

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

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

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,

Intervenor Defendants.

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

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO INTERVENOR
DEFENDANTS' MOTION FOR
CERTIFICATION UNDER
28 U.S.C. § 1292(b) AND STAY
OF FURTHER PROCEEDINGS**

Plaintiffs respectfully submit this response in opposition to Intervenor Defendants' motion, ECF No. 53 (the "Motion"), seeking certification for interlocutory appeal of this Court's order denying in large part Defendants' motions to dismiss, ECF No. 49 (the "Order"), and seeking a stay of further proceedings if the Court certifies the Order. Because Intervenor Defendants have

not demonstrated that the Order “involves 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), the Motion should be denied.

This Court applied well-established precedents to each factor in the standing inquiry, and there is no substantial ground for difference of opinion regarding this Court’s holding that Plaintiffs adequately pleaded general Article III standing. Intervenor Defendants’ disagreement with this Court’s application of standing principles to the facts alleged in this particular Complaint does not meet the threshold requirements for interlocutory review.

There is also no substantial ground for difference of opinion regarding this Court’s resolution of the question of whether the DHHS practice that Plaintiffs challenge is being carried out under color of state law for purposes of Section 1983. Plaintiffs sued Michigan officials, in their official capacities, for carrying out DHHS policy—namely, the policy of contracting with and funding child placing agencies that, for religious reasons, refuse to accept same-sex prospective foster and adoptive parents or place children with such families, regardless of the needs of the children in their care. Plaintiffs seek to enjoin this state action, which is undoubtedly occurring “under color of” state law. *See* 42 U.S.C. § 1983. This Court correctly held that “[t]he ‘gravamen’ of Plaintiffs’ Complaint is not the

purely private decisions of the faith-based agencies in turning them away. Rather Plaintiffs challenge the actions of Defendant state officials in entering into contracts for the provision of state-contracted services, expressly acknowledging and accepting that certain faith-based agencies may elect to discriminate on the basis of sexual orientation in carrying out those state-contracted services, conduct that the Defendants concede the State could not take itself.” Order at 75-76. Accordingly, there is no substantial ground for difference of opinion regarding whether Plaintiffs alleged state action under Section 1983.

Even when the threshold requirements for certification are met, whether to certify an order for interlocutory appeal rests in the sound discretion of the district court, and here prudential factors counsel against certification. This Court clearly articulated the legal issues in its Order and identified a number of issues on which discovery is necessary. This Court has already set an efficient discovery timeline, and Plaintiffs have served discovery requests, have started to meet and confer with Defendants and Intervenor Defendants, and are prepared to move forward in accordance with the schedule set forth by the Court on September 17, 2018, ECF No. 51. Certifying the Order for interlocutory review would needlessly delay the action.

Finally, if the Court does certify the Order for interlocutory review, it should decline Intervenor Defendants’ request for a stay. While there may be

some uncertainty regarding the correct standard to apply in determining whether to stay all proceedings pending an interlocutory appeal, a stay is not justified here under either approach. Intervenor Defendants have not shown a likelihood of success on the merits, irreparable injury, prospective harm to others, or a public interest favoring a stay, *see Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)), nor have they demonstrated that this Court should exercise its discretion to grant a stay. *See Reed v. Rhodes*, 549 F.2d 1050, 1052 (6th Cir. 1979).

In exercising its broad discretion, this Court should decline to certify the Order for interlocutory appeal and allow this litigation to proceed in the ordinary course.

Dated: October 12, 2018

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SUPPORT OF RESPONSE IN
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CONCISE STATEMENT OF ISSUES PRESENTED

1. Is there a substantial ground for difference of opinion concerning the correct standards of law for injury-in-fact, traceability, and redressability when the Court applied well-established, binding Sixth Circuit and Supreme Court precedent as to each of these factors?
2. Is there a substantial ground for difference of opinion concerning the relevance of the Section 1983 state actor analysis to private child placing agencies when Plaintiffs do not seek to hold any private child placing agencies liable under Section 1983 and when the Sixth Circuit has in any case already determined that such private child placing agencies are state actors?
3. Whether prudential considerations counsel against granting interlocutory review where the Court has already issued a scheduling order, parties have begun the process of discovery, and there is no reason to believe that continued discovery would be disproportionate or unduly protracted or burdensome?
4. If the Court permits interlocutory appeal, should this Court exercise its discretion to allow this action to proceed in the ordinary course?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

In re City of Memphis, 293 F.3d 345 (6th Cir. 2002); *Heckler v. Matthews*, 465 U.S. 728 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993); *Parsons v. U.S. Dept of Justice*, 801 F.3d 701 (6th Cir. 2015).

