UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

HONORABLE PAUL D. BORMAN

v.

No. 17-13080

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,

Proposed Defendant-Intervenors.
_____/

DEFENDANTS' AND DEFENDANT-INTERVENORS' MOTIONS TO DISMISS

Thursday, July 12, 2018

10:03 a.m.

(Appearances on the following page)

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(Call to order of the Court, 10:03 a.m.)

(Court and Counsel present.)

THE LAW CLERK: The Court calls Case Number 17-13080, *Dumont, et al. versus Lyon, et al.*

THE COURT: Okay. Y'all in the back can sit down and y'all in the front, let's identify yourselves for the record starting with the plaintiffs.

MS. COOPER: Good morning. Leslie Cooper with the ACLU.

THE COURT: Okay. You'll be arguing?

MS. COOPER: I will be.

THE COURT: Okay. And?

MS. OSTRAGER: Good morning, Your Honor. Ann-Elizabeth Ostrager from Sullivan and Cromwell also for the plaintiffs.

THE COURT: Okay.

MR. SCHNIER: Good morning. Jason Schnier, Sullivan and Cromwell, for the plaintiffs.

THE COURT: Okay.

MR. KAPLAN: Good morning. Jay Kaplan from the ACLU for the plaintiffs.

THE COURT: Very good.

And for the state defendants?

MR. BURSCH: Good morning. John Bursch, John Bursch Law, on behalf of the defendants.

THE COURT: You're keeping busy these days, aren't you?

MR. BURSCH: I am. Thank you, Your Honor.

THE COURT: And behind you or next to you, sir?

MR. SMITH: Yes. Assistant Attorney General Joshua Smith also on behalf of the state defendants.

THE COURT: Who will be arguing?

MR. BURSCH: I will be.

THE COURT: Okay. Very good.

And for the intervenor defendants?

MS. BARCLAY: Stephanie Barclay on behalf of the intervenor defendants, Your Honor, and I will be arguing.

THE COURT: Okay.

MR. RIENZI: Also, Mark Rienzi for the intervenor defendants.

MR. ORTNER: Daniel Ortner for the intervenors.

MR. PERRONE: And William Perrone also for the intervenors.

THE COURT: Okay. Have a seat. Let me spread out these matters and we'll proceed.

So the clock isn't ticking in terms of time limits. I'm just asking all the defendants here, looking at what we're

going to deal with, which is motions to dismiss under Rule 12, is there agreement that we don't consider matters outside the pleadings? In other words, the Sixth Circuit in a case called *Parsons versus U.S. Department of Justice*, 801 F.3d 701, 2015, dealt with a musical group, the Juggalos, J-U-G-G-A-L-O-S, and said when considering pleadings, standing and analysis must be confined to the four corners of the complaint. Do any of the parties disagree with that? Starting with plaintiff, do you disagree with that?

MS. COOPER: We don't, Your Honor.

THE COURT: State defendants?

MR. BURSCH: Only to comment that I believe the Sixth Circuit has recognized that when a complaint refers to other documents, so, for example, here the letters from Bethany Christian Services and St. Vincent Catholic Charities to the governor, that it's proper to take notice of what those documents are but otherwise imposing it.

THE COURT: Have they been included in your briefs?

MR. BURSCH: They have not. They're available online. We haven't referenced them.

THE COURT: Okay.

MR. BURSCH: But I just wanted to note that.

THE COURT: Okay. Very good.

And the intervenor defendants?

MS. BARCLAY: We would just note, Your Honor, that

under *Armengau v. Cline* --

THE COURT: Spell it to help Mrs. Lizza.

MS. BARCLAY: A-R-M-E-N-G-A-U v. Cline, C-L-I-N-E.

THE COURT: And cite that. What's the cite?

MS. BARCLAY: That's 7 Federal Appendix 336.

THE COURT: And what year?

MS. BARCLAY: And that's 2001.

