casinos. *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 481–82 (6th Cir. 2020). Nor does it matter that the exemptions originate from different statutes. Equal treatment "transcends the bounds between particular ordinances, statutes, and decrees." *Id.* at 481. *Second*, Michigan says some of the exemptions "apply equally to religious and secular actors." ECF No. 161, PageID.3374. But that "is no answer" because a law triggers strict scrutiny "whenever" it treats "*any* comparable secular activity more favorably than religious exercise." *Tandon*, 593 U.S. at 62.

VI. Michigan's law fails strict scrutiny as applied to Christian Healthcare.

Michigan does not dispute that its law is per se unconstitutional if it invades the ministry's religious autonomy and freedom of assembly or if it regulates the ministry's speech based on viewpoint. Because Michigan's law applies in these ways, it is per se unconstitutional. *Supra* §§ III.A, IV.B, V.A.

Applied to Christian Healthcare's other First Amendment rights, Michigan cannot satisfy any level of heightened scrutiny because it offers no evidence to justify its interest in applying its laws to Christian Healthcare's employment, pronoun, and medical care policies.

At times, Michigan claims it has a "compelling interest in eradicating discrimination." ECF No. 161, PageID.3356, 3371, 3373, 3383. But this interest is too "broadly formulated" to satisfy strict scrutiny. *Fulton*, 593 U.S. at 541 (citation modified). And Michigan didn't present any "evidence" to support its broad assertions. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 800 (2011); ECF No. 146, PageID.3239-3240 (making this point).

Michigan barely contests narrow tailoring. Michigan never refuted any of the ministry's alternatives to compelling pronoun usage or medical care, *see* ECF No. 146, PageID.3241-3242, even though the State had to show that those alternatives "would fail" to advance its interests. *McCullen v. Coakley*, 573 U.S. 464, 494–95 (2014). Michigan mentions narrow tailoring in one sentence in the context of the Employment Clause. ECF No. 161, PageID.3356. It then says those exemptions "exceed" Title VII. *Id.* But Title VII proves Michigan's lack of narrow tailoring. Title VII exempts religious organizations; Michigan doesn't. *See* 42 U.S.C.A. § 2000e-1(a); ECF No. 145-2, PageID.3167 (fifty-state employment-law survey). And Michigan offered no reason it could not exempt Christian Healthcare's employment practices like it exempts educational institutions and other employment decisions.

VI. The Unwelcome Clause facially violates the First and Fourteenth Amendments because it is vague and overbroad and allows unbridled discretion.

The words "objectionable, unwelcome, unacceptable, or undesirable" render the Unwelcome Clause facially vague and overbroad and grant Michigan officials unbridled enforcement discretion.

Vagueness and unbridled discretion. Michigan tries to clarify the definitions of "objectionable, unwelcome, unacceptable, or undesirable" with Merriam-Webster's dictionary definitions. ECF No. 161, PageID.3385. But Michigan has no guidance on how to interpret these words. ECF No. 139-2, PageID.2704. So there is no certainty that Merriam-Webster's definitions apply. Where to look for definitions matters—different dictionaries define the Unwelcome Clause's words differently. *See Objectionable*, The Random House Dictionary of the English Language 993 (1966) ("objectionable" means "causing or tending to cause an objection, disapproval, or protest"). In the end, Michigan's reference to Merriam-Webster's compounds the Unwelcome Clause's vagueness: the words themselves are

vague, *and* enforcement officials have no objective standards on where to look to define the words.

Michigan's attempt at clarity adds layers of confusion. Michigan mentions "offensive," "not pleasing," and other synonyms. ECF No. 161, PageID.3385. But courts have struck down those words as vague and overly discretionary. *See United Food & Com. Workers Union, Loc. 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 360 (6th Cir. 1998) (holding "'aesthetically pleasing'" invited "arbitrary or discriminatory enforcement"); *Matwyuk v. Johnson*, 22 F. Supp. 3d 812, 824–26 (W.D. Mich. 2014) (similar for "offensive"); *People for Ethical Treatment of Animals, Inc. v. Shore Transit*, 580 F. Supp. 3d 183, 193–95, 198 (D. Md. 2022) (similar for "offensive, objectionable"). Vague definitions cannot clear up vague words.

