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

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

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Plaintiffs do not dispute that Intervenors' Motion raises controlling questions of law that could resolve this case. Plaintiffs instead argue that the legal issues raised are neither novel nor disputed. Resp.5-12. Yet Plaintiffs fail to identify precedent that squarely addresses either issue Intervenors raise. Both on standing and state action, this case involves novel questions upon which courts may disagree.

Plaintiffs' only response to the many prudential considerations that favor certification is to claim that discovery has already started. But this ignores the fact that discovery is in its infancy (to Intervenors' knowledge, no documents have yet been produced). Plaintiffs also fail to allege or explain why a stay would be prejudicial, nor do they respond to the argument that an immediate appeal could resolve this dispute or at least alter the course of discovery.

I. The Court's Order raises standing questions upon which there is substantial grounds for difference of opinion.

Both injuries asserted by Plaintiffs rely on novel legal theories, not settled law. Plaintiffs first claim they were "personally turned away by certain faith-based child placing agencies." Resp.6. But their complaint does not challenge the actions of these private agencies, instead challenging only the State's actions.[1] Plaintiffs claim

[1] Plaintiffs' complaint fails to allege *any* stigmatic harm, much less stigmatic harm traceable to the State Defendants. The only claim of unequal treatment is directed at the actions of "some private child placing agencies." Compl. ¶83.

that by merely contracting with these private agencies—on areligious and admittedly neutral terms—their alleged injuries are traceable to the State, making the State legally responsible for a private party's conduct. Resp.14. The complaint does not allege that the State has treated Plaintiffs unequally in any way—nor that the State's actions motivated or coerced those of the private agencies. This makes Plaintiffs' injury a novel basis for Article III standing; Plaintiffs have not pointed to any case in which a party had standing to sue the government for differential treatment by private parties over which the government had no control or influence.

Plaintiffs rely on *Parsons*, but there the court credited multiple allegations that the government provided "the motivation behind [the third parties' illegal] actions." *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 715 (6th Cir. 2015). Plaintiffs here have not claimed that the State motivated the allegedly discriminatory actions of the private agencies. Instead, the agencies acted based on their sincere religious beliefs. Moreover, the third parties in *Parsons* were themselves state actors. *See id.* at 707-09 (law enforcement officers, Army).

Plaintiffs' second asserted injury raises similarly novel legal questions. Plaintiffs argue that the State created a barrier to adoption by contracting with certain faith-based adoption agencies. But Plaintiffs have failed to show that this injury can be

redressed by a favorable court decision.[2] If the State breaks its contract with St. Vincent, it will not make it easier for Plaintiffs to adopt, and no one has plausibly suggested how the State's *closure* of an adoption agency will *increase* the availability of adoption services for Plaintiffs. Here too, Plaintiffs fail to cite any case law in which an injury is redressable absent a showing that the plaintiff "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) (citation and internal quotation marks omitted).[3] Both alleged injuries raise preliminary legal questions ripe for immediate appellate consideration.

II. The Court's Order raises state action questions upon which there are substantial grounds for difference of opinion.

Plaintiffs' claim regarding state liability for actions by private adoption providers is similarly novel and untested. Mot.10-19. Plaintiffs assert they are challenging only the actions of the State. *See* Resp.13-15. But that leaves open a crucial question of when the State is liable for injuries caused by private third parties.

[2] Plaintiffs argue that refusing to contract with St. Vincent will alleviate their alleged *stigmatic* injury, but Plaintiffs fail to explain how shutting down St. Vincent will redress the alleged *barrier to adoption* injury.

[3] *Parsons* is again inapposite, requiring plaintiffs "show[] that a favorable decision will relieve a discrete injury." *Parsons*, 801 F.3d at 715 (citation omitted).

Plaintiffs do not claim to be harmed by the mere existence of state statutes. Indeed, this Court held that only Plaintiffs who were "personally turned away by certain faith-based child placing agencies," had standing, Op.19-20, dismissing the Plaintiff who was not. Op.41-42. Plaintiffs' injuries are thus premised upon the actions of private third parties—without their conduct, the claimed state action of "permitting a child placing agency to refuse to work with a same-sex couple" ceases to exist. Op.26. But what nexus must be shown to establish state liability for merely permitting the actions of private parties?

As this Court acknowledged, the question is "nuanced." Op.79. The Court distinguished *Blum* and related cases, but their application here is a question of first impression in the Sixth Circuit, and apparently nationwide. Mot.12-14. The Court's decision turns on fine factual distinctions because there is no binding, nor even persuasive, precedent holding a government entity liable for the actions of private parties in a situation like this one.