THE COURT: Okay.

MS. BARCLAY: It says the Sixth Circuit has, quote, taken a liberal view, end quote, of matters that can be considered under a 12(b)(6) motion.

And in *Gordon v. England*, that is 354 F Appendix 975, a 2009 case, the Court said, quote, A court that is ruling on a 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or otherwise appropriate for the taking of judicial notice.

So we would just say that our position is that this court can take notice of judicially noticeable facts in addition to the complaint.

THE COURT: Okay. You had mentioned two unpublished cases and they both precede *Parsons*. So I'm going to follow *Parsons*.

Okay. Let me just ask another question as we talk about preliminary matters.

Under the four corners then, we would not consult

matters outside of the pleadings, so let's begin then with defendant state, motion to dismiss, and please speak slowly. You seem to have the same defendant in both cases.

MR. BURSCH: I do.

Good morning, Your Honor. John Bursch --

THE COURT: Good morning, sir.

MR. BURSCH: -- on behalf of defendants Dr. Herman McCall and Nick Lyon. Would it be possible for me to reserve five minutes of my 30 for rebuttal?

THE COURT: Yes.

MR. BURSCH: And if you could just let me know when I'm getting close to the end of my 25, I would appreciate that.

THE COURT: And if you speak a little slower, that will help Mrs. Lizza.

MR. BURSCH: I certainly will.

THE COURT: Okay.

MR. BURSCH: May it please the Court. There is a long Supreme Court-approved practice of the government partnering with faith-based as well as secular service agencies such as hospitals, homeless shelters and refugee centers. And this case is no different because Michigan does not deny anyone the ability to adopt or foster children in the state's custody based on race, religion or sexual orientation.

THE COURT: Oh, that's required really under the statute.

MR. BURSCH: It absolutely is.

THE COURT: And the contract that you have with the agencies.

MR. BURSCH: That's correct.

THE COURT: State said as well.

MR. BURSCH: And the reason for that is the State's interest is to find as many families as possible for children.

THE COURT: Well, it's also the State's policy to not discriminate.

MR. BURSCH: Correct. So to achieve the policy of casting the net as wide as it can, the State has chosen to continue its long-time and historical practice contracting with faith-based and as well as secular child placement agencies. I'll refer to them as CPAs.

THE COURT: That's good.

MR. BURSCH: And the legislature has recognized that keeping the CPA network broad and diverse results in the recruitment of more families which benefits all children in the State's care.

Now, plaintiffs lack standing and they fail to state a claim, and I'll begin with standing. The plaintiffs actually --

THE COURT: A little slower will be nice.

MR. BURSCH: Yes, are arguing two types of standing. One is in the complaint and one is not. The one that is in the

complaint is taxpayer standing. The plaintiffs all allege they have taxpayer standing, specifically in paragraphs 64, 69, 74 and 79. But courts typically do not recognize state taxpayer standing. That's the *DaimlerChrysler* case that we cite on page 9 of our opening brief.

The Supreme Court in the *Flast* v. *Cohen* --

THE COURT: F-L-A-S-T.

MR. BURSCH: Yes, *versus Cohen*, C-O-H-E-N, did recognize a narrow exception applicable only to establishment clause claims -- so this would not apply to the equal protection claim -- where there is a specific legislative appropriation to implement a legislative --

THE COURT: So you're saying that if these plaintiffs allege they went to a CPA and they were told we won't service you because we don't service same-sex couples, that they don't have standing?

MR. BURSCH: I'm saying they do not have taxpayer standing.

THE COURT: Okay.

MR. BURSCH: We'll talk about Article III standing under *Lujan*.

THE COURT: Okay.

MR. BURSCH: Again, in the complaint the only standing they allege is taxpayer standing. I gave you the paragraphs where they said that.