PRELIMINARY STATEMENT

This Court concluded that Plaintiffs Kristy and Dana Dumont and Erin and Rebecca Busk-Sutton “adequately alleged general Article III standing.” Order at 32. The Court held that Plaintiffs “adequately alleged injury-in-fact,” Order at 18, because (1) Plaintiffs alleged that they “personally encountered . . . unequal treatment,” Order at 20, when they were turned away by child placing agencies, and because (2) Plaintiffs alleged “the unequal treatment they received as a result of being turned away . . . makes it more difficult for same-sex couples to adopt than it is for heterosexual couples.” Order at 22 (internal quotation marks and brackets omitted). Next, this Court held that Plaintiffs “adequately alleged that their injury is fairly traceable to the Defendants,” Order at 24, because “Plaintiffs allege that because of the State Defendants’ practice of continuing to enter into contracts that allow the child placing agencies to use religious criteria in excluding same-sex couples, they have suffered both stigmatic and practical harm.” Order at 27 (internal quotation marks omitted). Finally, this Court held that Plaintiffs “adequately alleged that their injuries are redressable by a favorable decision,” *id.*, because Plaintiffs “are asking that the barriers that they now face to adopting a child based on their sexual orientation be removed . . . [and] [i]f they are granted the relief they seek, those barriers will be eliminated and they will be able to pursue adoption on equal footing with other Michigan families.” Order at 31.

Moreover, the Court concluded that because “Plaintiffs challenge the actions of Defendant state officials in entering into contracts for the provision of state-contracted services, expressly acknowledging and accepting that certain faith-based agencies may elect to discriminate on the basis of sexual orientation in carrying out those state-contracted services, conduct that the Defendants concede the State could not take itself” and not “the purely private decisions of faith-based agencies,” Plaintiffs adequately alleged State action. Order at 75-76.

Following the denial, in substantial part, of their motion to dismiss, Intervenor Defendants moved for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), arguing that the Order involves two controlling questions of law as to which there exists a substantial ground for difference of opinion—namely, “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.” Intervenor Defendants’ Brief in Support of Motion for Certification (“Br.”) at 2.

No basis for certification of an interlocutory appeal exists, because, in declining to dismiss Plaintiffs’ complaint for lack of standing and in holding that Plaintiffs adequately alleged state action, the Court relied on well-established Sixth Circuit and Supreme Court precedent about which there exists no substantial ground for difference of opinion.

Moreover, several of Intervenor Defendants' arguments again rest upon a fundamental misrepresentation of Plaintiffs' allegations: Plaintiffs have not "plead[ed] an Establishment Clause violation by a non-government actor." *See* Br. at 2. Rather, as the Court recognized, Plaintiffs sued State officials for actions they are taking in their official capacity: "entering into contracts for the provision of state-contracted services, expressly acknowledging and accepting that certain faith-based agencies may elect to discriminate on the basis of sexual orientation in carrying out those state-contracted services." Order at 75. Nevertheless, Intervenor Defendants continue to "stubbornly, and inappropriately, insist on rewriting" not only the Plaintiffs' Complaint but also the Court's Order. *See* Order at 73. This Court should decline to certify the Order for interlocutory appeal.

