IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

KRISTY DUMONT; DANA DUMONT; ERIN BUSK-SUTTON; REBECCA BUSK-SUTTON; and JENNIFER LUDOLPH,

Plaintiffs,

v.

NICK LYON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency,

Defendants,

and

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

Defendant-Intervenors.

No. 2:17-CV-13080-PDB-EAS

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

DEFENDANT-INTERVENORS' MOTION FOR CERTIFICATION UNDER 28 U.S.C. § 1292(b) AND STAY OF FURTHER PROCEEDINGS

Defendant-Intervenors St. Vincent Catholic Charities, Melissa Buck, Chad Buck, and Shamber Flore, by their undersigned counsel, hereby move to certify its order on Defendants' Motions to Dismiss, ECF No. 49, for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). As described in the attached memorandum of law, the Court's order involves controlling questions of law regarding the proper standard for determining whether a plaintiff has standing to plead an Establishment Clause violation by a non-government actor, and whether or when the state may become liable for the actions of a private adoption agency. These are questions upon which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation. Should the Court grant this motion, Defendant-Intervenors also move to stay discovery and further proceedings pending the outcome of that appeal.

Prior to filing this motion, Defendant-Intervenors contacted counsel for Plaintiffs and Defendants to seek consent. Defendants do not oppose this motion. Plaintiffs have not stated a position.

Dated: September 28, 2018

Respectfully submitted,

/s/ Mark L. Rienzi

William J. Perrone (P 27591)
Counsel for Defendant-Intervenors
Diocese of Lansing
Lansing, Michigan 48933-1122
(517) 342-2522
wperrone@dioceseoflansing.org

Mark L. Rienzi
Stephanie H. Barclay
Counsel for Defendant-Intervenors
The Becket Fund for Religious Liberty
1200 New Hampshire Ave., N.W.
Suite 700
Washington, D.C. 20036
(202) 955-0095
mrienzi@becketlaw.org

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

KRISTY DUMONT; DANA DUMONT; ERIN BUSK-SUTTON; REBECCA BUSK-SUTTON; and JENNIFER LUDOLPH,

Plaintiffs,

v.

NICK LYON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency,

Defendants,

and

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

Defendant-Intervenors.

No. 2:17-CV-13080-PDB-EAS

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

DEFENDANT-INTERVENORS' BRIEF IN SUPPORT OF MOTION FOR CERTIFICATION UNDER 28 U.S.C. § 1292(b) AND STAY OF FURTHER PROCEEDINGS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

This case involves important questions of first impression in this Circuit concerning standing, injury, and state action. These questions arise in litigation that is deeply important to the orderly operation of the adoption system, a system that thousands of children and adoptive parents like Intervenors depend upon. These questions are also of threshold importance to this case, as particular answers, whether given now or years from now, will control whether the case may be decided at all.

It is for precisely these kinds of circumstances that Congress has authorized courts to certify orders for immediate interlocutory appeal under 28 U.S.C. § 1292(b). Plaintiffs respectfully seek such an order here, because the Court's order on Defendants' motion to dismiss involves controlling questions of law as to which there is substantial ground for difference of opinion (and for which, in many respects, the Court was deciding issues of first impression). An immediate appeal would free the parties and this Court from expending significant resources to litigate claims without guidance on the legal tests and standards that must be applied, or worse, on claims that will be rejected based upon threshold determinations of law.

Therefore, Defendant-Intervenors respectfully request that the Court certify its order on Defendants' motion to dismiss for immediate appeal under 28 U.S.C. § 1292(b) in order to resolve disputed questions of law not previously addressed in

the Sixth Circuit: the proper standard for determining whether a plaintiff has standing to plead an Establishment Clause violation by a non-government actor, and whether or when the state may become liable for the actions of a private adoption agency.

STANDARD OF LAW

Certification for immediate appeal is appropriate where there is "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). On the first factor, "A legal issue is controlling if it could materially affect the outcome of the case." *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002). With regard to the second factor, "A substantial ground for difference of opinion exists where reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed." *In re Trump*, 874 F.3d, 948, 952 (6th Cir. 2017) (citing *Reese v. B.P. Exploration, Inc.*, 643 F.3d 681, 688 (9th Cir. 2011)). With regard to the third factor, "The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law." *See Newsome v. Young Supply Co.*, 873 F. Supp. 2d 872, 878 (E.D. Mich. 2012).