So that very narrow *Flast v. Cohen* exception to taxpayer standing requires that you have expenditures that are actually appropriated by the legislature to implement a specific mandate, and that's the *Hein* case, H-E-I-N, that we cite at page 10 of our brief. So when you have discretionary spending, it doesn't fit that exception and there is no taxpayer standing. That's a problem here because there is no specific legislative appropriation for these adoption and foster care services. The department pays CPAs out of their general fund. In fact, they even, when they contract with the CPA, it's a matter of discretion as a matter of Michigan law. That's MCL 400.14f. So given that, there cannot possibly be taxpayer standing under well-established Supreme Court precedent.

THE COURT: So even though the legislature passes a budget that includes funding for DHS, you're saying that, therefore, it's not specific for this particular what?

MR. BURSCH: Not specific to this particular activity. And what the *Hein* case requires pursuant to the Supreme Court is to have an establishment clause, taxpayer standing, you would have to have a specific appropriation for the activity. So, for example, the legislature appropriates money to be spent to benefit a church; that would be the type of specific appropriation that would fit the *Hein* exception.

THE COURT: So if they appropriate money to the agency

and the agency says we're going to give it here and there's no standing as terms of how the agency spends the money or how the contractor that the agency contracts with spends the money.

MR. BURSCH: This is all true if you are referring to taxpayer standing.

THE COURT: Yes, I understand.

MR. BURSCH: Yes, that's exactly right.

So the second type of standing plaintiffs allege in their briefing but not in their complaint is this stigma-based harm from being turned down by these agencies. The problem there is that under *Lujan*, L-U-J-A-N, the Supreme Court requires for standing that injuries be fairly traceable to defendants. Now, the harm here is coming from the CPAs declining to license couples for adoption services. And the defendants concede at page 15 of their reply to the intervenors' motion to dismiss that they're not arguing that the agencies are state actors. Their argument --

THE COURT: You mean plaintiffs are state --

MR. BURSCH: I mean plaintiffs. Thank you. The plaintiffs' argument is that the State is responsible for the private actors' conduct because they have a contract. And that is directly --

THE COURT: And they get the money.

MR. BURSCH: Hmm?

THE COURT: They get the money from.

MR. BURSCH: They do. But the Supreme Court has directly rejected that theory too. And it's the *Blum* case, B-L-U-M. It's cited at page 4 of the intervenors' reply brief in support of their motion to dismiss and --

THE COURT: Let me ask this question since you mentioned the *Blum* case.

MR. BURSCH: Yes.

THE COURT: One of the provisions of the case says the required nexus, that's at 1004-05, required nexus may be present if a private entity has exercised powers that are traditionally the exclusive prerogative of the State.

MR. BURSCH: Yes.

THE COURT: And in this case, child welfare, child placement, aren't those powers that are traditionally the exclusive prerogative of the State?

MR. BURSCH: Respectfully, Your Honor, they are not. Things like liquor licensing are exclusive provinces of the State because they've always been that way. As we explained in our brief, and I think the intervenors do as well, the provision of adoption and foster care services was traditionally done by private entities, traditionally faith-based entities. And even today there are both public and private contractors who perform this service.

THE COURT: So you're saying the State has no role in the child welfare, wards of the State. When a child becomes a

ward of the State --

MR. BURSCH: No, this is not our position. The language quoted from page 1004 to 1005 of the opinion refers to the exclusive province in the State. And I don't have a list of citations, but you could look up dozens and dozens of cases interpreting that phrase. The lower courts understand that to be a very narrow exception, one that only applies where the State, as in a liquor license, has traditionally and today exclusive control of that regulatory field.

What *Blum* does --

THE COURT: Let me ask a question --

MR. BURSCH: Yes.

THE COURT: -- in terms of that, and looking at the injury, the stigma you're saying does not rise to anything that the plaintiffs can harm. Is that a concrete harm which is satisfied as to First Amendment due process claims? Because in the *Parsons* case they say stigmatization also constitutes an injury, in fact, for standing purposes.