This Court should also deny Intervenor Defendants' request for a stay of further proceedings pending appeal. If this Court applies the four factors used to determine whether to grant a stay of a preliminary injunction pending appeal (likelihood of success on the merits, irreparable injury, harm to others, and public interest), those factors do not favor a stay at this time. Alternatively, if this Court applies the broader, discretionary standard applicable for requests to stay discovery pending a ruling on a dispositive motion, this Court should exercise its discretion to allow the case to proceed in the ordinary course. This Court has already set an efficient discovery schedule, the parties have exchanged Initial Disclosures, and

Plaintiffs have served all Defendants with Interrogatories and Requests for Production. Plaintiffs and State Defendants have met and conferred to negotiate appropriate custodians and search terms. Far from advancing the litigation, an interlocutory appeal coupled with a stay of all proceedings would needlessly delay litigation of the merits of Plaintiffs' claims and leave the State of Michigan without guidance as to its constitutional obligations.

LEGAL STANDARD

The general rule is that parties may appeal only from a final judgment. This has been the rule “[f]rom the very foundation of our judicial system.” *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017) (quoting *McLish v. Roff*, 141 U.S. 661, 665-66 (1891)) (internal quotation marks omitted). “This final judgment rule . . . preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice.” *Id.* As an exception to this rule, a judge may certify an interlocutory appeal of an order if he is “of the opinion that such order involves 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). Even when these criteria are met, “[t]he decision to certify an appeal pursuant to section 1292(b) is left to the sound discretion of the district

court.” *Sigma Fin. Corp. v. Am. Int’l Specialty Lines Ins. Co.*, 200 F. Supp. 2d 710, 723 (E.D. Mich. 2002) (Borman, J.).

Interlocutory appeal is “granted sparingly and only in exceptional cases.” *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002). “The burden is on the appellant to establish exceptional circumstances that warrant review of an interlocutory order.” *In re Greektown Holdings, LLC*, 2015 WL 300366, at *3 (E.D. Mich. Jan. 22, 2015) (Borman, J.). In the instant case, Intervenor Defendants have failed to establish both the threshold requirements of Section 1292(b) and the additional requirement of “exceptional circumstances.”

ARGUMENT

I. THIS COURT CORRECTLY APPLIED ESTABLISHED LAW TO CONCLUDE THAT PLAINTIFFS HAVE STANDING.

There is no substantial ground for difference of opinion as to the proper standards for Article III standing analysis. The Sixth Circuit has identified several factors that district courts have found sufficient to demonstrate “a substantial ground for difference of opinion” under Section 1292(b): “(1) the question is difficult, novel and either a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions; (2) the question is difficult and of first impression; (3) a difference of opinion exists within the controlling circuit; or (4) the circuits are split on the question . . . [and] our own circuit has not answered [the question].” *In re Miedzianowski*, 735

F.3d 383, 384 (6th Cir. 2013) (internal quotation marks omitted) (emphasis omitted). None of these factors are satisfied here because, as to each of the three prongs of standing doctrine—*injury-in-fact*, traceability, and redressability—this Court relied on established, binding precedent.

A. Injury-in-Fact

This Court relied on well-established and controlling Sixth Circuit and Supreme Court precedent in determining that both the practical harms and the stigmatic injuries alleged in the Complaint are *injuries-in-fact* for Article III standing purposes. See Order at 18-24 (citing *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993); *Heckler v. Matthews*, 465 U.S. 728 (1984); *Parsons v. U.S. Dept of Justice*, 801 F.3d 701 (6th Cir. 2015)). Applying *Parsons* and *Allen v. Wright*, 468 U.S. 737, *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377 (2014), the Court held that the stigmatic injuries alleged by Plaintiffs are *injuries-in-fact* for Article III purposes because “[Plaintiffs] were personally turned away by certain faith-based child placing agencies . . . — [they allege that] they personally encountered the unequal treatment about which they complain through that act of being turned away as prospective adoptive parents.” Order at 19-20.¹

¹ Intervenor Defendants also appear to take issue with whether certain injuries were adequately plead in the Complaint. Br. at 6-8. But Intervenor Defendants offer no argument that the pleading standard established by the Supreme Court in

Moreover, applying *City of Jacksonville*, the Court expressly rejected Intervenor Defendants' argument that there was no injury-in-fact because the Plaintiffs had other options and held that Plaintiffs "have sufficiently alleged an injury separate from the stigmatic harm they claim to have suffered – the unequal treatment they received as a result of being turned away based upon their status as a same-sex couple, a barrier that makes 'it more difficult for [same-sex couples to adopt] than it is for [heterosexual couples].'" Order at 22 (quoting *City of Jacksonville*, 508 U.S. at 666 (alterations in original)).