REASONS FOR GRANTING THE MOTION

I. The Court should certify the order due to a controlling question of law upon which there is substantial ground for difference of opinion regarding Plaintiffs' standing.

Here, certification is appropriate because the Plaintiffs' standing is a controlling question of law upon which there is substantial grounds for difference of opinion, and resolution of that question would materially advance termination of the litigation.

Plaintiffs' standing is a controlling question of law. Standing is a threshold dispositive issue, one that is "undoubtedly controlling because [its] resolution could materially affect the outcome of the case." *In re Trump*, 874 F.3d at 951 (citation and internal quotation marks omitted); *see also Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 642 (6th Cir. 2015) (accepting interlocutory jurisdiction to resolve threshold issues), *abrogated on other grounds by China Agritech v. Resh*, 138 S.Ct. 1800 (2018); *Reliable Carriers Inc. v. Moving Sites LLC*, No. 17 Civ. 10971, 2018 WL 1477666, at *2 (E.D. Mich. Mar. 27, 2018) (certifying an order under Section 1292(b) because it dealt with a "dispositive issue").

There is also substantial grounds for difference of opinion regarding the remaining plaintiffs' standing. This factor is satisfied where there is "there is conflicting authority on an issue." *Chrysler Group LLC v. South Holland Dodge, Inc.*, 862 F. Supp. 2d 661, 688 (E.D. Mich. 2012). A "substantial ground for a

difference of opinion" exists under Section 1292(b) when "(1) [an issue] is difficult and of first impression; (2) a difference of opinion exists within this circuit; or (3) there is a circuit split." *Reliable Carriers*, 2018 WL 1477666, at *2 (citing *Chrysler Group LLC*, 862 F. Supp. 2d at 388).

Standing is a question of law particularly appropriate for interlocutory appeal. *See Am. Fed'n of Gov't Emps. v. Clinton*, 180 F.3d 727, 729 (6th Cir. 1999) ("[S]tanding is a question of law reviewed *de novo*."). The Sixth Circuit has frequently exercised its interlocutory jurisdiction to consider standing issues. *See In re Trailer Source, Inc.*, 555 F.3d 231, 235 (6th Cir. 2009) (interlocutory appeal involving derivative standing); *Caruana v. Gen. Motors Corp.*, 204 F. App'x 511, 512 (6th Cir. 2006) (interlocutory appeal involving antitrust standing); *Thompson v. Bd. of Educ. of Romeo Cmty. Sch.*, 709 F.2d 1200, 1204 (6th Cir. 1983) (interlocutory appeal involving Article III standing); *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1146 (6th Cir. 1975) (interlocutory appeal involving antitrust standing).

Here, the question of standing is difficult and of first impression. Plaintiffs have claimed unique forms of harm—a "20% barrier to adoption," and stigmatic harm caused by a non-state actor—which have not previously been addressed by the Sixth Circuit. As is clear from the Court's lengthy analysis of the standing question, no case squarely addresses such a claim.

The issue of Michigan's liability for the actions of private adoption providers is also a question of first impression. The question of traceability depends upon legal determinations of the state's potential liability for such actions as well as state action determinations which have not previously been addressed by the Sixth Circuit. *See* ECF No. 49 at 24-27 (relying upon case involving federal designation of a group as a criminal gang). Given the novel issues in this case, certification is appropriate to permit the Sixth Circuit to provide guidance on this question in the first instance.

The question of redressability for the actions of an adoption provider is also a question of first impression in this circuit. The Sixth Circuit has held that "Redressability is typically more difficult to establish where the prospective benefit to the plaintiff depends on the actions of independent actors." *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 715–16 (6th Cir. 2015). In order to establish this prong of the standing inquiry, plaintiffs must plead facts sufficient to connect the dots: "Redressability thus requires that prospective relief will remove the harm, and the plaintiff must show that [s]he personally would benefit in a tangible way from the court's intervention." *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 670 (6th Cir. 2007) (internal citations and quotation marks omitted). And when considering standing at the motion to dismiss stage, the court's review is confined "to the complaint itself," not to arguments Plaintiffs later made in briefing. *Agema v. City of Allegan*, 826 F.3d 326, 332 (6th Cir. 2016).

