

No. 19-2185

In the United States Court of Appeals for the Sixth Circuit

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

Plaintiffs-Appellees,

v.

ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; JOO YEUN CHANG, in her official capacity as the Executive Director of the Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants-Appellants,

and

ALEX M. AZAR, II, in his official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

On Appeal from the U.S. District Court for the
Western District of Michigan, Southern Division
No. 1:19-CV-00286

**PLAINTIFFS-APPELLEES' RESPONSE TO
STATE DEFENDANTS' EMERGENCY MOTION
FOR AN INJUNCTION PENDING APPEAL**

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
INTRODUCTION.....	1
BACKGROUND	2
A. Faith-based agencies help address Michigan’s shortage of homes.....	2
B. Michigan encourages families to consider multiple agencies.	4
C. Michigan law protects religious agencies.....	5
D. Michigan reverses course.....	6
STANDARD OF REVIEW.....	8
ARGUMENT	9
I. Michigan’s actions prove no stay is needed.....	10
A. Michigan has voluntarily delayed enforcement.....	10
B. Michigan’s continuing actions demonstrate why an injunction is necessary.	12
II. Michigan fails to meet the high standard for a stay.	14
A. Michigan cannot succeed on the merits because its actions violate the First Amendment.....	14
1. <i>State Defendants are violating state law to target St. Vincent.</i>	14
2. <i>Michigan’s new policy is non-neutral because it targets St. Vincent’s religious views.</i>	16

3. <i>Michigan’s new policy is not generally applicable.</i>	20
4. <i>Michigan’s new policy violates the Free Speech Clause.</i>	21
5. <i>Michigan cannot survive strict scrutiny.</i>	21
B. Michigan fails the remaining stay factors	22
CONCLUSION	24
CERTIFICATE OF COMPLIANCE.....	25
CERTIFICATE OF SERVICE.....	26

TABLE OF AUTHORITIES

	Page(s)
<i>Agency for Int’l Dev. v. AOSI</i> , 570 U.S. 205 (2013).....	14, 21
<i>Brown v. Entm’t Merchs. Ass’n</i> , 564 U.S. 786 (2011).....	21
<i>Certified Restoration Dry Cleaning Network v. Tenke Corp.</i> , 511 F.3d 535 (6th Cir. 2007).....	8-9, 11
<i>Church of Lukumi Babalu Aye v. City of Hialeah</i> , 508 U.S. 520 (1993).....	14, 17, 21
<i>Connection Distrib. Co. v. Reno</i> , 154 F.3d 281 (6th Cir. 1998).....	23
<i>Detroit Free Press v. Ashcroft</i> , No. 02-1437, 2002 WL 1332836 (6th Cir. Apr. 18, 2002).....	11
<i>Dumont v. Lyon</i> , 2:17-cv-13080 (E.D. Mich. Dec. 15, 2017).....	<i>passim</i>
<i>Leary v. Daeschner</i> , 228 F.3d 729 (6th Cir. 2000).....	8
<i>Masterpiece Cakeshop v. Colorado Civil Rights Comm’n</i> , 138 S. Ct. 1719 (2018).....	12, 16, 17
<i>Mich. State A. Philip Randolph Inst. v. Johnson</i> , 833 F.3d 656 (6th Cir. 2016).....	9
<i>Michigan Coal. of Radioactive Material Users v. Griepentrog</i> , 945 F.2d 150 (6th Cir. 1991).....	8, 14
<i>New Hope Family Servs. v. Poole</i> , No. 19-1715 (2d Cir. Nov. 4, 2019)	23
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	16, 22

<i>S.E.C. v. G. Weeks Sec.</i> , 678 F.2d 649 (6th Cir. 1982).....	9
<i>Serv. Employees Int’l Union Local 1 v. Husted</i> , 698 F.3d 341 (6th Cir. 2012).....	8
<i>Teen Ranch v. Udow</i> , 479 F.3d 403 (6th Cir. 2007).....	4
<i>Trump v. Hawaii</i> , 138 S. Ct. 2392 (2017).....	18-19
<i>Ward v. Polite</i> , 667 F.3d 727 (6th Cir. 2012).....	<i>passim</i>
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	21

Statutes

Mich. Admin. Code r. 400.12201	3
Mich. Comp. Laws § 722.115.....	3
Mich. Comp. Laws § 722.117.....	3
Mich. Comp. Laws § 722.118.....	3
Mich. Comp. Laws § 722.124e.....	<i>passim</i>
Mich. Comp. Laws § 722.124f	6

Other Authorities

<i>Child Placement</i> , Sault Ste. Marie Tribe of Chippewa Indians (July 1, 2019)	4
Dana Nessel (@dananessel), Twitter (Apr. 14, 2019, 1:57 PM).....	18
<i>Finding an Agency That’s Right for You</i> , Department of Human Services.....	4

<i>MI AG Files Emergency Motion in Buck, St Vincent Catholic Charities Case</i> , Michigan Attorney General (Oct. 11, 2019)	13
Michigan Attorney General, <i>Attorney General Nessel’s statement on Dumont v Gordon settlement agreement</i> , YouTube (Mar. 22, 2019)	7, 18
<i>Minority Specializing Agency and Resource Directory</i> , AdoptUSKids	4
Minutes, <i>House Standing Committee on Families, Children, and Seniors</i> , Michigan House of Representatives (Feb. 18, 2015).....	10
<i>State Settles Same-Sex Adoption Case</i> , Michigan Dep’t of Attorney General (Mar. 22, 2019)	7, 19

INTRODUCTION

The District Court’s preliminary injunction decision was correct, and Michigan has not satisfied the high bar necessary for this Court to stay that decision pending appeal. Worse yet, State Defendants have belittled those who have disfavored religious beliefs as “hate mongers,” and even extended the attacks to an Article III judge.

The District Court’s injunction merely allows Plaintiff-Appellee St. Vincent Catholic Charities (“St. Vincent”) to do what it has done for decades: serve children and families. Those families depend on St. Vincent to complete their adoptions, support foster children recovering from abuse, and recruit new homes for Michigan children without a forever family. State Defendants have failed to explain why it is necessary to shut down a successful agency before this appeal can be heard. Nor has Michigan explained what crisis justifies an emergency motion to this Court. By its own admission, Michigan voluntarily delayed enforcement prior to being enjoined.

The District Court got it right: Michigan’s actions target religious practices it disfavors. Its actions cannot survive strict scrutiny, and St. Vincent—not Michigan—is likely to prevail on the merits. Allowing St. Vincent to remain open helps Michigan find more homes for children. Michigan cannot satisfy the high bar necessary to show abuse of

discretion, nor the urgent need for a stay pending appeal. This Court should deny the motion.

BACKGROUND

A. Faith-based agencies help address Michigan's shortage of homes.

“Michigan has a chronic shortage of foster and adoptive homes.” Op., R. 69, Page ID # 2501. There are nearly 13,000 children in foster care, and 2,000 seeking adoptive families. Decl., R. 34-3, Page ID # 972. Michigan determined that “[h]aving as many possible qualified adoption and foster parent agencies in this state is a substantial benefit to [Michigan's] children.” Mich. Comp. Laws § 722.124e.

St. Vincent has served Michigan's children for over seventy years. Decl., R. 6-1, Page ID ## 228-229. It recruits foster and adoptive families, performs home studies, then oversees foster placements and adoptions. Decl., R. 6-1. St. Vincent has caseworkers available 24 hours a day, providing therapy, home visits, birth parent visitation, and help finding additional treatment and support. *Id.*

Witnesses testified to St. Vincent's impact. Shamber Flore, now a thriving adult, was removed from her birth home at age five after experiencing years of abuse. Decl., R. 6-3, Page ID # 272. Without St. Vincent, Shamber never would have found a forever family with the Flores. *Id.* St. Vincent also made a profound difference for Chad and Melissa Buck, who adopted five children special needs children through

St. Vincent. Decl., R. 6-2. St. Vincent caseworkers were available at all hours to provide support and accompanied the Bucks to countless medical appointments. *Id.* at Page ID # 263. The Bucks are unaware of any other agency that goes to these lengths. *Id.* Neither is expert witness Karen Strachan, a state-certified trainer with long experience in the child welfare system. Expert Report, R. 42-3. In her expert opinion, “St. Vincent provides excellent care for children and families and fills an important need in the Michigan welfare system.” *Id.* at Page ID ## 1644-1665. “If St. Vincent were to close, then fewer homes would be available in an already overburdened system, leading to adverse consequences for foster and pre-adoptive children.” *Id.* at Page ID # 1654.

