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-APPELLANTS' MOTION TO DISMISS THE APPEAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

After invoking this Court's jurisdiction, filing and losing a substantive motion, and causing the parties to brief and the courts to hear multiple "emergency" filings, Defendants-Appellants ("Michigan" or the "State") now want to short-circuit this appeal before the Court can finish deciding it. It seems this Court's review thus far has not been to Michigan's liking, and the State is eager to find another tribunal. Indeed, after previously saying it was an emergency to get into this Court (Mot. to Stay), now the State says it is an emergency to get into a different court (Mot., R. 87).

Although insisting it owes no explanation for this about-face, the reasons it does give prove its only purposes are forum-shopping and delay. Certification to the Michigan Supreme Court is not a reason to dismiss, is not going to resolve the case, and only creates delay. Factfinding will not help the courts resolve questions of law. And Michigan's admissions here contradict the claims in its earlier "emergency" motion for relief.

The Court should deny the motion and finish this appeal in order to promote judicial efficiency and provide guidance to the lower courts on an issue of public importance. This motion also gives the Court the

opportunity to make clear to litigants that such gamesmanship will not be countenanced.

FACTUAL AND PROCEDURAL BACKGROUND

For nearly a century, St. Vincent has helped find loving homes for Michigan's foster children. Decl., R. 6-1, Page ID # 229. This work is central to St. Vincent's ministry and helps to assist some of the nearly 13,000 children in Michigan's foster care system. Aff., R. 34-3, Page ID # 972.

The same sincerely held religious beliefs that compel St. Vincent's foster care ministry prohibit St. Vincent from certifying same-sex (or unmarried) couples. Decl., R. 6-1, Page ID # 231. Accordingly, when such couples approach St. Vincent, it refers them to other agencies. Op., R. 69, Page ID # 2503. This referral practice is unremarkable, as many private agencies specialize in helping certain populations.[1] Michigan even passed

[1] *See, e.g., 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."); *Minority Specializing Agency and Resource Directory*, AdoptUSKids, 4, https://perma.cc/NZ64-QLV8 (discussing specialized agencies in Michigan).

the 2015 Laws to expressly protect this practice. *Id.* at Page ID # 2498; 2015 PA 53, 54 & 55.

Thus, Michigan knew of, allowed, and even defended this referral practice. Op., R. 69, Page ID # 2498. But after a change of administrations in early 2019, Michigan's policy changed too. The new attorney general had declared that the 2015 Laws protecting St. Vincent's religious beliefs' "only purpose [was] discriminatory animus," and called those who supported the laws "hate-mongers." *Id.* at Page ID # 2499. In March 2019, Michigan announced a new policy which forced St. Vincent into an impossible choice: violate its religious beliefs about the family or close its highly effective foster care ministry. *Id.*

St. Vincent brought this case in April 2019. Compl., R. 1. Shortly thereafter, Michigan tried to get the case transferred from the Western District of Michigan, where all the parties reside, to the Eastern District of Michigan. Mot., R. 29. The District Court denied that motion. Order, R. 52.

St. Vincent sought a preliminary injunction, which, in September 2019, the district court granted. Op., R. 69. On the merits, the district court held that Michigan's attempt to impose "a State-orthodoxy test that

prevent[ed] Catholic believers from participating" in foster care and adoption constituted unconstitutional religious targeting. *Id.* at Page ID # 2519.

Two weeks later, Michigan filed an "emergency" request, asking the district court to stay the injunction pending appeal, claiming that it "present[ed] significant potential injury to children." Mot., R. 72; Br., R. 73, Page ID # 2559. The district court denied that request. Order, R. 84, Page ID # 2751. The State then filed an expedited motion to stay the injunction pending appeal in this Court, claiming an "emergency" because "the State" is "compel[led] . . . to turn a blind eye to taxpayer-funded discrimination," causing "immeasurable and irreparable" "harm to Appellants, prospective families, children in state-supervised care . . . and their families, and the LGBT community . . . ." Mot. to Stay at 3, 5. The Court granted expedited consideration of that motion, then denied the motion with an opinion.