The Court rested its determination on standing based on the fact that "Plaintiffs . . . are asking that the barriers that they now face to adopting a child based on their sexual orientation be removed." ECF No. 49 at 31. But this is alleged nowhere in Plaintiffs' complaint. Further, as the Court acknowledged, "faith-based agencies concede that their ability to . . . continue to partner with the State is dependent upon the religious belief protection they have been granted by the State." *Id.* Which means that the relief Plaintiffs seek will result in the closure of St. Vincent's public foster and adoption programs. Plaintiffs have never explained how closing an adoption agency will "remove" a "barrier" to their ability to adopt. And as the Court acknowledged at the hearing, "we don't know" if St. Vincent "closed" whether other agencies would "open to be amenable to same-sex couples." ECF No. 48 at 103. But the very fact that we "don't know" means that Plaintiffs have not met their burden for redressability.

For example, in *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1423 (6th Cir. 1996), the Sixth Circuit found that an organization focused on the rights of children did not have standing to challenge the existence of religious exemptions in child endangerment laws. The Plaintiffs argued that the existence of such remedies violated the Establishment Clause. The Court rejected that argument on both causation and redressability grounds. With regard to causation, it emphasized that the harm was caused by the independent actions of the parents or

guardians, and refused "assume that if the parents and guardians in the religion-based class were not exempt from prosecution, they would no longer deny medical treatment on religious grounds to children in their charge." *Id.* Similarly, it was "purely speculative whether the invalidating of the challenged provisions of the statutes would redress the plaintiffs' claimed injury." *Id.* at 1425; *see also Binno v. Am. Bar Ass'n*, 826 F.3d 338, 345 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 1375 (2017) (holding that a plaintiff failed to demonstrate standing because his requested "relief depends on action by the law schools—third parties" that would not be directly subject to legal requirements from the court's order, and thus "a favorable decision" was not redressable).

In addition, the Court bases its standing determination on Plaintiffs' desire "to adopt a child based on the same criteria applied to every other family seeking to adopt in Michigan." ECF No. 49 at 31. But given that the Court rightly concluded that Plaintiffs do not have taxpayer standing, they have no basis on which to assert a cognizable injury for this allegation. Nothing in the state's law specifically applies different criteria to same-sex couples compared to other couples. Plaintiffs are thus challenging on a constitutional basis the differential treatment they experienced at the hands of private parties. And neither Plaintiffs nor the Court point to any case where Plaintiffs had standing to sue a government actor for different treatment by private parties.

To the contrary, as another court in this district has recently recognized, demonstrating standing "is much more difficult to establish when 'a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else.'" *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 221 F. Supp. 3d 913 (E.D. Mich 2016) (Tarnow J.,) (citation omitted), *aff'd and remanded*, 900 F.3d 250 (6th Cir. 2018). In other words, when "redressability . . . depends on decisions beyond the Court's control," there is no standing. *Barry v. Corrigan*, 79 F. Supp. 3d 712, 725 (E.D. Mich. 2015), *aff'd sub nom*. *Barry v. Lyon*, 834 F.3d 706 (6th Cir. 2016).

At minimum, these are questions upon which "fair-minded jurists might reach contradictory conclusions," and therefore fit for interlocutory appeal. *In re Trump*, 874 F.3d at 952. Even where the "Court remains confident in its decision," certification is appropriate where "cases that have addressed the issue of standing in the context of the First Amendment have dealt with" very different circumstances, and "the Court acknowledged the difficulty of applying those cases to the present cause of action." *Nickolas v. Fletcher*, No. 3:06-CV-00043, 2007 WL 2316752, at *2 (E.D. Ky. Aug. 9, 2007). The same is true here: presented with a novel argument, the Court relied upon cases from a variety of different settings in its standing determinations because the precise standing question here has not previously been addressed.