Intervenor Defendants offer no argument to distinguish such precedents or to suggest how there is a "substantial ground for difference of opinion" with respect to the controlling legal standard for injury-in-fact. Accordingly, as to injury-in-fact Intervenor Defendants have not demonstrated the threshold requirements for certification. *See In re Greektown*, 2015 WL 300366, at *4 ("[T]here appears to be no real controversy at all about the correct legal standard to be applied. The controversy arises over the application of those legal standards . . .").

Ashcroft v. Iqbal and *Bell Atlantic Corporation v. Twombly*, and applied by this Court here, was not the correct standard. Order at 14-15 (applying *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

B. Traceability

Intervenors-Defendants are wrong that the Court's analysis of well-settled principles of traceability present "novel issues" warranting certification of an interlocutory appeal. Contrary to Intervenor Defendants' argument that the Court's order relied on "legal determinations of the state's potential liability for [the actions of private adoption providers] . . . which have not previously been addressed by the Sixth Circuit," Br. at 5, the Court in fact applied well-established Sixth Circuit and Supreme Court precedent to precisely these questions to determine that Plaintiffs' stigmatic and practical harms are "at least 'fairly traceable'" to "the State Defendants' practice of continuing to enter into contracts that allow the child placing agencies to use religious criteria in excluding same-sex couples." Order at 24-27 (citing *Parsons*; *Warth v. Seldin*, 422 U.S. 490 (1975); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

For example, the Court discussed and quoted extensively from the *Parsons* decision, which specifically addressed the requisite standard of causation/traceability when a third party is also involved in causing the injury. The Court identified the standard as follows: "in order to establish causation, 'there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'"

Order at 18 (quoting *Parsons*, 801 F.3d at 710). Applying *Parsons*, the Court determined that even if the decisions of private child placing agencies to turn away prospective families headed by same-sex couples because of the agency's religious beliefs contributed to the injuries suffered by Plaintiffs, "Plaintiffs have alleged facts that 'link' the State Defendants to their injuries by alleging that the State Defendants' conduct enabled the child placing agencies to take the actions that they did with regard to same sex couples." Order at 26-27.

Intervenor Defendants offer no argument to distinguish *Parsons* and the other binding precedents relied upon by the Court or to suggest how there is a "substantial ground for difference of opinion" with respect to the controlling legal standard for traceability.

Intervenor Defendants are also wrong for at least three reasons that the Court's traceability analysis relied on "state action determinations . . . which have not previously been addressed by the Sixth Circuit." *See* Br. at 5. First, as the Court explained in its order, its traceability determination did not rely on any state action determination. To the contrary, the Court clearly explained that the "state actor" analysis is a statutory requirement relevant only to the merits question of whether a cause of action exists under Section 1983, not a part of the Article III standing analysis. *See* Order at 73 n.7. Second, as recognized by the Court and discussed in further detail below, to the extent that any state actor analysis is

relevant, the proper object of that analysis is the State Defendants against whom the plaintiffs seek a remedy under Section 1983. Intervenors offer no argument that there is any room to doubt, let alone a substantial ground for difference of opinion, as to whether the State Defendants are state actors. Finally, as the Court recognized, even if it were required to determine whether private child placing agencies in contract with the State may be “state actors,” the Sixth Circuit has already definitively addressed that question as a matter of law in a published decision. *See* Order at 64 n.6 (discussing *Brent v. Wayne Cnty. Dep’t of Human Serv.*, 901 F.3d 656 (6th Cir. 2018)).²