Relatedly, the Dumonts—a same-sex couple who support the State's new policy—unsuccessfully sought intervention before the district court. Mot., R. 18. Their appeal of that decision is fully briefed and pending before this Court in a separate appeal. *Buck v. Gordon*, 19-1959 (6th Cir.

filed Aug. 28, 2019). The Dumonts also sought intervention in this appeal. St. Vincent opposed that motion, arguing that it should either be denied outright, or consideration delayed until the resolution of the Dumonts' intervention appeal. That motion is still pending.

While St. Vincent's case was pending, another foster agency, Catholic Charities of West Michigan, filed a case in *state* court (the Michigan Court of Claims) challenging the state's new policy. *Catholic Charities v. Mich. Dep't of Health & Human Servs.*, 2:19-cv-11661 (E.D. Mich. removed June 5, 2019). That lawsuit brought claims under the 2015 Laws and federal constitutional claims similar to those at issue here. *See* Not. of Removal., *Catholic Charities*, 2:19-cv-11661 (E.D. Mich., June 5, 2019), ECF No. 1. That agency, like St. Vincent, sought a preliminary injunction. Mot., *Catholic Charities*, 2:19-cv-11661 (E.D. Mich., June 26, 2019), ECF No. 11. But Michigan apparently did not want the issue decided in that court either—so it removed that case from state court to the Eastern District of Michigan. *See* Not. of Removal., *Catholic Charities*, 2:19-cv-11661 (E.D. Mich., June 5, 2019), ECF No. 1.

This Court ordered Michigan to file its opening brief in this appeal by January 6, 2020. Michigan ignored that order. Instead, on January 6, Michigan filed a contested motion to dismiss this appeal.

ARGUMENT

Under Federal Rule of Appellate Procedure 42(b), an appellant seeking to dismiss its docketed appeal must ask the Court to dismiss the appeal "on terms agreed to by the parties or fixed by the court." While Michigan has insisted that "[n]o explanation for . . . dismissal is required,"[2] dismissal is not automatic. Because an appellant must file a *motion* to dismiss, not a *notice* of dismissal (*see* Fed. R. App. P. 41(a)(1)(A)), this Court decides whether dismissal is warranted. It is unwarranted here.

I. This Court should not countenance Michigan's gamesmanship.

Michigan seeks to use dismissal to manipulate this Court's processes and evade an adverse decision. Michigan's own motion reveals as much. Each of its stated reasons for dismissal is more transparent than the last.

First, Michigan claims it needs dismissal so it can ask the district court to ask the Michigan Supreme Court to interpret the 2015 Laws.

---

[2] Mot. to Dismiss at 2.

Mot. to Dismiss at 2. This makes no sense. Michigan does not need to dismiss this case to seek state-question certification. It could ask this Court. Parties do it all the time. *E.g., In re Certified Question from U.S. Court of Appeals for the Sixth Circuit*, 696 N.W.2d 687 (Mich. 2005); *In re Certified Question from U.S. Court of Appeals for Sixth Circuit*, 659 N.W.2d 597 (Mich. 2003).[3]

If Michigan actually wanted this question resolved by the state courts—as opposed to simply evading the remainder of this Court's review—it had an ideal opportunity to do so: Catholic Charities of West Michigan recently brought a claim under the 2015 Laws in state court. *Catholic Charities*, 2:19-cv-11661 (E.D. Mich. removed June 5, 2019). Yet Michigan *removed* that case to federal court. Not. of Removal, *Catholic Charities*, 2:19-cv-11661 (E.D. Mich., June 5, 2019), ECF No. 1. So, Michigan removed a state case raising state law claims to federal court, and now wants to shift a federal case raising federal claims to state court.

[3] At a minimum, under Michigan's own logic, this Court should wait to see if the district court grants the State's certification request (currently pending) and deny Michigan's motion if the certification is denied.