Resolution of the standing question would also materially advance termination of the case. Discovery has not yet begun. "An interlocutory appeal materially advances the litigation when it 'save[s] judicial resources and litigant expense.'" *Newsome*, 873 F. Supp. 2d at 878 (quoting *W. Tenn. Chapter of Associated Builders & Contractors, Inc. v. City of Memphis*, 138 F. Supp. 2d 1015, 1026 (W.D. Tenn. 2000)). This would certainly be the case here, since an appeal might end the litigation entirely. As one court ruled in a similar circumstance, "A reversal of the Court's decision on the issue of standing would completely terminate this action and bar any further proceedings, thus, eliminating the need for discovery and a trial. Therefore, the Court finds that this litigation will be materially advanced by certifying the issue of standing for interlocutory appeal." *Nickolas*, 2007 WL 2316752 at *2. Even if the court of appeals did not order dismissal of the case, its decision would shed light on the test to be used to assess standing, making clear what type of proof will be expected of plaintiffs and what standard this Court should use going forward. Given the availability of an interlocutory appeal under 28 U.S.C. § 1292(b), it is difficult to see any benefit to the Court or the parties from forging ahead without that guidance.

II. The Court should certify the order due to a controlling question of law upon which there is substantial ground for difference of opinion regarding government liability for the actions of private parties.

Like standing, the novel theory of state liability in this case raises a controlling question of law upon which there is substantial ground for difference of opinion. As the Court's lengthy analysis makes clear, the proper test for government liability related to a private party's actions is a complex question which courts have used a variety of tests to resolve.

In resolving the state action question, the Court relied upon the Sixth Circuit's recent opinion in *Brent v. Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656 (6th Cir. 2018). There, on an issue of first impression in the Sixth Circuit, the court held that plaintiffs had adequately pled that a residential care facility and a foster care provider were state actors under § 1983 for the purposes of that case. *Id.* at 675-78. *Brent*'s analysis focused on the state's duty to "protect children who are wards of the state from the infliction of unnecessary harm," *id.* at 677 (citation and internal quotation marks omitted), and the foster and residential agency's participation in and assumption of that duty. Even so, the court expressed doubt as to whether plaintiffs would be able to demonstrate a question of material fact on these issues at summary judgment. *Id.* at 677-78.

Here, however, Plaintiffs have explicitly conceded that they are *not* alleging St. Vincent is a state actor. ECF No. 37 at 15 (conceding that "the Complaint does not

argue that [St. Vincent] or other agencies are state actors."). Rather, they are alleging that the state is liable for the actions of a private adoption agency simply by virtue of contracting with the agency and having an awareness of certain religious practices. The Sixth Circuit's analysis in *Brent* does not answer this question. Moreover, a petition for rehearing *en banc* is currently pending in *Brent*.

In *Brent*, the Sixth Circuit looked to whether "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brent*, 901 F.3d at 676 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)). In *Brent*, the Sixth Circuit acknowledged that a number of factors come into play, including "including [1] whether 'a nominally private entity . . . is controlled by an 'agency of the State,' [2] whether the private entity 'has been delegated a public function by the State,' and [3] whether the 'government is "entwined in [the private organization's] management or control.'" *Id.* (quoting *Brentwood Acad.*, 531 U.S. at 295 (internal citations omitted). Plaintiffs and the Court have already acknowledged the distinct actions and interests of the State and Intervenors in permitting Intervenors to join the case. *See* ECF No. 34 at 21, 23-24. Neither the Sixth Circuit in *Brent* nor any other court has analyzed how these factors should be balanced in the circumstances at hand. Nor have Plaintiffs even argued that these factors should

apply. At a minimum, there is likely to be a substantial difference of opinion on the matter.

More broadly, in determining whether the state can be held liable for the actions of a private party, the Sixth Circuit has previously held that, in order to attribute those actions to the state, the plaintiffs need to show pervasive government oversight and veto power over the actions at issue. In *Wilcher v. City of Akron*, 498 F.3d 516, 521-22 (6th Cir. 2007), the city could be liable for the actions of a contractor—who had been determined not to be a state actor—only because "the city specifically reserved the power to approve" changes to the "rules" governing the program, and "officials reserved express power to review and overrule decisions made by" the contractor over the conduct in question. Here, by contrast, Plaintiffs have not pled that Michigan reserved power over St. Vincent's decision to refer couples elsewhere, nor that the state had any obligation, or even right, to review and approve St. Vincent's intake procedures for home studies. *See* Compl. ¶¶ 25-26.