To do this work, St. Vincent, like all other child-placing agencies, must be licensed by and contract with the Michigan Department of Health and Human Services (“MDHHS”).¹ Contracted agencies may oversee foster and adoptive placements. Decl., R. 6-1, Page ID # 232. Agencies also recruit and perform home studies for applicants, but they can’t bill MDHHS for those services.² St. Vincent covers those costs with private funds. *Id.* at Page ID ## 233-234.

¹ Mich. Comp. Laws §§ 722.115, 722.117, 722.118; Mich. Admin. Code r. 400.12201.

² Decl., R. 6-1, Page ID # 233; Ex., R. 6-8; Ex., R. 6-9. In unusual cases, agencies may bill for a home study, subject to a case-specific contract. Decl., R. 6-1, Page ID # 233.

B. Michigan encourages families to consider multiple agencies.

Prospective foster or adoptive families may work with MDHHS or one of nearly sixty child-placing agencies.³ Michigan encourages families to “interview a couple agencies” and “[c]hoose an agency you are compatible with.”⁴ Private agencies in Michigan may refer families elsewhere for a variety of reasons, including location, capacity, and agency specialization. Decl., R. 6-1, Page ID # 238. Some agencies specialize, for example, by serving Native American families⁵ or African American children.⁶

In order to foster or adopt, families must obtain a home study. “The criteria for home studies include . . . ‘[s]trengths of the relationship’ between the couple, including ‘level of satisfaction’ and stability of the relationship and their relationship history.” Br., R. 34, Page ID # 922.

³ For this reason, Michigan’s reliance upon *Teen Ranch v. Udow*, 479 F.3d 403 (6th Cir. 2007) (Mot.12) is inapposite. Michigan’s foster-care system is one of “true private choice,” where prospective foster and adoptive parents may choose among many diverse agencies. *See* 479 F.3d at 409 (lack of “true private choice” was dispositive).

⁴ *Finding an Agency That’s Right for You*, Department of Human Services, <https://perma.cc/9U84-5VK8>.

⁵ *Child Placement*, Sault Ste. Marie Tribe of Chippewa Indians (July 1, 2019), <https://perma.cc/J4DW-C46B> (“The agency services children who are enrolled or eligible for enrollment as Sault Ste. Marie Tribe.”).

⁶ *Minority Specializing Agency and Resource Directory*, AdoptUSKids, 4, <https://perma.cc/NZ64-QLV8>. Homes for Black Children has since closed for reasons unrelated to this case.

The agency conducts a home study and recommends licensure to the State. Decl., R. 6-1, Page ID # 231. As a Catholic organization, St. Vincent cannot provide a written recommendation endorsing a relationship that would conflict with its sincere religious beliefs. *Id.* If unmarried or same-sex couples seek St. Vincent's endorsement, the agency's staff refers them to other agencies. *Id.* at Page ID # 235.

St. Vincent serves LGBTQ children in its foster program and group home, and LGBTQ couples may attend the St. Vincent's parent support group. *Id.* at Page ID # 237. And same-sex couples endorsed by another agency can and have adopted children in St. Vincent's care. Op., R. 69, Page ID # 2504.

C. Michigan law protects religious agencies.

In 2015, Michigan passed 2015 Public Act Nos. 53, 54, & 55 (the "2015 Laws"). These laws "[e]nsur[e] that faith-based child placing agencies can continue to provide adoption and foster care services" consistent with their religious beliefs.⁷ When faith-based agencies cannot serve a particular family for religious reasons, they must "[p]romptly refer the applicant to the webpage on the department's website that identifies other licensed child placement agencies."⁸ Also, when MDHHS "makes a referral to a child placing agency for foster care case management or

⁷ Mich. Comp. Laws § 722.124e(1)(e), (g).

⁸ Mich. Comp. Laws § 722.124e(4).

adoption services,” the agency “may decide not to accept the referral if the services would conflict with the child placing agency’s sincerely held religious beliefs.”⁹ If an agency complies with the law, as St. Vincent does, Michigan “shall not take an adverse action against a child placing agency,” including “canceling a contract with the child placing agency.”¹⁰

Michigan updated its contracts in response to this law, acknowledging that nothing in the contract “limits or expands the application of the Public Act.” Ex., R. 6-12, Page ID # 352. Michigan enforced its policies by requiring agencies to follow the 2015 Laws, including directing a Catholic agency to adopt a program statement that it “serve[s] children and families through the placement and adoption of children with . . . married couples made up of two parents of the opposite sex.” Ex., R. 59-1, Page ID # 1967. Michigan defended its actions in federal court, stating: “some child-placing agencies have a sincerely held religious belief that prevents them from licensing or adopting to same-sex couples, which is protected by PA 53.” Answer at Page ID # 1189, *Dumont v. Lyon*, 2:17-cv-13080, (E.D. Mich. Dec. 15, 2017), ECF No. 52.

D. Michigan reverses course.

In November 2018, Defendant Nessel was elected Attorney General. Nessel previously called the 2015 Laws “a victory for hate mongers,”

⁹ Mich. Comp. Laws § 722.124f(1)

¹⁰ Mich. Comp. Laws § 722.124e(3), (7)(a).

stating there was “no viable defense” for these laws because their “only purpose [was] discriminatory animus.” Op., R. 69, Page ID # 2510. “When AG Nessel took office Jan. 1, 2019, she reviewed the facts of the [Dumont] case . . . [and] strongly recommended resolving the case.”¹¹ On March 22, Michigan settled the case. Stipulated Dismissal, *Dumont*, 2:17-cv-13080, (E.D. Mich. 2019), ECF No. 82.

Michigan then issued a new policy memorandum. Ex., R. 37-7. This memorandum claims the 2015 Laws “do[] not prohibit MDHHS from taking adverse action against an agency that refuses to provide state-contracted services for accepted referrals based on its sincerely held religious beliefs.”¹² In other words, once an agency accepts a referral to help a single child, state law no longer protects it. Michigan does not deny that, under this policy, St. Vincent must either provide written certifications for same-sex couples or stop providing foster and adoptive services to children in the child welfare system.

St. Vincent sought and obtained a preliminary injunction against enforcement of Michigan’s new policy. Two weeks later, Michigan sought a stay. Mot., R. 72. The District Court rejected the request, holding that

¹¹ *State Settles Same-Sex Adoption Case*, Michigan Dep’t of Attorney General (Mar. 22, 2019), <https://perma.cc/6HGY-DG4T>. See also Op., R. 69, Page ID # 2512; Michigan Attorney General, *Attorney General Nessel’s statement on Dumont v Gordon settlement agreement*, YouTube (Mar. 22, 2019), <https://perma.cc/Y6SY-MP8D>.

¹² Ex., R. 37-8, Page ID # 1445.

“the State ha[d] offered nothing new and ha[d] failed to come to grips with the factual basis on the preliminary injunction record.” Op., R. 84, Page ID # 2751. Michigan now makes the same request here.

STANDARD OF REVIEW

To obtain a stay, Michigan must “demonstrate . . . that there is a likelihood of reversal.” *Michigan Coal. of Radioactive Material Users v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). This Court considers: (i) whether Michigan is likely to succeed on the merits, (ii) whether Michigan would suffer irreparable harm without a stay, (iii) whether others would suffer harm with a stay, and (iv) the public interest. *Serv. Employees Int’l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012).