The Supreme Court has said that state action cases "shed light upon the analysis necessary to resolve" that question, *Blum v. Yaretsky*, 457 U.S. 991, 1003-04 (1982), and Intervenors have demonstrated that state action is a complex area of law that does not support a finding of state action by the agencies here. Mot.10-12, 15-19. Plaintiffs have no response except to claim it is irrelevant whether Intervenors are

state actors. But it is relevant precisely because this state action analysis illuminates the proper legal analysis of their claims.

Intervenors have also shown that the question of state liability for the actions of private child welfare providers is a complex and unsettled area of law. Mot.18-19 & n.2. In response, Plaintiffs fail to identify any case, binding or persuasive, supporting their argument that the State is legally liable for alleged discrimination by private child welfare providers. Plaintiffs' failure underscores the problem: there is no precedent directly on point, making this case ripe for appellate guidance.

On whether Intervenors are state actors, Plaintiffs claim that *Brent* "definitively addressed that question." Resp.10. But this comes after Plaintiffs concededly failed to plead state action by Intervenors. Mot.10. And *Brent*'s holding does not answer the distinct question raised here because *Brent* turned on 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 v. Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656, 676 (6th Cir. 2018) (citation omitted). That analysis is inapplicable given that there is no attempt to treat the private agencies' actions as those of the State; instead, the State's ability to contract is challenged based on private actions *not attributable* to the State. Mot.11-12. Plaintiffs have no response

on the merits of *Brent*.[4] Nor can Plaintiffs get away from *Wilcher v. City of Akron*, 498 F.3d 516, 521-22 (6th Cir. 2007), which applied a narrower standard for government liability for First Amendment violations arising from the conduct of a contractor who is not a state actor. Mot.12.

Finally, Plaintiffs object to Intervenors' argument regarding state *in*action, claiming that they seek to prevent the State from entering into contracts with religious adoption providers. Resp.15 & n.5. But the very point of Intervenors' argument was to show that courts have described the legal standard differently, and that the line between state inaction, significant state encouragement, and state coercion is difficult to parse. Mot.14-17. This is why immediate guidance from an appellate court is appropriate in this case.

III. A stay of further proceedings is warranted if the Order is certified.

"Trial courts have 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); *see also Williams v. Scottrade, Inc.*, No. 06-10677, 2006 WL 1722224, at *1 (E.D. Mich. June 19, 2006) ("'[I]t is settled that

[4] Plaintiffs incorrectly claim Intervenors argued *Brent* was not binding due to a rehearing petition. Resp.10 n.2. Intervenors argued *Brent* was instructive, but its discussion of the relevant factors raised serious questions about how its test might apply here, and that a petition was outstanding. Mot.11-12. That petition has since been denied, but the uncertainty over the legal standard remains.

entry of an order staying discovery pending determination of dispositive motions is an appropriate exercise of the court's discretion.'") (citation omitted). Courts in this Circuit routinely order a stay as a matter of course whenever the factors for certification are met—without any additional analysis.[5]

Under this discretionary standard, a stay of discovery is warranted. Intervenors have shown that the legal issues raised are "dispositive of plaintiffs' . . . claims" and Plaintiffs have not shown any prejudice that would result from a short discovery delay. *Pullen v. McDonald's Corp.*, No. 14-11081, 2015 WL 13037269, at *3 (E.D. Mich. Apr. 28, 2015). Further, the early stage of this litigation counsels in favor of a stay, as any appellate decision could "significantly impact the course of discovery and this litigation," *irth Sols., LLC*, 2018 WL 1870140, at *2, and applying the correct legal standard now would avoid wasting judicial resources later.

Intervenors' Motion should be granted.

Respectfully submitted,

/s/ Mark L. Rienzi

[5] *E.g., Adams v. Bradshaw*, No. 1:05CV1886, 2010 WL 816532, at *3 (N.D. Ohio Mar. 4, 2010) (automatically granting stay); *Clay v. Emmi*, No. 13-11555, 2015 WL 2449183, at *1 (E.D. Mich. May 21, 2015) (same); *irth Sols., LLC v. Windstream Commc'ns, LLC*, No. 2:16-219, 2018 WL 1870140, at *2 (S.D. Ohio Apr. 19, 2018) (citing cases in which "district courts routinely grant stays upon finding that certification is appropriate").

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Dated: October 19, 2018

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 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.

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