This accords with the Supreme Court's determination in *Blum*, which makes clear that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *see also DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989) (government not liable for the actions of

private parties even if it is "aware" and didn't stop them). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Blum*, 457 U.S. at 1004-05. The Court distinguished *Blum* because the Plaintiffs claim that St. Vincent's actions are a reasonably forseeable consequence of Michigan's actions. ECF No. 49 at 77. The case upon which the Court relied, *Paige v. Coyner*, made clear that *Blum* still applies where "the private party is the one allegedly responsible for taking the constitutionally impermissible action." 614 F.3d 273, 280 (6th Cir. 2010). Here, the gravamen of the complaint is that "private agencies performing a public function with taxpayer dollars and under contract with the State cannot perform actions that would be unconstitutional if performed directly by the State." Compl. ¶ 9. In other words, private parties like St. Vincent's are the ones taking the allegedly constitutionally impermissible action. Therefore the application of *Blum* and *Coyner* to this case is a controlling question upon which "fair-minded jurists might reach contradictory conclusions." *In re Trump*, 874 F.3d at 952

Furthermore, *Blum* instructed that "cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action" will "shed light upon the analysis necessary to resolve" the direct state liability question at issue here. *Blum*, 457 U.S. at 1003-04. Therefore Plaintiffs' failure to plead coercion or even significant encouragement

on the part of Michigan raises serious questions about whether the state can be culpable for actions which would not otherwise pass the Supreme Court and Sixth Circuit's test for state action by a third party.

Absent direct state oversight and involvement in the actions of a contractor, the Sixth Circuit looks instead to whether the state has "exercise[d] such coercive power or provide[d] such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state." *Wilcher*, 498 F.3d at 519–20 (quoting *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992)). The Sixth Circuit has repeatedly distinguished between mere government "encouragement" of a private entity's action and the coercive type of encouragement needed to transform a private actor into a state actor: "to the extent that Rankin and Simon (two rogue rangers) 'encouraged' him, this is not the type of significant encouragement which would turn DeNicola's choice to delete the tapes into that of government action." *S.H.A.R.K. v. Metro Parks Serving Summit Cty.*, 499 F.3d 553, 565 (6th Cir. 2007). Elsewhere, the Sixth Circuit has noted that "It is often difficult to distinguish action from inaction[.]" *Barber v. Overton*, 496 F.3d 449, 465 (6th Cir. 2007).

Other circuits have likewise emphasized that mere government inaction or even mild encouragement is insufficient to establish liability. For instance, the Third Circuit held that "Under the circumstances related in his complaint, [Plaintiff] cannot show the deprivation of a constitutional right through state action because his claims

amount to nothing more than inaction on the part of the public officials." *See, e.g.*, *Jackman v. McMillan*, 232 F. App'x 137, 139 (3d Cir. 2007). Instead, plaintiffs need to plead that government "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* The First Circuit held that "We believe that the district court incorrectly characterized the requirements for state action when it found that the government inaction evidenced in this case is equivalent to government approval and encouragement of the questioned action." *Ponce v. Basketball Fed'n of Commonwealth of P.R.*, 760 F.2d 375, 379 (1st Cir. 1985).

Other district courts within the Sixth Circuit have reached conclusions at odds with the one here. One held that "More than mere approval or acquiescence in the initiatives of the private party is necessary to hold the state responsible for those initiatives." *Snodgrass-King Pediatric Dental Assocs., P.C. v. DentaQuest USA Ins. Co.*, 295 F. Supp. 3d 843, 863 (M.D. Tenn. 2018) (quoting *Campbell v. PMI Food Equip. Grp., Inc.*, 509 F.3d 776, 784 (6th Cir. 2007)). Another reached a similar conclusion: "For the activities of the private actor to constitute state action under this test, more is required than merely the approval or acquiescence of the state in the decisions or actions of the private actor." *Brown ex rel. Thomas v. Fletcher*, 624 F. Supp. 2d 593, 600 (E.D. Ky. 2008). Courts have also been clear that plaintiffs must allege more than government funding, and must plead that "the government has

exercised coercive power or has provided . . . significant encouragement for the challenged action." *Bourbon Cmty. Hosp., LLC v. Coventry Health & Life Ins. Co.*, No. 3:15-CV-00455-JHM, 2016 WL 51269, at *5 (W.D. Ky. Jan. 4, 2016) (internal quotation omitted). In that case, "because 'merely contracting with the government, receiving government funding, and following government regulation—even if extensive and detailed—is not sufficient to establish state action,' Plaintiffs have failed to allege sufficient facts establishing control by the State over the specific conduct of which Plaintiffs complain." *Id.* (quoting *Dicrescenzo v. UnitedHealth Grp.*, No. CV 15-00021, 2015 WL 5472926, at *6 (D. Haw. Sept. 16, 2015)).[1] Given these conflicting questions, and given the Plaintiffs' failure to actually plead any