MR. BURSCH: Yes. We would concede that in some circumstances stigma can be injury sufficient for standing. Our point under *Blum* is that the State isn't responsible for stigma that's imposed or caused by someone else. And if I can --

THE COURT: But if they give money to and the money is specifically dealing with the children.

MR. BURSCH: But that's correct. If I could just read to you what the Supreme Court said in *Blum* on those same pages that you are referring to.

THE COURT: Okay.

MR. BURSCH: That this is not a nexus case because -- I'm sorry, it's not an exclusive power case. But what *Blum* says and this is --

THE COURT: You can't hold state officials liable for the actions of private parties, that's what you're going to say?

MR. BURSCH: Yes. They can't be responsible unless it 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. Mere approval or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.

And in that same passage the Court refers to if there had been an affirmative command, then that would be a different story. But there's no allegations here nor could there be that the State is affirmatively commanding CPAs how they should run their practice.

One other citation I'll give you in the Supreme Court's *DeShaney* case --

THE COURT: Spell it.

MR. BURSCH: D-E-S-H-A-N-E-Y. It is cited on page 7 of the intervenors' reply brief. And that reiterates that simply because the State is aware that one of its contractors is engaged in certain conduct isn't enough to satisfy the *Blum* test. The State has to actually tell them to do something in order for that to be satisfied.

So if the plaintiffs cannot link the declination by the CPA to the State as a state action, then regardless of whether stigma is recognized as a harm for purposes of standing, they cannot establish the fairly traceable to defendants' portion of the *Lujan* test, it's that simple.

THE COURT: But you're saying that the State does not, when it makes a child a ward of the State, does not have the exclusive control over that child that it has made a ward of the State and is also required under state legislation to seek foster care, adoption, and they're carrying out that purpose by signing up, contracting with agencies, and that's not a prerogative of the State to deal with children in dire straits, that they have legally made wards of the State.

MR. BURSCH: To be perfectly clear --

THE COURT: Yes.

MR. BURSCH: -- the State has absolutely exclusive authority with respect to individual children, but the exclusive test that the Supreme Court is referring to in *Blum* is over a regulatory area. And the State has not ever been the

exclusive regulator as with liquor licenses, and I would submit I'm not aware of any case in the entire country which has ever said that a state has exclusive province in the adoption and foster care area such that it would be appropriate to attribute actions of their contractors to the State as state conduct. I'm not aware of a single case.

THE COURT: But when they contract with these individuals, the contracts all seem to state that they will not discriminate, Michigan Department of Health and Human Services will not discriminate, because of marital status, gender identity, sexual orientation. And then it later says that it refers back, that under we'll call 2015 PA 53 the contractor has the sole discretion to decide whether to accept, not accept a referral. And the statute, as we know, that's the one that says that the department shall not take an adverse action against a child placing agency that has declined to provide services that conflict with the child placing agency's sincerely held religious belief.

MR. BURSCH: Yes. That is the careful balance that the legislature exercising its policy prerogative has created, one where an agency --

THE COURT: Can then --

MR. BURSCH: Can --

THE COURT: -- act in a way that discriminates against marital status or gender identity based on 53 after stating the

state law also says you can't do that.

MR. BURSCH: Right. Just to explain the referral process. The State does not go forward with any adoption or foster care service until it accepts a referral of a particular child from the State. Once it accepts that referral, the agency is absolutely bound by that nondiscrimination provision that you just read including the prohibition against discrimination based on sexual orientation.

THE COURT: The referral process, going back to the beginning of it, involved the couple going to a CPA and saying we want to be set up to have -- receive a child. And the CPA goes through their process of dealing with that individual and makes a recommendation to the State.

MR. BURSCH: It's two separate processes. You've got the recruitment process where the CPA tries to develop a pool of families that would be suitable foster care or adoption providers and that is something the CPA does on its own.

THE COURT: On its own, but can the CPA, in building up their roster, say the roster is only going to include people that adhere to our religious beliefs?