Injunctions are “accorded a great deal of deference on appellate review and will only be disturbed if the court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.” *Griepentrog*, 945 F.2d at 153 (citations omitted). Under this “highly deferential” standard, this Court “do[es] not decide whether [it] would grant a preliminary injunction if [it] were acting in place of the district court.” *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). For the same reason, this Court does not require that district courts hold evidentiary hearings before issuing injunctions if the record contains “adequate documentary evidence upon which to base an

informed, albeit preliminary, conclusion that the plaintiff would prevail on the merits.” *Certified Restoration Dry Cleaning Network v. Tenke Corp.*, 511 F.3d 535, 553 (6th Cir. 2007) (quoting *S.E.C. v. G. Weeks Sec.*, 678 F.2d 649, 651 (6th Cir. 1982)) (cleaned up). Succinctly put, “[t]he injunction will seldom be disturbed.” *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 662 (6th Cir. 2016).

ARGUMENT

The injunction preserves “a carefully balanced and established practice that ensures non-discrimination in child placements while still accommodating traditional Catholic religious beliefs on marriage.” Op., R. 69, Page ID # 2519. Michigan’s children benefit from this “longstanding,” “established” status quo. *Id.* at Page ID # 2501.

Michigan now wants to end this carefully-struck balance. But its Attorney General’s actions and its own haphazard enforcement demonstrate that its policies are neither neutral nor generally applicable. “A double standard is not a neutral standard.” *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012). Because Michigan’s policies are unconstitutional, it is unlikely to prevail. The only irreparable harm here is the harm done to St. Vincent if a stay were granted. Keeping St. Vincent open maximizes the number of foster families available to serve children. *See* Op., R. 69, Page ID # 2503.

Michigan's motion fails on the merits. Its policy violates the First Amendment under *Ward* and *Smith* (because it is not neutral and generally applicable) and under *Masterpiece* and *Lukumi* (because Michigan's actions target St. Vincent's religious belief). Yet this Court need not even reach the merits. The Court should deny this motion because Michigan has demonstrated no urgency, voluntarily delayed enforcement, continued to target St. Vincent, and publicly criticized Judge Jonker.

I. Michigan's actions prove no stay is needed.

A. Michigan has voluntarily delayed enforcement.

Michigan's arguments boil down to the claim that it has always had the same policy, and St. Vincent is violating it. That's incorrect. But even assuming Michigan is right, there is no emergency. St. Vincent's Executive Director testified in support of the 2015 Laws, so its religious practices were no secret to Michigan.¹³ Michigan admitted in 2017 that "some child-placing agencies have a sincerely held religious belief that prevents them from licensing or adopting to same-sex couples."¹⁴ In 2017, an MDHHS official even filed a complaint against St. Vincent. Ex., R. 1-

¹³ Minutes, *House Standing Committee on Families, Children, and Seniors*, Michigan House of Representatives (Feb. 18, 2015), <https://perma.cc/5YEQ-TWYD>.

¹⁴ Answer at Page ID # 1189, *Dumont*, 2:17-cv-13080, (E.D. Mich. Dec. 15, 2017), ECF No. 52.

3, Page ID # 82. Yet Michigan did not penalize St. Vincent in the intervening *four years*. Br., R. 34, Page ID # 925 (“Due to the then-pending *Dumont* lawsuit, the Department did not finalize its investigations of SVCC,” and “Because of the present lawsuit, the Department has not been able to finalize its investigation of SVCC.”). Instead, Michigan renewed St. Vincent’s adoption contract in 2016 and its foster contract in 2018. Ex., R. 6-8, Page ID # 296; Ex., R. 42-2, Page ID # 1586.

None of these are disputed facts.¹⁵ They are from Michigan’s filings, contract, and affidavits. Either Michigan has had the same policy throughout, in which case its two-year enforcement delay is grounds to deny this “emergency” motion. *See, e.g., Detroit Free Press v. Ashcroft*, No. 02-1437, 2002 WL 1332836, at *1 (6th Cir. Apr. 18, 2002) (“the harm alleged must be both certain and immediate”). Or Michigan’s dilatory tactics are proof that, as St. Vincent contended and the District Court

¹⁵ Michigan claims that “Sixth Circuit precedent requires that the district court hold an evidentiary hearing to resolve any factual dispute.” Mot.7 n.1. Not so. Michigan admitted there was “adequate documentary evidence,” which is what this Court requires. *Certified Restoration Dry Cleaning Network*, 511 F.3d at 553 (6th Cir. 2007) (cleaned up); *see also* Ex. B at Page ID #1793-1794 (admitting “there is certainly a strong record of discovery in this case”). As Judge Jonker said, “[w]hat I see is people emphasizing different things.” *Id.* at Page ID #1794.

found, Michigan previously recognized that state law protected St. Vincent.

Even under its new policy, Michigan has delayed seeking emergency relief. St. Vincent sought relief by September 30, when its adoption contract expired. The District Court issued its injunction on September 26. St. Vincent immediately sent a signed contract to the state, which returned it, signed, on October 10. Ex. A. Michigan did not request any emergency relief to prevent it from entering into that contract. Instead, Michigan signed the contract, filed a stay motion two weeks after the injunction, and after that was denied, waited another full week to ask this Court for “emergency” relief from its contractual obligations. *See* R. 72 (stay motion Oct. 10); R. 75 (denial Oct. 22); Mot. (emergency motion Oct. 29).

B. Michigan’s continuing actions demonstrate why an injunction is necessary.

Since receiving the preliminary injunction opinion, Michigan has continued to forget its “own high duty to the Constitution and to the rights it secures,” *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018). Michigan’s stay motion continues to denigrate St. Vincent’s religious exercise “by characterizing it as merely rhetorical.” *Id.* at 1729. Michigan claims the injunction “compels the State to turn a blind eye to taxpayer-funded discrimination cloaked in religious exercise.” Mot.3. And after appealing, Nessel issued a press

release stating: “The judge’s attacks on Nessel were highly unusual,” claiming that “the Court attacks the attorney general” and that Judge Jonker “misconstrued and took out of context” Defendant Nessel’s statements.¹⁶ Nessel herself stated: “Judge Jonker’s comments unnecessarily inflamed an issue that at its core is about adhering to contractual obligations with the state; nothing more and nothing less.”¹⁷ In its motions papers, Michigan claimed “the Court attacks the Attorney General,” and said “[t]he Court’s animosity toward Attorney General Dana Nessel’s viewpoint on previously pending legislation is only thinly veiled.”¹⁸

The District Court put it well: Michigan “fail[s] to come to grips with the factual basis on the preliminary injunction record that supports the inference of religious targeting.” Op., R. 84, Page ID # 2751. Michigan’s professed eagerness to penalize St. Vincent raises the strong likelihood that, if the stay were granted, St. Vincent would be forced to file further emergency motions, seeking urgent relief from subsequent motions, merits, or en banc panels of this Court.

¹⁶ *MI AG Files Emergency Motion in Buck, St Vincent Catholic Charities Case*, Michigan Attorney General (Oct. 11, 2019), <https://perma.cc/86XV-6XKN>.

¹⁷ *Id.*

¹⁸ Br., R. 73, Page ID # 2546, 2551-2552.

II. Michigan fails to meet the high standard for a stay.

A. Michigan cannot succeed on the merits because its actions violate the First Amendment.

Michigan cannot meet its “great[] difficulty in demonstrating a likelihood of success on the merits.” *Griepentrog*, 945 F.2d at 153. Under the Free Exercise Clause, laws which are not neutral or generally applicable face strict scrutiny. A policy targeting religion, either covertly or overtly, is not neutral. And a policy littered with exemptions that subject religious exercise to “unequal treatment” is not generally applicable. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534, 543-544 (1993). Nessel’s hostile targeting renders Michigan’s antidiscrimination policy non-neutral. And, separately, the policy’s *ad hoc*, exemption-riddled application renders it not generally applicable.

Further, forcing a private actor on “its own time and dime” to voice a government-mandated message—like endorsing same-sex marriage—violates the Free Speech Clause. *See Agency for Int’l Dev. v. AOSI*, 570 U.S. 205, 218 (2013). Michigan cannot pass strict scrutiny.

1. *State Defendants are violating state law to target St. Vincent.*

Michigan and St. Vincent previously enjoyed “a carefully balanced and established practice that ensure[d] non-discrimination in child placements while still accommodating traditional Catholic religious beliefs on marriage.” Op., R. 69, Page ID # 2519.