Moreover, certification here would be so plainly futile Michigan cannot seriously expect it to further this case, only to delay it. St. Vincent raised exclusively federal claims. Compl., R. 1. The district court's preliminary injunction was premised not upon the construction of the 2015 Laws, but upon Michigan's impermissible targeting of disfavored religious beliefs. *See generally*, Op., R. 69. The district court used the 2015 Laws as one of many factors explaining the status quo and the public interest. *See id.* at Page ID # 2517 ("The history of this case, the *Dumont* litigation, the Michigan Legislature's enactment of 2015 PA 53, the 2018 campaign for Michigan Attorney General and General Nessel's statements create a strong inference that the State's real target is the religious beliefs and confessions of St. Vincent."); *id.* at Page ID # 2524. A binding construction of the 2015 Laws would not resolve St. Vincent's claims under the First Amendment.

Second, Michigan claims that it needs to "fully develop the factual and legal record." Mot. to Dismiss at 2-3. Nonsense. Indeed, before the district court, Michigan already admitted (months ago) that:

> [T]here's been a *very extensive* amount of discovery on this case from the related Dumont Litigation . . . . So there is a certainly a strong record of discovery in this case already.

Tr., R. 51, Page ID # 1793-94. Both this Court and the district court have also already concluded that the facts are largely uncontested. Op. Denying Stay at 2; R. 51 at Page ID # 1798-1808. And the "legal record"—whatever that means—is fully developed already. The legal questions before this Court are the same questions that were decided below, with extensive briefing, argument, and opinions.

Michigan's third stated reason gets to the heart of the matter. *See* Mot. to Dismiss at 2. In truth, Michigan seeks dismissal and certification to another court because this Court threw cold water on the State's perceived chances of winning. The State admits as much, stating that its dismissal request is motivated by "this Court's decision on the request to stay the preliminary injunction pending appeal." *Id.* Its sudden about-face and its tactics reveal a gamesmanship this Court should not tolerate. This Court's sister circuits have held the same.

In *In Re Nexium Antitrust Litigation*, the First Circuit held that "[a] party should not be able to manipulate the formation of precedent by dismissing an appeal." 778 F.3d 1, 2 (1st Cir. 2015) (internal quotation marks omitted). Likewise, in *Albers v. Eli Lilly & Co.*, the Seventh Circuit denied voluntary dismissal to "curtail strategic behavior" and to "foil" the

appellant's "attempt to make the stock of precedent look more favorable than it really is." 354 F.3d 644, 646 (7th Cir. 2004). And, in *Khouzam v. Ashcroft*, the Second Circuit denied voluntary dismissal in part because it was "troubled by the government's tactics" and believed "it [was] trying to avoid having this Court rule on that issue." 361 F.3d 161, 168 (2d Cir. 2004). The timing of Michigan's dismissal request and its tactics leading up to that request have no good explanation. Michigan filed this appeal in October 2019, and then immediately demanded *emergency* relief from this Court. Mot. to Stay Pending Appeal. Michigan then waited until the very day its brief was due before seeking dismissal.

The Court should not entertain such maneuvering.

II. Dismissal would undermine judicial economy and waste judicial resources.

A. Dismissal would needlessly delay this Court's consideration.

This is an interlocutory appeal. Even if this Court dismisses *this* appeal, another is all but guaranteed to follow after the district court enters final judgment.

In a nearly identical posture, the First Circuit held that: "[Appellants] should not be able to circumvent this panel by dismissing an interlocutory appeal on an issue they can later press again before a

different panel in an appeal after final judgment." *In Re Nexium Antitrust Litig.*, 778 F.3d at 2. Similarly, in *University of Notre Dame v. Sebelius*, the Seventh Circuit denied voluntary dismissal, holding that:

> [I]t was apparent that the appeal would be refiled . . . . So dismissal or remand would be an interruption rather than a termination—a source of delay harmful to both parties and disruptive of this court's schedule.