C. Redressability

This Court correctly held that Plaintiffs’ claims are redressable, applying settled law. Order at 27-33 (citing *Meese v. Keen*, 481 U.S. 465 (1987); *Lujan; Parsons*). Contrary to Intervenor Defendants’ assertions, Plaintiffs do not seek redress for “the actions of an adoption provider,” *see* Br. at 5, or redress that depends on actions of third parties; Plaintiffs seek to enjoin unlawful actions by the

² Intervenors misleadingly suggest that the Sixth Circuit’s *Brent* decision is not binding precedent because “a petition for rehearing *en banc* is currently pending.” Br. at 11. Notwithstanding the fact that the Sixth Circuit’s published decision remains binding unless it is subsequently reversed, Intervenors neglect to mention that the petition for rehearing in *Brent* was filed by plaintiffs, not the defendant child placing agencies, and the petition does not challenge the Sixth Circuit’s holding that child placing agencies under contract with the state are state actors. *See* Petition for Rehearing and/or Rehearing En Banc, *Brent v. Wayne Cnty. Dep’t of Human Servs.*, No. 17-1428 (6th Cir. Sept. 14, 2018), ECF No. 37.

State Defendants. As the Court correctly recognized, the requested relief would redress Plaintiffs' injuries because Plaintiffs "will no longer suffer the humiliation they allege they suffer now, if they are awarded the relief they seek." Order at 29. Applying *Parsons*, this Court explained that "it is reasonable to assume a likelihood that the injury would be partially redressed where, as here, the [Plaintiffs] have alleged that the [child placement agencies] violated their rights because of the [State Defendants' conduct]." Order at 29 (quoting *Parsons*, 801 F.3d at 717 (alterations in original)). Further, this Court explained that, regardless of whether Plaintiffs have more options, Plaintiffs "are asking that the barriers they now face to adopting a child based on their sexual orientation be removed" and held that "[i]f [Plaintiffs] are granted the relief they seek, those barriers will be eliminated and they will be able to pursue adoption on equal footing with other families." Order at 31.³

Again, Intervenor Defendants offer no argument to distinguish the precedents on which this Court relied or to suggest how there is a "substantial ground for difference of opinion" with respect to the controlling legal standard for redressability. Intervenor Defendants' reliance on *Children's Healthcare is a*

³ Thus, contrary to Intervenor Defendants' contention, Plaintiffs' claims would be redressed by a favorable judgment, whether or not STVCC chooses to close and whether or not additional agencies that would accept all qualified families would increase their services after any such closure.

Legal Duty, Inc. v. Deters, 92 F.3d 1412 (6th Cir. 1996); *Binno v. Am. Bar Ass’n*, 826 F.3d 338 (6th Cir. 2016); and *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 221 F. Supp. 3d 913 (E.D. Mich. 2016), is misplaced. In these cases, redressability depended on actions by third parties beyond the court’s control. Here, by contrast, if Plaintiffs prevail and the Court enjoins the State from contracting with agencies that refuse to place children with same-sex parent families based on religious objections, Plaintiffs will be afforded complete relief because there would be no agency providing public child placing services using religious criteria to exclude same-sex couples. Plaintiffs’ relief in no way turns on conduct of private child placing agencies. “No speculative inferences are necessary here to conclude that the relief requested will result in the Plaintiffs receiving the dignity and equal treatment they seek.” Order at 31.

II. PLAINTIFFS SEEK A REMEDY AGAINST STATE OFFICIALS FOR STATE POLICIES THEY ARE IMPLEMENTING IN THEIR OFFICIAL CAPACITIES, SO INTERVENOR DEFENDANTS’ ARGUMENT CONCERNING “STATE ACTION” IS A RED HERRING THAT DOES NOT WARRANT CERTIFICATION.

As this Court correctly held, “Plaintiffs have adequately alleged state action.” Order at 82. In response, Intervenor Defendants argue at length that private child placing agencies are not “state actors.” Br. at 10-20. This argument is foreclosed by Sixth Circuit precedent, as this Court explained. More importantly, it is irrelevant.

Section 1983 provides a private cause of action to bring suit against “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” 42 U.S.C. § 1983. As the text of the statute makes clear, to determine whether a person may be sued under Section 1983, a court must determine whether that person is “acting under color of [law].” A “host of facts” bear on the inquiry, and private parties have been found to be so-called “state actors” in a great variety of cases. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296-97 (2001) (collecting cases).