This followed the framework the Michigan legislature set forth in 2015 (*supra* pp. 5-6): Michigan *cannot* “take an adverse action against a child placing agency on the basis that the child placing agency has declined or will decline to provide any services that conflict with . . . the child placing agency’s sincerely held religious beliefs” Mich. Comp. Laws § 722.124e(3).

There is no factual dispute over what state law says, nor what Michigan did to follow it. Michigan previously “updated its adoption services master contracts ‘to reflect’” state law. Op., R. 69, Page ID # 2509. St. Vincent acted accordingly—providing referrals and “allow[ing] other qualified agencies to make recommendations on behalf of unmarried or LGBTQ couples.” *Id.* at Page ID # 2503. In *Dumont*, Michigan “admit[ed] that some child-placing agencies have a sincerely held religious belief that prevents them from licensing or adopting to same-sex couples, which is protected by” the 2015 Laws. Answer at Page ID # 1189, *Dumont*, ECF No. 52. And Michigan defended its accommodation of faith-based agencies: “[i]f [they] are not allowed to operate according to their religious principles, they will shut down, which can have the effect of reducing the number of available families. Such a result will do nothing to help a single child find a home.” Mot. to Dismiss at Page ID # 64, *Dumont*, 2:17-cv-13080 (E.D. Mich. Dec. 15, 2017), ECF No. 16.

Now, Michigan argues the District Court “upend[ed] the status quo” (Mot.3), claiming the “status quo” is that St. Vincent has been in violation of state policy all along. *See, e.g., id.* at 4. Michigan’s assertions cannot be reconciled with state law, nor with Michigan’s own statements in *Dumont*. The State’s newfound interpretation of state law—that it disappears the moment an agency accepts a referral for a single child—renders it meaningless.

The District Court was correct: “Until January 2019”—when Defendant Nessel took office—“the State accepted and defended [St. Vincent’s] practice . . . as complying fully with the 2015 statute and other applicable law.” Op., R. 69, Page ID # 2518. There is no abuse of discretion here; the District Court drew the most logical conclusions from Michigan’s actions.

2. Michigan’s new policy is non-neutral because it targets St. Vincent’s religious views.

Both before and after taking office, Attorney General Nessel took actions “inappropriate for a[n] [officer] charged with the solemn responsibility of fair and neutral enforcement” of state law. *Masterpiece*, 138 S. Ct. at 1729. Where the Supreme Court affirmed the “decent and honorable religious or philosophical premises” behind St. Vincent’s views, *see Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), Nessel said only “hate mongers” could hold them, *see* Op., R. 69, Page ID ## 2526-2527. Where the Michigan legislature sought balance between religious

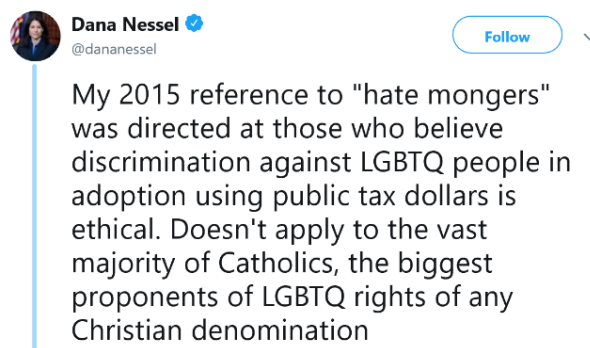
agencies and state interests, *supra* pp. 5-6, Nessel said that supporting the 2015 Laws means “you honestly have to concede that you just dislike gay people more than you care about the needs of foster kids.” *Id.* at Page ID # 2510 n.9. According to Nessel, the “only purpose” of the 2015 Laws was “discriminatory animus.” *Id.*

To sidestep Nessel’s hostility, Michigan argues that the Court should only analyze whether the antidiscrimination policy is “facially” neutral. *See* Mot.3, 8, 11, 14, 23. But “[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt.” *Lukumi*, 508 U.S. at 534. The Supreme Court has placed no “artificial limits on the factors a Court may consider” to identify religious targeting. *Order, R.* 84, Page ID # 2753 (citation omitted). Relevant factors include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question,” and “contemporaneous statements” by decisionmakers. *Masterpiece*, 138 S. Ct. at 1722. Nessel’s hostility toward St. Vincent’s religious exercise, before and after her election; her hostility toward Judge Jonker (*supra* pp. 12-13); and her impact on Michigan’s changed antidiscrimination policy, are all relevant here.

Michigan tries to minimize Nessel’s hostility by claiming that her statements were not anti-religious, and any hostility ended when she became Attorney General. Mot.18-20. It also claims that *the state’s*

Attorney General had “no bearing” on Michigan’s about-face¹⁹—indeed, Michigan disputes that any policy change occurred at all. *See id.* at 15-21. All these arguments fail.

First, Nessel’s hostility continued after she became Attorney General. After taking office, Nessel explained that “hate monger” “[d]oesn’t apply to the vast majority of Catholics”—just the ones “who believe discrimination against LGBTQ people in adoption using public tax dollars is ethical.”



Dana Nessel (@dananessel), Twitter (Apr. 14, 2019, 1:57 PM), <https://perma.cc/4RYN-LXVK>. Further, as discussed *supra* pp. 12-13, Nessel, as a public official, attacked Judge Jonker’s impartiality. Thus, unlike President Trump’s behavior in *Trump v. Hawaii*, 138 S. Ct. 2392,

¹⁹ *But see* Michigan Attorney General, *Attorney General Nessel’s statement on Dumont v Gordon settlement agreement*, YouTube (Mar. 22, 2019), <https://perma.cc/Y6SY-MP8D>.

2416-2418 (2017)—upon which Michigan relies (Mot.17-18)—this case involves statements made *after* taking office.²⁰

Nessel’s admissions demonstrate that the policy is, in fact, new. Nessel stated that “she reviewed the facts” of the *Dumont* litigation, determined Michigan “could be subject to liability,” and “strongly recommended resolving the case.”²¹ Previously, Michigan took the position that “if [Michigan] adopted Plaintiffs’ desired policy”—the policy in effect now—it would “condition[] faith-based CPAs’ participation in the foster system on the agencies giving up their religious principles,” raising a potential First Amendment violation. *See* Mot. to Dismiss at Page ID # 82, *Dumont*, ECF No. 16. Michigan also took the position that St. Vincent’s actions were “protected by PA 53.” Answer at Page ID # 1189, *Dumont*, ECF No. 52. And it enforced PA 53 by, among other things, requiring another agency to specify that it only worked with “married couples made up of two parents of the opposite sex.” Ex., R. 59-1, Page ID # 1967. Only after Nessel’s election was that defense dropped and St. Vincent put to

²⁰ The similarities with *Trump* end with Nessel’s tweets. *Trump* dealt with an executive order involving immigration and national security—contexts “largely immune from judicial control.” *See* 138 S. Ct. at 2418-2419. Nor did it involve a free exercise claim. *See id.* at 2429 (Breyer, J., dissenting)). And, while the executive order in *Trump* went through several iterations, Michigan’s about-face remains unchanged.

²¹ *State Settles Same-Sex Adoption Case*, Michigan Dep’t of Attorney General (Mar. 22, 2019), <https://perma.cc/6HGY-DG4T>; *see also* Op., R. 69, Page ID # 2512.

the choice between violating its beliefs and closing its doors. This new policy is not neutral.

3. Michigan's new policy is not generally applicable.

Even if the targeting had not occurred, Michigan's policy would still be subject to strict scrutiny because it fails the general applicability requirement. As this Court held, "[t]he key problem . . . is not the adoption of this anti-discrimination policy," it is making exemptions "for secular—indeed mundane—reasons," but not religious reasons. *Ward*, 667 F.3d at 730, 739. Here, Michigan has focused on the idea that once an agency accepts a referral, it loses protection. Mot.4. But its contracts permit MDHHS officials to grant waivers transferring cases even after referrals have been accepted. Ex., R. 6-12, Page ID # 352. In other words, it makes individualized exceptions.