[1] Many courts, including in this district, have noted that a government contract alone is insufficient to establish state action. *See, e.g.*, *Range v. Eagan*, No. CV 17-11245, 2017 WL 9477693, at *4 (E.D. Mich. Dec. 6, 2017), *report and recommendation adopted*, No. 17-11245, 2018 WL 446450 (E.D. Mich. Jan. 17, 2018) ("The law is clear, however, that the mere existence of a government contract, standing alone, does not establish a sufficiently close nexus to constitute state action."); *Simescu v. Emmet Cty. Dep't of Soc. Servs.*, 942 F.2d 372, 375 (6th Cir. 1991) ("The mere existence of a contract between a governmental agency and a private party is insufficient to create state action."); *Rose v. Figgie Int'l*, No. K88-321 CA8, 1990 WL 302739, at *4 (W.D. Mich. Feb. 1, 1990), *aff'd*, 919 F.2d 739 (6th Cir. 1990) ("It is patently clear that merely contracting with the government or receiving government funds is insufficient to constitute state action."); *see also Partin v. Davis*, 675 Fed. App'x 575, 587 (6th Cir. 2017) ("Similarly, the Supreme Court has held that even '[a]cts of . . . private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.'") (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982)).

coercive action or even significant encouragement on the part of the government, the state's liability here is a question upon which there is a difference of opinion.

A difference of opinion is also likely to exist on the question of whether plaintiffs here can claim a stigmatic injury at the hands of the state. The Court determined that the plaintiffs had adequately pled such an injury, and that their injury could be attributed to the state defendants. ECF No. 49 at 19-22. But the complaint is devoid of any allegations of stigmatization or denigration, much less stigmatization at the hands of the state. Moreover, the cases upon which the Court relied to find stigmatic injury are far afield from the circumstances here, and are cases in which the government itself had taken action that denigrated or stigmatized the plaintiffs. In *Parsons*, the federal government had designated the Plaintiffs' group as a criminal gang. *Parsons v. U.S. Dept. of Justice,* 801 F.3d 701, 713 (2015). In *Moss v. Spartanburg*, plaintiffs alleged that the religious course at issue was "merely one instance of a broader pattern of Christian favoritism by the School District." *Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 607 (4th Cir. 2012). *Moss* also involved a public high school student, and "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). No such heightened concern applies here. Finally, the Court relied upon *Allen*, but there the Supreme Court denied standing not just because the plaintiffs had not applied and

been rejected, but also because their claims of injury were premised on the actions of independent third parties: "the injury to respondents is highly indirect and 'results from the independent action of some third party not before the court.'" *Allen v. Wright*, 468 U.S. 737, 757 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). There is, at minimum, grounds for differences of opinion as to how *Allen* and other cases dealing with "stigmatic" injury apply in a case where the complaint is devoid of any allegation of stigma, much less stigma at the hands of the parties it actually sued.

Certification is also appropriate because the decision involves complex and unsettled questions and whether the actions of private child welfare providers are attributable to the state for Constitutional purposes simply because the state contracts with such private parties and has some knowledge of their practices. If, as Defendants maintain, those actions are purely private, this impacts the validity of plaintiffs' claims under the Establishment Clause and Equal Protection Clause, since courts have permitted the government to take affirmative steps to accommodate the religious choices of private actors. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). And Plaintiffs' arguments

on this point raise issues with decisions of multiple circuit courts holding that private adoption and foster care providers are private actors.[2]

Aside from Plaintiffs' concession that they have not alleged that St. Vincent is a state actor, the question of whether a private adoption agency is a state actor for the purposes of home study certifications appears to be an issue of first impression. Not only are there grounds for disagreement, but courts disagree even on the proper test to use. Immediate appeal would give the Sixth Circuit the opportunity to clarify which test ought to apply in these circumstances. Certification would also advance the termination of the litigation, since a determination that the state cannot be held responsible in such circumstances would end the case. Even if the Sixth Circuit were to determine that state action had been properly pled, its ruling would provide the