The “state actor” analysis would be central to this action if Plaintiffs seek to enjoin the actions of a private child placing agency like St. Vincent. However, as the Court recognized, they do not. Order at 72-73, 76-77. Plaintiffs sued two State officials in their official capacities for their official actions, and Plaintiffs seek “an order enjoining [State] Defendants, in their official capacities, from contracting with or providing taxpayer funding to private child placing agencies that exclude same-sex couples” Compl. Prayer for Relief ¶ B. Because Plaintiffs did not sue any private child placing agency under Section 1983, Intervenor Defendants’ state actor argument rests upon a fundamentally faulty premise.

Defendant Intervenors' continued reliance upon *Blum v. Yaretsky*, 457 U.S. 991 (1982), is in error. Defendant Intervenors suggest that *Blum* will “shed light upon the analysis necessary to resolve’ the direct state liability question at issue here.” Br. at 13 (quoting *Blum*, 457 U.S. at 1003-04). However, as the Court recognized, *see* Order at 73-74, in *Blum* the plaintiffs “[we]re not challenging particular state regulations or procedures, and their arguments concede[d] that the decision to discharge or transfer a patient originates not with state officials, but with nursing homes that are privately owned and operated.” *Blum*, 457 U.S. at 1003. Here, by contrast, Plaintiffs do not challenge private child placing agencies’ determinations of whether to work with a couple. Plaintiffs challenge the State’s practice of choosing to contract with and fund agencies, while knowingly permitting them to make child placing decisions based on religious eligibility criteria. Because, unlike in *Blum*, Plaintiffs do challenge “state regulations or procedures,” this Court correctly held that “*Blum* is not controlling here.” Order at 76.

For these reasons, the Court need not determine whether any child placing agency is a state actor because suit has not been brought against, and no injunction is sought against, any child placing agency.⁴ Because Plaintiffs

⁴ As an alternative ground for the Order, the Court concluded based on the Sixth Circuit’s decision in *Brent* that Plaintiffs adequately pleaded that child placing agencies like St. Vincent are “state actors” for purposes of Section 1983

challenge a State practice undertaken by State Defendants in their official capacities, there can be no question that the challenged actions are being carried out under color of state law and may be enjoined under Section 1983.⁵

III. PRUDENTIAL CONSIDERATIONS COUNSEL AGAINST CERTIFICATION.

Prudential considerations do not support certifying the Order for interlocutory review. This Court has already set a discovery schedule, the parties have exchanged Initial Disclosures, Plaintiffs have served State Defendants and Intervenor Defendants with Interrogatories and Requests for Production, and the meet and confer process with the State Defendants and Intervenor Defendants has begun. Unlike in the cases relied upon by Intervenor Defendants, there is no reason to expect that discovery will be a protracted process that will impose undue burdens on the parties. Interlocutory appeal should be “granted sparingly and only in exceptional cases.” *In re City of Memphis*, 293 F.3d at 350. In this case,

liability. Order at 64 n.6 & 72 (citing *Brent v. Wayne Cnty. Dep’t of Human Servs.*, 901 F.3d 656, 677 (6th Cir. 2018)). Because *Brent* is controlling precedent in the Sixth Circuit, this alternative holding does not provide a basis for interlocutory review.

⁵ Intervenor Defendants also argue for the first time that State officials cannot be held liable under Section 1983 for “inaction.” *See* Br. at 14-17. But unlike the cases they cite, Plaintiffs are not suing State Defendants for their “inaction”; they are suing them to challenge State Defendants’ practice of contracting with and funding agencies that discriminate, based upon religious principles, on grounds of sexual orientation. It is these actions that Plaintiffs seek to enjoin. *See* Compl. Prayer for Relief.

Intervenor Defendants have failed to establish the “exceptional circumstances” that warrant interlocutory review. *See In re Greektown Holdings, LLC*, 2015 WL 300366, at *3 (E.D. Mich. Jan. 22, 2015) (Borman, J.).