Michigan also permits certain child welfare agencies to limit their services based on race, gender, or sexual orientation—in fact, one agency provides homes only for LGBT youth. *See Br.*, R. 6, Page ID ## 181-182, 203-204. Michigan permits these policy violations, claiming a sweeping interest in eradicating all "invidious discrimination." Mot.25. The only logical conclusion is that, to Michigan, St. Vincent's religious distinctions are "invidious," while secular distinctions based on race, gender, and sexual orientation are not. This is not generally applicable. "At some point, an exception-ridden policy takes on the appearance and reality of

a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.” *Ward*, 667 F.3d at 740. The same is true here.

4. Michigan’s new policy violates the Free Speech Clause.

On its own dime, St. Vincent conducts “an exhaustive review of” a “family’s eligibility” to foster a child and makes “subjective as well as objective determinations” about that family. Op., R. 69, Page ID # 2502. Because of St. Vincent’s religious views on marriage and family, it does not make these determinations, which it understands to be an endorsement, for unmarried or LGBTQ couples. *See supra*. Michigan wants to force St. Vincent to make written recommendations of those couples—on penalty of exclusion from the child-welfare system. The Free Speech Clause prohibits such compulsion. *See AOSI*, 570 U.S. at 218.

5. Michigan cannot survive strict scrutiny.

A law “target[ing] religious conduct . . . will survive strict scrutiny only in rare cases.” *Lukumi*, 508 U.S. at 546. This is not one of them.

Even if Michigan can identify an “interest[] of the highest order,” *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), Michigan must demonstrate that restricting religious exercise is “actually necessary to the solution.” *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011). Precision is critical.

Here, Michigan claims a compelling interest in ending “invidious discrimination.” Mot.25. There is nothing talismanic about “invidious discrimination.” As the District Court found, “St. Vincent does not prevent any couples, same-sex or otherwise, from fostering or adopting.” Op., R. 69, Page ID # 2504. St. Vincent’s religious views are “decent and honorable,” not invidious. *Obergefell*, 135 S. Ct. at 2602.

Since Michigan permits other agencies to refer applicants elsewhere and make distinctions based upon protected status, it cannot have a compelling interest in penalizing St. Vincent. *See Ward*, 667 F.3d at 740 (“[t]he multiple types of referrals tolerated by the counseling profession severely undermine the university’s interest”) (citation omitted). Further, as the District Court held, shutting down religious foster agencies that do not conform to the State’s orthodoxy “would constrict the supply of [agencies] and undermine the State’s intent of getting certified placements for kids.” Op., R. 69, Page ID # 2520.

Nor can Michigan prove that it has used the least restrictive means available. The state identified a less restrictive alternative in 2015: allowing agencies to refer families to better-suited agencies, as protected by state law.

B. Michigan fails the remaining stay factors.

Michigan has shown no irreparable harm, merely overheated rhetoric about the effects of St. Vincent’s religious views. *See* Mot.27. It does not

explain how it will be irreparably harmed by a delay in shutting down a successful foster agency—particularly one that Michigan has waited *years* to penalize.

St. Vincent, not Michigan, faces irreparable harm. “It is well-settled that loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (cleaned up). Indeed, a Second Circuit motions panel enjoined a similar state policy this week, concluding that “specific, irreparable First Amendment injury result[s] from” being forced to “either (1) compromise [the adoption agency’s] religious beliefs . . . or (2) close its adoption ministry.” Order at 4, *New Hope Family Servs. v. Poole*, No. 19-1715 (2d Cir. Nov. 4, 2019), ECF No. 160.

A stay here would similarly devastate the families and children who rely on St. Vincent. The District Court determined that “[s]huttering St. Vincent would create significant disruption for the children in its care, who already face an unpredictable home life and benefit from stability. It would also hurt the foster and adoptive parents who rely on St. Vincent for support and would have to find new resources.” Op., R. 69, Page ID # 2523. Michigan has not met its heavy burden to demonstrate this finding was an abuse of discretion.

Finally, the public interest favors denying a stay. “Having as many possible qualified adoption and foster parent agencies in this state is a substantial benefit to the children of this state” Mich. Comp. Laws § 722.124e(1)(c). This only occurs if St. Vincent stays open. Closing agencies like St. Vincent, as Michigan told a federal court in 2017, “will do nothing to help a single child find a home.”²²

CONCLUSION

The Court should deny the motion.

Dated: November 6, 2019

Respectfully submitted,
/s/ Lori H. Windham
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²² Mot. to Dismiss at Page ID # 64, *Dumont*, ECF No. 16.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,194 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Century Schoolbook 14-point type) using Microsoft Word 2016.

Dated: November 6, 2019

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Emergency Motion for Injunction Pending Appeal was filed this 6th day of November, 2019 through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

Dated: November 6, 2019

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EXHIBIT A

CONTRACT NUMBER: MA 190000001069

AMENDMENT NUMBER: 3

Between

THE STATE OF MICHIGAN

DEPARTMENT OF HEALTH AND HUMAN SERVICES

And

CONTRACTOR	St. Vincent Catholic Charities
CONTRACTOR ADDRESS	2800 W. Willow St., Lansing, MI 48917
CONTRACTOR EMAIL	Seykaa@stvcc.org

STATE CONTACT	NAME	EMAIL
Contract Administrator	Cathe Hoover	HooverC3@michigan.gov
BGP Analyst	Katie McFarland	McFarlandK1@michigan.gov

CONTRACT SUMMARY			
SERVICE DESCRIPTION	Adoption - A17-33001		
GEOGRAPHIC AREA	Statewide		
INITIAL EFFECTIVE DATE	10/01/2016	CURRENT EXPIRATION DATE	09/30/2019
CURRENT CONTRACT VALUE	\$1,250,000.00		
CONTRACT TYPE	Unit Rate/Per Diem		

AMENDMENT DESCRIPTION				
EXTEND EXPIRATION DATE	☒ YES	☐ NO	NEW EXPIRATION DATE	09/30/2020
AMENDMENT AMOUNT			ESTIMATED REVISED AGGREGATE CONTRACT VALUE	
\$.00	☐ INCREASE	☐ DECREASE	\$1,250,000.00	
NATURE OF CHANGE	This amendment will extend the contract one year, move the payment schedule to Schedule B, change language, and change the contract number.			

The undersigned have the lawful authority to bind the Contractor and the Michigan Department of Health and Human Services (MDHHS) to the terms set forth in this Contract.

By signing this Contract, the Contractor certifies and assures to the state that they will comply with the Anti-Trust Lobbying Act 31 USC 1352, as revised by the Lobbying Disclosure Act of 1995, 2 USC 1601 et seq, Federal Acquisition Regulations 52.203.11 and 52.203.12, and Section 503 of the Departments of Labor, Health & Human Services and Education, and Related Agencies section of the current FY Omnibus Consolidated Appropriations Act.

FOR THE CONTRACTOR:

St. Vincent Catholic Charities

Contractor

 Signature of Director or Authorized Designee
 ANDREA E. SEYKA
 Print Name
 9/24/19
 Date

FOR THE STATE:

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES

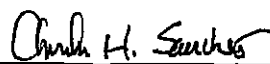

 Signature of Director or Authorized Designee
 Christine H. Sanches
 Director, Bureau of Grants and Purchasing
 Print Name
 10.10.19
 Date

EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK, et al.,

Plaintiffs,

DOCKET NO. 1:19-cv-286

vs.

ROBERT GORDON, et al.,

Defendants.

TRANSCRIPT OF RULE 16 SCHEDULING CONFERENCE
BEFORE THE HONORABLE ROBERT J. JONKER, CHIEF JUDGE

GRAND RAPIDS, MICHIGAN

June 26, 2019

Court Reporter: Glenda Trexler
Official Court Reporter
United States District Court
685 Federal Building
110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

Proceedings reported by stenotype, transcript produced by
computer-aided transcription.

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* * * * *

Grand Rapids, Michigan

June 26, 2019

3:59 p.m.

P R O C E E D I N G S

THE COURT: We're here on the case of Buck against
Gordon, 1:19-cv-286, for a Rule 16.

Let's start with appearances, please.

MS. WINDHAM: Lori Windham for plaintiffs.

THE COURT: All right.

MR. REAVES: Nicholas Reaves for plaintiffs.

THE COURT: All right. Thank you.