[2] *See, e.g.*, *Leshko v. Servis*, 423 F.3d 337, 343 (3d Cir. 2005) (foster parents were not state actors even though they were considered state employees in some contexts); *Johnson v. Rodrigues*, 293 F.3d 1196, 1203 (10th Cir. 2002) ("Appellees respond that the adoption center and the adoptive parents cannot be considered state actors under any test. We agree."); *Rayburn ex rel. Rayburn v. Hogue*, 241 F.3d 1341, 1347 (11th Cir. 2001) (district court correctly determined state action tests were not met because "the [S]tate exercised no encouragement of the Hogues' actions, nor is foster care traditionally an exclusive [S]tate prerogative. We agree.") (internal quotation marks omitted); *Milburn by Milburn v. Anne Arundel Cty. Dep't of Soc. Servs.*, 871 F.2d 474, 479 (4th Cir. 1989) ("The State of Maryland was not responsible for the specific conduct of which the plaintiff complains, that is, the physical child abuse itself. It exercised no coercive power over the Tuckers; neither did it encourage them. The care of foster children is not traditionally the exclusive prerogative of the State.").

Court and the parties with necessary guidance to better focus discovery and factfinding.

III. Prudential considerations also support certification.

In addition to the express language of Section 1292(b), courts also consider prudential reasons for certifying orders for interlocutory appeal. *See In re Trump*, 874 F.3d at 952-53 ("prudential factors" weighed in favor of permitting an interlocutory appeal); *Kraus v. Bd. of Cty. Rd. Comm'rs for Kent Cty.*, 364 F.2d 919, 922 (6th Cir. 1966) (interlocutory appeals are appropriate when they "may avoid protracted and expensive litigation."). Another court in this district has taken prudential considerations into account and noted that "judicial economy interests" are an important factor in determining whether to certify an order for interlocutory appeal. *See In re Auto. Parts Antitrust Litig.*, No. 12 MD 2311, 2013 WL 4784682, at *4 (E.D. Mich. Sept. 6, 2013). Here, discovery is likely to impose significant burdens on the state and the parties, and conducting that discovery without certainty as to the proper test to use will only complicate and delay resolution of this case. Therefore prudential considerations weigh in favor of granting certification and staying discovery until the Sixth Circuit can resolve the threshold questions in this dispute.

Section 1292(b) specifically contemplates a stay of discovery in such circumstances.[3] Thus, "[w]hen considering a stay pending appeal pursuant to § 1292(b), the Court has 'broad discretion to decide whether a stay is appropriate to "promote economy of time and effort for itself, for counsel, and for the litigants."'" *ASIS Internet Servs. v. Active Response Grp.*, No. C07 6211 THE, 2008 WL 4279695, at *3-4 (N.D. Cal. Sept. 16, 2008) (quoting *Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1094 (E.D. Cal. 2008)). The most efficient course here, should the Sixth Circuit permit the interlocutory appeal, is to stay further proceedings in the district court to avoid the considerable and potentially unnecessary expense and effort of conducting discovery in this case.

CONCLUSION

For these reasons, Defendant-Intervenors respectfully request that the Court certify its order denying Defendants' motion to dismiss, ECF No. 49, for immediate interlocutory appeal. Defendant-Intervenors also request that the Court stay discovery and further proceedings during the pendency of that appeal.

[3] *See* 28 U.S.C. § 1292(b) ("[A]pplication for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.").

Dated: September 28, 2018

Respectfully submitted,

/s/ Mark L. Rienzi

William J. Perrone (P 27591)
Counsel for Defendant-Intervenors
Diocese of Lansing
Lansing, Michigan 48933-1122
(517) 342-2522
wperrone@dioceseoflansing.org

Mark L. Rienzi
Stephanie H. Barclay
Counsel for Defendant-Intervenors
The Becket Fund for Religious Liberty
1200 New Hampshire Ave., N.W.
Suite 700
Washington, D.C. 20036
(202) 955-0095
mrienzi@becketlaw.org

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2018, I electronically filed the above document(s) with the Clerk of Court via CM/ECF, which will provide electronic copies to counsel of record.

/s/ Mark L. Rienzi

Mark L. Rienzi
Stephanie H. Barclay
Counsel for Defendant-Intervenors
The Becket Fund for Religious Liberty
1200 New Hampshire Ave., N.W.
Suite 700
Washington, D.C. 20036
(202) 955-0095
mrienzi@becketlaw.org