743 F.3d 547, 561 (7th Cir. 2014). If this Court grants dismissal now, either Michigan or St. Vincent will be back after final judgment to appeal a nearly identical (or identical) issue. The district court's preliminary injunction—and this appeal—address the merits of St. Vincent's claims and the core question of this case: can the State target religious beliefs it disfavors and mandate a state-imposed orthodoxy? Any appeal from final judgment will necessarily raise the same question. Further, both this Court and the district court have acknowledged that the facts are largely undisputed. The only difference will be that the roughly 100 days already spent on this appeal—and the parties' substantial motions practice and preliminary briefing efforts—will have been wasted.

B. The lower courts would benefit from this Court's immediate consideration.

This is an unusually important case, both to constitutional canon and to the public. The State of Michigan targeted St. Vincent for its religious beliefs, attempting to shutter a foster care ministry that has faithfully served Michigan's children for decades. In *Khouzam v. Ashcroft*, the Second Circuit denied voluntary dismissal in part because the case "[was] clearly an issue of public importance." 361 F.3d at 168. Here, too, the lower courts and the state child welfare system need this Court's guidance.

The district court would benefit from this Court's guidance. In fact, it predicted the parties would seek appellate review after its preliminary injunction decision (true), that the case below would pause during this Court's review (true), and that the parties would return with Sixth Circuit guidance (now false, if Michigan gets its way). Michigan would have the parties return empty-handed.

Other courts would also benefit from this Court's immediate guidance. Another case challenging Michigan's policy is currently pending in the Eastern District of Michigan. *Catholic Charities*, 2:19-cv-11661 (E.D. Mich. removed June 5, 2019). Catholic Charities has sought a

preliminary injunction, which is currently pending. That case raises both state law claims and First Amendment claims similar to those at issue here. This Court's immediate consideration of this case would help resolve *Catholic Charities* as well—not to mention the other cases that are bound to arise as Michigan continues its course of religious discrimination.

In fact, Michigan's discrimination has spread. Recently, Ingham County (a Michigan political subdivision) reduced St. Vincent's refugee program funding. It did so explicitly because St. Vincent has succeeded in this case. *St. Vincent Catholic Charities v. Ingham Cty.*, 19-cv-1050 (W.D. Mich. filed Dec. 13, 2019). Thus, Michigan's delay is not just a strain on judicial resources—it is also placing further strain on a non-profit ministry working to keep its doors open. Guidance from this Court is the surest means of resolving this quickly spreading issue and safeguarding St. Vincent's First Amendment rights.

Guidance to lower courts is yet another reason to deny voluntary dismissal. In *Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.*, the Seventh Circuit denied voluntary dismissal, holding that:

> We believe that it would be irresponsible to dismiss this case without review. Cases like this one are common and are economically significant. This is an opportunity to provide additional guidance to the district courts.

743 F.3d 243, 246 (7th Cir. 2014). Likewise, both the Eleventh and Ninth Circuits found the need to guide the lower courts relevant in denying dismissal. *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983); *Naruto v. Slater*, No. 16-15469, 2018 WL 3854051 (9th Cir. Apr. 13, 2018). Given the importance of the issues in this case, and the need for guidance by the lower courts, dismissal is unwarranted.

III. This Court should deny dismissal because Michigan has failed to propose just terms for dismissal.

Rule 42 allows dismissal "on the appellant's motion on terms agreed to by the parties or fixed by the court." Fed. R. App. P. 42(b). The parties have not agreed to dismissal terms and Michigan has failed to propose any. Instead, it would bolt from its own appeal and leave the Court holding the bag. This Court should deny dismissal "so that the investment of public resources already devoted to this litigation will have some return." *Albers*, 354 F.3d at 646.

The Dumonts' motion to intervene as appellants is still pending. If granted, they would join the case and take a position similar to

Michigan's. If so, dismissal would become—as this Court put it—"a meaningless gesture." *Twp. of Benton v. Cty. of Berrien*, 570 F.2d 114, 119 (6th Cir. 1978). Moreover, in a separate, fully-briefed appeal, this Court is currently considering whether the Dumonts should have been allowed to intervene in the case below. If this Court reverses, the Dumonts will try to appeal this preliminary injunction.[4] St. Vincent believes that the district court was correct to deny intervention, and that intervention on appeal should also be denied. But the existence of the pending appeal and motion complicate Michigan's attempt to dismiss the appeal now, and risk undercutting the future merits panel of this Court which must decide intervention. The State has no plan for the pending would-be appellants.