MR. SMITH: Assistant Attorney General Joshua Smith
for the state defendants, Your Honor.

THE COURT: All right.

MR. BATES: Christopher Bates for the federal

03:59:41 1 defendants.

2 *THE COURT:* Okay. Thank you.

3 Nobody wants to sit in the first chair on the defense
4 side, is that it?

03:59:46 5 *MS. OSTRAGER:* Your Honor --

6 *MR. SMITH:* I'll do it.

7 *THE COURT:* You don't have to. It's okay. They all
8 work.

9 Go ahead.

03:59:53 10 *MS. OSTRAGER:* Your Honor, my name is Ann-Elizabeth
11 Ostrager.

12 *THE COURT:* Get to a microphone, if you would, just
13 so that we can hear you well. Thank you.

14 *MS. OSTRAGER:* Thank you, Your Honor. My name is
04:00:03 15 Ann-Elizabeth Ostrager from Sullivan & Cromwell, and I
16 represent the proposed intervenor defendants Kristy and
17 Dana Dumont along with my colleagues from the ACLU who are
18 available should Your Honor want to entertain any discussion of
19 any of the papers filed by the intervenors.

04:00:19 20 *THE COURT:* All right. Can you spell your name for
21 me, the last name?

22 *MS. OSTRAGER:* O-S-T-R-A-G-E-R.

23 *THE COURT:* Thanks.

24 *MS. OSTRAGER:* Thank you.

04:00:29 25 *THE COURT:* Okay. And just sit at the table because

04:00:31 1 then you'll have a microphone. I don't know if you'll have
2 anything to say or address anyway, but you might as well be
3 there.

04:00:41 4 The main thing that I wanted to hear from the parties
5 today is to try to understand the trajectory of the case a
6 little bit. And in particular whether from a preliminary
7 injunction point of view that's really where both sides are
8 going. And depending on how that comes out, whoever loses is
9 going to go straight to the Court of Appeals, which I would
04:00:59 10 expect. And if that's the trajectory, as opposed to, you know,
11 really getting a preliminary injunction and then litigating the
12 rest of the case to final judgment as we might in a, you know,
13 employment case, for example, it's going to change the shape of
14 where we're going.

04:01:15 15 So can you give me some insight into that? I take it
16 where both of you want to go eventually is upstream, and I
17 don't know how much, if any, desire either side has to litigate
18 here past the preliminary injunction before we hear from the
19 Court of Appeals.

04:01:31 20 But let me start with plaintiff, and then we'll get
21 the other people's position.

04:01:44 22 *MS. WINDHAM:* Certainly, Your Honor. We believe that
23 the preliminary injunction motion is fully briefed. It's ripe
24 for decision at any time. We're happy to present argument on
04:01:44 25 that today or at any time.

04:01:46 1 As Your Honor has noted, there's an extensive record
2 on that already, and so we hope to receive a decision on that
3 soon, because it is urgent for our clients. And I -- as far as
4 plaintiffs go, we don't have any objection to holding off on
04:02:02 5 discovery while that is decided and if there is any appeal
6 after that.

7 *THE COURT:* Okay. Well, I'm pretty sure there will
8 be an appeal no matter what, but maybe not.

9 Go ahead.

04:02:14 10 *MR. SMITH:* Thank you, Your Honor. Although the
11 motion for preliminary injunction is fully briefed, I think
12 that in order for plaintiffs to make a sufficient evidentiary
13 showing, that they would have to present proofs, Your Honor,
14 and that they would need a hearing on that. We, of course, are
04:02:28 15 prepared to argue that today. But to the extent that they do
16 not present proofs, I don't think that they will have made a
17 sufficient evidentiary showing for preliminary injunction.

18 Now, I would agree with plaintiffs' counsel, though,
19 that to the extent this Court wants to hold a hearing and/or
04:02:44 20 decide the preliminary injunction, then we could certainly hold
21 off on discovery.

22 As indicated in our comments on the proposed
23 scheduling order, there's been a very extensive amount of
24 discovery on this case from the related Dumont litigation that
04:03:02 25 occurred in the Eastern District before Judge Borman. So there

04:03:05 1 is certainly a strong record of discovery in this case already.

2 *THE COURT:* All right. Well, from your -- both sides
3 have submitted significant evidentiary support in the form of
4 affidavits at least on the preliminary injunction issue

04:03:20 5 already, and sometimes that's enough for a preliminary
6 injunction decision either way. Sometimes it's not where
7 there's significant factual dispute. And I can't say I've
8 looked through all of the 1,700 pages that we already have on
9 the record, but I think I've skimmed enough to see I don't see

04:03:40 10 a lot of factual disputes between the parties in their
11 evidentiary submissions. What I see is people emphasizing
12 different things.

13 So what do you think or what do you expect to dispute
14 factually? I know you both disagree on the law, but what are
04:03:54 15 the factual disputes that you see at the heart of the
16 preliminary injunction?

17 *MR. SMITH:* Is that addressed to me, Your Honor?

18 *THE COURT:* Yes.

19 *MR. SMITH:* Well, I think there's several. I mean,
04:04:04 20 first of all, plaintiffs either do not understand or
21 mischaracterized the regulatory role of the State of Michigan
22 vis-a-vis child-placing agencies.

23 *THE COURT:* All right.

24 *MR. SMITH:* They mischaracterize whether the
04:04:16 25 nondiscrimination clauses in the contract, which have been

04:04:21 1 there for nearly four years I believe in the case of the
2 adoption contract and for nearly three years in the case of the
3 foster care contract for St. Vincent, they mischaracterize as
4 new policies resulting from the Dumont consent decree. But I
04:04:36 5 think there's a basic factual dispute there.

6 *THE COURT:* Well, what's the fact -- why isn't that
7 at least a mixed question? I mean, how are we going to learn
8 anything from you cross-examining the plaintiffs about that, or
9 how are they going to learn anything from you cross-examining
04:04:49 10 your people on that? Don't you just disagree on the legal
11 significance of those things?

12 *MR. SMITH:* I think it's more than a disagreement on
13 the legal significance. I think it's a disagreement as to what
14 do those basic facts mean. I mean, I would agree that the fact
04:05:04 15 of the non --

16 *THE COURT:* All right. Well, let's assume for
17 purposes of argument that the way the department is applying
18 the language today is the way it's always been meant to apply
19 for four years. The plaintiffs' position is that's
04:05:16 20 unconstitutional. I mean, isn't that the gravamen of their
21 brief?

22 *MR. SMITH:* I think that could be gleaned from their
23 brief, Your Honor. I think that they are characterizing this
24 as a new policy. There certainly, to the extent that they have
04:05:29 25 any viable cause of action against Attorney General Nessel,

04:05:35 1 that they have to characterize it as a new policy because
2 otherwise this is a policy that was put in place about three
3 and a half plus years before Attorney General Nessel became
4 Attorney General Nessel. She was private citizen Nessel at
04:05:50 5 that time. So certainly if that's the claim, then they have no
6 viable cause of action against the Attorney General.

7 But on a deeper level, to the extent that they are
8 alleging that the department has not enforced the
9 nondiscrimination clauses, has not conducted investigations, or
04:06:09 10 I believe in their response to our motion for preliminary
11 injunction they allege that a government official is the person
12 who filed the internal complaints that put in motion the
13 investigations of Bethany Christian Services Madison Heights,
14 Bethany Christian Services East Lansing, and St. Vincent
04:06:36 15 itself, that's simply not true. What put that in motion was
16 the filing of the Dumont Complaint by the Dumonts, the
17 Busk-Suttons, and Ms. Ludolph who was later dismissed in that
18 case. But my client's position is when they received that
19 Complaint, they had a duty pursuant not only to contract but a
04:06:55 20 duty pursuant to the licensing rules for CPAs to investigate
21 those matters.

22 Now, as stated in the affidavits and as stated in our
23 motion, the fact that they didn't release those investigations
24 is related to the ongoing litigation in Dumont, and now it's
04:07:13 25 related to the ongoing litigation in the Buck case. So --

04:07:19 1 *THE COURT:* All right. Well, the regulatory role
2 issue in your view is a factual one at least in part, but what
3 do you expect the plaintiffs to produce by way of evidence? It
4 sounds more like it's an evidentiary proffer from your people
04:07:35 5 who will get on the stand and say that's the way it's always
6 been and there's been no change.