Michigan also ascribes a meaning to the Unwelcome Clause that its text does not support. Michigan says the Unwelcome Clause prohibits public accommodations from posting signs indicating that customers "will be denied service or treated unequally because of a protected characteristic." ECF No. 161, PageID.3385. This reading violates the canon against surplusage. ECF No. 146, PagID.3243-3244. And none of Michigan's definitions sustains its view. A sign stating, "Zionism is Racism" or "Free Palestine" may make a Jewish customer feel unwelcome or objectionable, but it does not indicate that the customer would be denied equal service. The disconnect between Michigan's understanding of the Unwelcome Clause and its text exposes its vagueness.

Overbreadth. Michigan says the Accommodation Publication Clause is not overbroad because it prohibits statements that "services will be" (i) "denied" or (ii) "provided unequally." ECF No. 161, PageID.3387-3388. That is true of the *Denial Clause*, not the *Unwelcome Clause*. The Denial Clause bans statements indicating that the "full and equal enjoyment" of services ("provided unequally" part) "will be refused, withheld," or "denied" ("denied" part) because of a protected trait. MCL

37.2302(b). To give the Unwelcome Clause full effect, the terms "objectionable, unwelcome, unacceptable, or undesirable" must mean something besides denials or unequal services. Michigan has no response to that dilemma except to return to the Denial Clause. So the Unwelcome Clause is overbroad because it has a "substantial number of" unconstitutional "applications," but no legitimate "sweep" independent of the Denial Clause. *United States v. Stevens,* 559 U.S. 460, 473 (2010) (cleaned up). None of Michigan's suggestions cure this defect.

First, Michigan suggests signs like "No Blacks," "No Muslims," and "No Gays" explain why the Unwelcome Clause isn't overbroad. ECF No. 161, PageID.-3386. But those signs trigger the Denial Clause because they express a categorical ban on serving groups of people.

Next, Michigan says that a "No God but Allah" sign is legal because it does not "indicat[e] that Christians will be denied service." *Id.* at 3387. Again, that explains why the post does not violate the Denial Clause. But a non-Muslim seeing that sign could feel "objectionable, unwelcome, unacceptable, or undesirable" under the Unwelcome Clause. That the sign may also be "religious expression" of "the owner's faith" highlights the Unwelcome Clause's overbreadth. *Id.*

Finally, Michigan claims the "permitted by law" phrase acts as a "safety valve" that protects the First Amendment. ECF No. 161, PageID.3387. But in the hair salon case, the owner argued that the First Amendment protected her social media posts. ECF No. 139-4, 3005, 3009. The Department and the Commission's ALJ rejected the argument because "the Commission does not have the authority to adjudicate constitutional challenges." *Id.* at 2991; *id.* at 3005, 3009, 3012. The Department and the Commission's ALJ said the owner would have to raise that defense "in the Court of Claims." *Id.* at 3012; *id.* at 3005. But by then the owner will have endured years of litigation and be on the hook for penalties. A "safety valve" that releases after the damage is done offers no real protection.

Conclusion

The undisputed facts show that Christian Healthcare has standing. Michigan failed to offer evidence to meet the heavy burden of mootness. And the First and Fourteenth Amendments protect Christian Healthcare's activities. The ministry asks this Court to grant its summary-judgment motion, deny Michigan's cross-motion, and enter judgment for the ministry.

Respectfully submitted this 10th day of February, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 2026, I electronically filed the foregoing document with the Clerk of Court using the ECF system which will send notification of such filing to all counsel of record who are registered users of the ECF system.

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