IV. THIS COURT, IN ITS DISCRETION, SHOULD DECLINE TO IMPOSE A STAY PENDING APPEAL IF CERTIFICATION IS GRANTED.

Finally, if the Court does certify the Order for interlocutory review, which it should not, a stay of further proceedings is not warranted. Although district courts in this circuit have applied different standards in considering whether to grant a stay of all proceedings pending an interlocutory appeal, *compare Evans v. Armenta*, 2016 WL 7971189, at *6 (E.D. Ky. Jan. 26, 2016) (applying the traditional four-factor test for a stay of a judgment pending appeal, where the movant sought “to ‘stay discovery and other proceedings’ in this case pending the appellate court’s resolution of the legal question at issue”) *with Pullen v. McDonald’s Corp.*, 2015 WL 13037269, at *3 (E.D. Mich. Apr. 28, 2015) (applying the broader standard for determining whether to grant a discovery stay pending resolution of a dispositive motion, where the movant sought a stay but “the Court is not being asked to stay the entire proceeding”), under any standard this Court should not stay proceedings.

If this Court applies the four-factor test traditionally used for stays pending appeal, Intervenor Defendants have not demonstrated that these factors

weigh in favor of a stay. *See Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014); *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (noting that movants must “provid[e] specific facts and affidavits supporting assertions that these factors exist”).

First, for the reasons articulated by this Court in its Order and the reasons stated above, Intervenor Defendants are unlikely to succeed on the merits of their appeal, even if certified. Second, Intervenor Defendants have not shown that they will suffer irreparable harm absent a stay. This Court has set an efficient discovery schedule, and discovery has already commenced in earnest. The parties have exchanged Initial Disclosures, and Plaintiffs have served both State Defendants and Intervenor Defendants with Interrogatories and Requests for Production. Plaintiffs and State Defendants have met and conferred to negotiate appropriate custodians and search terms and to discuss the possibility of stipulating to certain facts in advance of summary judgment. Plaintiffs and Intervenor Defendants have initiated the meet and confer process, as well. There is no reason to believe Defendants would be unduly burdened—let alone irreparably injured—by allowing discovery to proceed. Finally, Intervenor Defendants have demonstrated no harm to third parties that would result from denying their request for a stay, and the public’s interest is best served by efficiently resolving this action

so that Michigan's child welfare system can obtain clarity regarding its constitutional obligations. The four relevant factors do not support a stay pending appeal here.

Under the alternative standard, although this Court "ha[s] broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined," *Hahn v. Star Bank*, 190 F.3d 708, 719 (6th Cir. 1999), this Court should not grant a stay here. As the Sixth Circuit has explained, granting leave to pursue an interlocutory appeal does not mandate a stay of discovery where "the value of the constitutional rights to be protected far outweighs administrative costs that might be incurred." *Reed v. Rhodes*, 549 F.2d 1050, 1052 (6th Cir. 1979). This Court has already set a discovery schedule, Plaintiffs are prepared to proceed in accordance with that schedule, and a stay will only introduce unwarranted delay.

* * *

The Order correctly applied the law to conclude that Plaintiffs Kristy and Dana Dumont and Erin and Rebecca Busk-Sutton adequately alleged general Article III standing to proceed further with both their Establishment Clause and Equal Protection claims. Intervenor Defendants' principal argument—that child placing agencies are not state actors—is a response to a fantasy suit against St. Vincent that Plaintiffs never filed, and Intervenor Defendants' standing arguments

ignore the clear and controlling Sixth Circuit and Supreme Court precedent relied upon by this Court. Because there exists no “substantial ground for difference of opinion” as to any controlling question of law involved in the Order, this Court should decline to certify the Order for interlocutory appeal, and it should exercise its discretion to allow the case to proceed in the ordinary course.

CONCLUSION

Plaintiffs respectfully request that the Motion be denied.

Dated: October 12, 2018

/s/ Ann-Elizabeth Ostrager

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CERTIFICATE OF SERVICE

I hereby certify that, on October 12, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: October 12, 2018

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