7 *MR. SMITH:* I think that's a fair characterization,
8 Your Honor.

9 *THE COURT:* All right. So from the plaintiffs, what
04:07:45 10 do you dispute in the basis that they have submitted on the
11 evidence? I mean, what would you need an evidentiary hearing
12 for?

13 *MR. SMITH:* Well, with all due respect, I think they
14 need an evidentiary hearing to prove their case.

04:07:59 15 *THE COURT:* Well, I'm saying you want to
16 cross-examine their affidavits basically? Is that what you're
17 saying?

18 *MR. SMITH:* I think it would be beneficial.

19 *THE COURT:* What do you think are wrong in those
04:08:07 20 affidavits? What do you expect to show that's factually
21 inaccurate?

22 *MR. SMITH:* Well, I think part of the problem is that
23 as far as the individual plaintiffs go, they simply lack
24 standing to bring the suit.

04:08:19 25 *THE COURT:* I understand your argument. What I want

04:08:22 1 to know is what do you dispute factually? So they don't have
2 standing because of what? They are not interested in adopting
3 through St. Vincent anymore or something else?

04:08:32 4 *MR. SMITH:* Well, I think their allegation is that
5 at least on behalf of the Bucks that they are only interested
6 in adopting through St. Vincent and they have at least put
7 forward the belief that they would be unable to adopt a sibling
8 of one of their adopted children through anybody other than
9 St. Vincent if St. Vincent decides to no longer provide foster
04:08:51 10 care services under contract with the State of Michigan. So I
11 think that that's what their claim is, and I think that claim
12 is simply untrue for several reasons. One, by their own
13 admission in the Complaint they can adopt through the Michigan
14 Adoption Resource Exchange.

04:09:05 15 *THE COURT:* Okay. If it's already in the Complaint,
16 then -- what I'm trying to get at is why do we need to take the
17 time to hear the plaintiffs call the four or five people that
18 they have already got affidavits from, say what they said, and
19 then have you cross-examine to find out stuff that's already in
04:09:24 20 the Complaint? And then on the same side why do we need to
21 have your people come and recite what they have already said so
22 that the plaintiff can cross-examine? If we already have
23 through the submissions of the parties a reasonably complete
24 factual record, why can't we get to the legal issues? And if
04:09:42 25 we need time to dispute genuine issues that have been framed in

04:09:46 1 the affidavits, okay, I get that. But, you know, time is a
2 precious resource, and I don't want to spend a lot of time
3 doing things that are already part of the 1,700-page record and
4 not materially going to change anything.

04:09:59 5 *MR. SMITH:* I understand that, Your Honor. I mean,
6 obviously if you're prepared to make a decision based on the
7 submissions to the Court, certainly it's your right to do so.

8 *THE COURT:* Well, I'm prepared to do what I need to
9 do, but the point is, I need to understand what I'm going to
04:10:14 10 learn in that process or what I need to learn. So, you know, I
11 mention an employment case where we get a lot of preliminary
12 injunction practice. There's often dramatically different
13 factual issues between the parties about whether certain
14 information was taken or not taken from computer systems, and
04:10:31 15 there's really no way to deal with that effectively on paper.
16 And I haven't read everything. We're in trial right now, so I
17 definitely haven't had time to read everything. But what I
18 didn't seem to see was that kind of factual clash in the
19 affidavits each side submitted, and that's why I'm trying to
04:10:49 20 get a focus on it.

21 *MR. SMITH:* I think that there is sufficient factual
22 clash.

23 *THE COURT:* All right. So regulatory role --

24 *MR. SMITH:* Regulatory --

04:10:57 25 *THE COURT:* -- whether plaintiffs have articulated

04:10:59 1 facts that support standing. Other categories?

2 MR. SMITH: And I would say just to perhaps
3 recharacterize what I said earlier, their lack of standing is a
4 legal issue. I think that that is in fact a legal issue.

04:11:13 5 THE COURT: I'm trying to focus on the factual issues
6 right now.

7 MR. SMITH: I understand.

8 THE COURT: I want to understand what, if anything,
9 we're going to gain through an evidentiary hearing.

04:11:22 10 MR. SMITH: Well, I think as I said at the outset,
11 the plaintiffs very much mischaracterized the regulatory role
12 of the State of Michigan.

13 THE COURT: All right. So we've already got that.
14 Other than regulatory role?

04:11:31 15 MR. SMITH: The history of the nondiscrimination
16 clauses.

17 THE COURT: Well, is there a disputed factual history
18 on that, or are we just going to say here is the way the
19 clauses rolled out and then you're going to dispute with them
04:11:44 20 when the interpretation changed or if it changed?

21 MR. SMITH: I think that is an issue of fact.

22 THE COURT: Well, isn't that the same thing as the
23 regulatory role I guess I'm getting at? And we've already
24 talked about that.

04:11:58 25 MR. SMITH: I don't think it's quite the same thing

04:11:59 1 because the allegation they are making with regard to the
2 regulatory role is that the State of Michigan has not been
3 uniformly enforcing those nondiscrimination clauses or that it
4 has granted many exceptions. Now, for an example --

04:12:14 5 *THE COURT:* Okay. So what other than that? To me
6 that's part of what you were talking about earlier, at least as
7 I understood it. But what else?

8 *MR. SMITH:* Well, if you look at their allegations
9 regarding the exceptions themselves --

04:12:24 10 *THE COURT:* Well, don't look at -- tell me what you
11 need factually, what you need to contest factually in what they
12 have submitted.

13 *MR. SMITH:* Well, they have -- part of that is they
14 have submitted in their filings that there are several types of
04:12:39 15 CPAs, child-placing agencies, that specialize in particular
16 populations. Now, their contention is that that specialization
17 somehow means that the State of Michigan allows them to
18 discriminate based on protected characteristics. Now, that is
19 a fact issue. We do not allow them to do that. Some of these
04:13:01 20 are not --

21 *THE COURT:* So you're talking about their reference
22 to people that focus on young men and people that focus on
23 young women individually or exclusively?

24 *MR. SMITH:* Yeah. The boys to men --

04:13:12 25 *THE COURT:* Do you disagree with that factual claim,

04:13:15 1 that there are certain people that you allow to deal only with
2 young boys and only with young women? Or do you disagree
3 with -- you do disagree with that?

4 *MR. SMITH:* We disagree with the factual claim, yes.

04:13:25 5 *THE COURT:* So what's your factual claim on that
6 point?

7 *MR. SMITH:* Well, first of all, two of the
8 institutions they name are not child-placing agencies, they are
9 child-caring institutions. They have a different set of rules,
04:13:33 10 they have a different set of contracts. They are not
11 comparable to a child-placing agency.

12 *THE COURT:* So you agree that they only deal with
13 boys or only deal with girls, but it's irrelevant in your view
14 because they are not child-protection agencies or
04:13:44 15 child-placement agencies?

16 *MR. SMITH:* Correct. I don't know if they only deal
17 with boys or not, what I do know is they are not child-placing
18 agencies.

19 *THE COURT:* Well, I'm not talking about the factual
04:13:52 20 issues. Whether they are a child-placement agency or something
21 else, that's not going to be a factual dispute, is it? Aren't
22 we just going to be able to look at a list and figure that out?

23 *MR. SMITH:* I think that you could, Your Honor. I
24 will concede that. Their claim, however, is that they are all
04:14:06 25 in the same category, and I would say that claim is factually

incorrect.

THE COURT: So what other factual disputes do you expect to see framed if we go to evidentiary hearing?

MR. SMITH: Well, they also claim that certain child-placing agencies -- they seem to claim at least that they only serve certain populations by specializing in them, and that is simply not true. Instead they are subject to the same set of rules and they are subject --

THE COURT: Again, you would agree with them factually, but you'd just say they are overcharacterizing it or mischaracterizing it, that serving one population isn't the same thing as discriminating based on a protected characteristic?

MR. SMITH: I would disagree with their assertions of fact.

THE COURT: I see.