In fact, the State has proposed no terms for the just dismissal of this appeal. The State has offered no terms to compensate St. Vincent's substantial efforts litigating this appeal, opposing Michigan's stay on an expedited schedule, and preparing for a brief that never came. The State has offered no terms for what this Court should do to prevent the State

[4] That the Dumonts sought intervention in this appeal essentially guarantees as much.

from simply ignoring court deadlines it dislikes. The State has offered no terms for what preclusive effect the preliminary injunction decision and this Court's already-issued emergency motion decision should have.

Even if the Court grants Michigan's motion, the Court should rebuke the State's gamesmanship in prosecuting this appeal. Michigan demanded that this Court consider its request to stay the preliminary injunction on an emergency basis. Michigan claimed "immeasurable and irreparable" harm to third parties if the preliminary injunction remained in place. Mot. to Stay at 5.

Now, Michigan wants to pursue a notoriously-lengthy certification process that could keep that preliminary injunction in place *for years*. The same day it filed its dismissal motion here, Michigan told the district court that "any prejudice" from the certification delay "falls almost entirely on State Defendants, the party seeking the certification, and should not serve as a basis for denying the request." Br., R. 88, Page ID # 2810. Either the preliminary injunction causes "immeasurable and irreparable" harm to all sorts of third parties or keeping the preliminary injunction in place—for years—prejudices no one outside this case.

As a government actor, Michigan has "'the responsibility to seek justice,' and 'should refrain from instituting or continuing litigation that is obviously unfair.'" *Freeport-McMoRan Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45, 47 (D.C. Cir. 1992) (quoting Model Code of Prof'l Responsibility EC 7-14 (Am. Bar Ass'n 1981)). Michigan removed a state court case to federal court. It tried to transfer this case to another district. It ran to this Court on an "emergency" basis based on assertions of harm toward third parties. When Michigan didn't like the result it received, it dropped those assertions and asked to dismiss the appeal so that it can try to get the case into yet another forum.

Michigan displayed blithe disregard for deadlines—filing a late answer in the district court (*see* Answer, R. 77) and failing to file a timely brief here, without explanation or acknowledgement in either. Courts should not countenance this sort of behavior, particularly by government actors. *Cf. Heartland Plymouth Court MI, LLC v. Nat'l Labor Relations Bd.*, 838 F.3d 16, 28 (D.C. Cir. 2016) (labeling the NLRB a bad-faith actor and awarding attorney fees for the appeal because the NLRB's "obstinacy forced Heartland to waste time and resources fighting for a freedom the Board knew our precedent would provide"). This Court should make it

clear to Michigan, even if the Court grants Michigan's motion, that these antics will not be tolerated.

CONCLUSION

Resolution of the important legal questions in this appeal should not be delayed while Michigan flails from forum to forum. The Court should deny the Appellant's motion to dismiss.

Dated: January 9, 2020

Respectfully submitted,

/s/ Lori H. Windham

William R. Bloomfield (P68515)
Catholic Diocese of Lansing
Lansing, Michigan 48933-1122
(517) 342-2522
wbloomfield@dioceseoflansing.org

Lori H. Windham
Mark L. Rienzi
Nicholas R. Reaves
William J. Haun
Jacob M. Coate
The Becket Fund for
Religious Liberty
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955-0095
lwindham@becketlaw.org

Counsel for Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the part of the document exempted by Federal Rule of Appellate Procedure 32(f), it contains 3,441 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: January 9, 2020

/s/ Lori H. Windham
Lori H. Windham
The Becket Fund for
Religious Liberty
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955-0095
Lwindham@becketlaw.org

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed this 9th day of January, 2020 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: January 9, 2020

/s/ Lori H. Windham
Lori H. Windham
The Becket Fund for
Religious Liberty
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036
(202) 955-0095
Lwindham@becketlaw.org