MR. SMITH: I think those assertions are simply wrong.

THE COURT: Okay.

MR. SMITH: And I think the evidence would show that they are wrong. You can certainly give credence and I think you should give credence to our sworn affidavits because the people who have provided affidavits --

THE COURT: That's my point. They are already there in the record, so what do you want to cross-examine in the

04:15:10 1 plaintiffs' evidentiary submission? And I'm hearing regulatory
2 role including some of the things you're touching on now. What
3 else?

4 *MR. SMITH:* Well, again, I want to reiterate, we
04:15:19 5 don't have a burden of proof.

6 *THE COURT:* Please, please, please don't argue with
7 me. Do you think I don't know that? Look, you're a half an
8 hour late to start with. I'm in trial. I've got plenty of
9 other things to do. And I've got 1,700 pages in the record
04:15:32 10 already. Just answer my questions so we can frame how we
11 proceed. That's what I want to know. That's all we're doing
12 today.

13 So, of course, they have the burden of proof. We
14 know that. I'm trying to understand in practical terms what
04:15:45 15 both of us, all parties and the Court, are going to gain or not
16 gain from an evidentiary hearing. That's all. So what else do
17 I need to know that you're going to dispute factually?

18 *MR. SMITH:* I think that those are probably the main
19 areas, Your Honor.

04:15:57 20 *THE COURT:* Okay. Let me go to the plaintiffs. I
21 heard in your opening comments that things were fully briefed
22 and ready for decision, that you were ready to go on the paper
23 record, but maybe I overread that. Do you think there are
24 factual disputes from your perspective that need evidentiary
04:16:14 25 hearing?

04:16:14 1 *MS. WINDHAM:* Your Honor, we are prepared to rest on
2 the factual record. This is our motion and our burden of proof
3 on most issues. And we believe that there's more than enough
4 here for Your Honor to grant a preliminary injunction to my
04:16:27 5 clients.

6 I'm happy to cross-examine the State's witnesses if
7 that's what they want to do, however, what I'm concerned about
8 here is the timing. As we said in the Seyka declaration, which
9 is attached to our reply brief, my client, St. Vincent, is
04:16:44 10 already dealing with employees who are leaving because they
11 don't know if the agency is going to be open after
12 September 30th. They are dealing with foster and adoptive
13 families coming to them wondering what's going to happen and if
14 they are going to continue to have this agency there to serve
04:16:58 15 them. And so time is of the essence for my clients, and I'm
16 concerned about the delays, unnecessary delays that would be
17 created if we were to have to have an evidentiary hearing on
18 this.

19 I identify three things that the State is saying it
04:17:12 20 wants to dispute. Number one, on the question of the standing
21 of the plaintiffs, I'm not familiar with a case where we've had
22 an evidentiary hearing on plaintiffs' standing. That's
23 generally judged with regard to the Complaint. But I'd also
24 note that in their motion --

04:17:26 25 *THE COURT:* I heard him say he was going to

04:17:28 1 recharacterize that as a legal point anyway, so I thought he
2 was taking that off the table.

3 *MS. WINDHAM:* All right. With regard to this issue
4 of child-placing agencies versus nonchild-placing agencies, I
04:17:40 5 believe that that is a legal point. Are the nonchild-placing
6 agencies relevant to whether the State's policies are neutral
7 and generally applicable under the Free Exercise Clause? I
8 believe they are. Because if this is an important goal the
9 State has, then the question becomes are they actually applying
04:17:57 10 it across the board? If they are allowing others who serve
11 children in the child welfare space to violate that. And I
12 have not seen in any of their four affidavits that they filed
13 any evidence -- any argument on that other than the idea that
14 these are just not child-placing agencies. If they are
04:18:14 15 allowing agencies to depart from that standard, then it's not a
16 neutral and generally applicable standard.

17 Number 2, they say that child-placing agencies, even
18 if they specialize, are still required to follow the
19 nondiscrimination provisions. However, again, in their four
04:18:32 20 affidavits they filed they have not identified any
21 investigations that they have undertaken with regard to those
22 agencies nor any sort of statewide communications and training
23 for employees of the sort that they are doing right now to try
24 and make sure that religious agencies are complying with the
04:18:50 25 State's policy.

04:18:52 1 And on the first one, on the question of when the
2 policy changed, I agree the policy is unconstitutional whether
3 it's an old policy or a new policy. But, again, we have the
4 State's representations that it made in federal court where it
04:19:04 5 admitted for many years some private child-placing agencies
6 that provide foster care and adoption services under contract
7 with the State operate in accord with their religious beliefs,
8 a practice now permitted expressly in law by PA 53. So the
9 State has acknowledged that it was aware of these agencies'
04:19:22 10 practices, that it continued to contract with them and
11 permitted them to operate.

12 Now we know through the State's written statements
13 and documents that it is taking a position that what those
14 agencies are doing is improper, violates their contracts, and
04:19:35 15 that the State can now penalize them under the law. That is a
16 targeted action in violation of the Free Exercise Clause, and I
17 believe it's clear from the papers what the State has done
18 here. And so I don't believe that any further factual
19 development is necessary in order to establish a violation of
04:19:51 20 the Free Exercise Clause or of the Free Speech Clause.

21 *THE COURT:* All right. Do you want to respond at
22 all? And I guess the point would be if the plaintiff is saying
23 "We think we make our burden of proof on the written record"
24 and you think otherwise, don't you already through your own
04:20:14 25 arguments and submissions have framed your position as you've

04:20:19 1 just outlined it? I mean, isn't that already there?

04:20:32 2 *MR. SMITH:* Yeah, I would have to concede that this
3 is plaintiffs' motion. If they don't want an evidentiary
4 hearing, I think that their opinion has some weight on that.
5 My thought is that in order for them to sustain their burden
6 for what the Sixth Circuit has characterized as extraordinary
7 relief, they need to put on some more proofs. Particularly
8 they plaster over the distinction between CPAs and non-CPAs.
9 Your Honor, they have a different set of rules and they don't
04:20:54 10 have the same contracts. They are not comparable. And I do
11 think that's a fact issue.

12 Second, they have no evidence -- they have the burden
13 of proof. They have said that the State has offered no
14 evidence that we apply this uniformly. Well, we have. This
04:21:11 15 clause was enforced in 2017 and 2018 against Catholic Charities
16 West Michigan. They agreed to a corrective action plan. It
17 was enforced against them. As stated in the affidavits, the
18 Du -- or excuse me -- the St. Vincent and the Bethany
19 investigations were not released because of the then-pending
04:21:33 20 litigation. The St. Vincent investigation still has not been
21 released because shortly after the Dumont case was concluded
22 this case was filed.

23 *THE COURT:* All right. When you say as stated in the
24 affidavits --

04:21:49 25 *MR. SMITH:* Yes.

04:21:49 1 *THE COURT:* -- you're telling me it's already in
2 front of me, right?

3 *MR. SMITH:* Yes. Yes. There are details regarding
4 the Catholic Charities West Michigan investigations, and there
04:21:58 5 are also some statements regarding the two Bethany
6 investigations and the St. Vincent investigation, Your Honor.

7 *THE COURT:* All right. From the plaintiffs' point of
8 view are you willing to live with that, or do you feel like you
9 need to cross-examine that to make your case on the preliminary
04:22:14 10 injunction?

11 *MS. WINDHAM:* Your Honor, I believe that what the
12 Court has in front of it is sufficient to make a determination
13 on the preliminary injunction.

14 *THE COURT:* All right. Let's say we go forward, we
04:22:26 15 have a preliminary injunction hearing, whether it's evidentiary
16 or otherwise for now, I make my decision, whichever way it
17 comes out, you know, I would expect whoever loses to appeal. I
18 mean, that's what I would expect given the case so far and
19 where I would think it's going. Maybe I'm wrong. But talk to
04:22:46 20 me about what you envision after that in this court, if
21 anything, before we hear from the Court of Appeals.

22 You know, if I grant the injunction and the State
23 appeals, is there anything either side wants here by way of
24 discovery and litigation? Or vice versa, if I deny the
04:23:02 25 injunction and you appeal at the plaintiffs' table, anything