MR. BURSCH: Yes, they can. Because where the State gets involved is only when that child referral is made. And if the agency doesn't have a child -- or I'm sorry, a family to immediately place that child, they can decline it. And if they do, then they can accept it but they have a family they already

know they're working with. It's at that point that the money starts to flow and you have this closer relationship between the State and the CPA but it's separated by the contractual process and PA 53 itself.

THE COURT: So you're saying, Judge, don't consider how the referral -- or not how -- not the referral, but how the roster of families is created by a CPA because they don't get money to put individuals who want to go through the process or the children who are available, they don't want to use same-sex -- will they use same-sex families or are you just saying, Judge, that's not part of what we're here about?

MR. BURSCH: That's not what we're here about because under clear U.S. Supreme Court precedent, what the CPA does without the State affirmatively commanding it to do is not state action that can be attributable to these state defendants.

THE COURT: And the Supreme Court precedent you're speaking of?

MR. BURSCH: Was the *Blum* case that we were just talking about. In addition, as we start to get into the merits of the claim, there's still a state action requirement. I think the strongest case is the *Rendell-Baker*, that's R-E-N-D-E-L-L, hyphen, B-A-K-E-R case, cited at page 21 of our principal brief. And I'll note, as we did in our reply, that the plaintiffs did not even respond to the *Rendell-Baker*

analysis. There you had a school which received 90 percent of its budget and almost all of its students by referral from the State and yet the U.S. Supreme Court held that there was not --

THE COURT: What was the year of that decision?

MR. BURSCH: The year?

THE COURT: Yeah, please.

MR. BURSCH: Give me one moment.

THE COURT: Sure. I can page to page 21.

MR. BURSCH: The year is 1982. The cite is 457 U.S. 830. So, again --

THE COURT: Say it again. The year?

MR. BURSCH: Did I say 1982? 1982, yes.

THE COURT: Okay.

MR. BURSCH: So even where you had significant government funding, significant government sending of the students and some government regulation about their operations, the Supreme Court said that the school's actions could not be attributed to the State as government actions because they're separate. And, in fact, this court, not you but the Eastern District of Michigan --

THE COURT: Right.

MR. BURSCH: -- in the *Brent* case, B-R-E-N-T --

THE COURT: This is Judge Cook's case.

MR. BURSCH: Exactly, made that same conclusion for the same reasons specifically regarding the provision of these

child welfare services in Michigan.

THE COURT: Let me ask a question. If it's a separate process, in terms of recruitment, why does your contract even have to mention Public Act 53 and also acknowledge the conscience objection?

MR. BURSCH: I think, obviously, incorporating governing law, PA 53, is standard to make sure that everyone knows what the rights are. But the reason that the nondiscrimination statement remains there is because once a referral has been accepted and the agency has that responsibility for the child, then the nondiscrimination statement does kick in. So if an agency didn't have an available family and they accepted a referral and then a same-sex couple came to them and wanted to adopt that child, I think it would be difficult for the agency to argue that PA 53 applies because PA 53 clearly draws the line at acceptance of the referral. And so if an agency wants to protect its conscience rights, it must act before it accepts the referral. Once it does, then PA 53 no longer applies and the nondiscrimination statement does.

THE COURT: So if they accept a referral -- but that's after they've done the groundwork and they've excluded same-sex couples from getting the ability to have them do the groundwork to be then available, authorized to receive a child.

MR. BURSCH: Again, to be clear, simply because a --

St. Vincent Catholic Charities, because of its religious beliefs, can't recommend a couple as an adoptive family doesn't mean that couple can't become an adoptive family. There are more than 100 CPAs in Michigan, many right in the area where the plaintiffs live and --

THE COURT: So you're saying that PA 53 can take away the right of a same-sex couple both under Michigan law and under federal law in terms of discrimination against same-sex couples?

MR. BURSCH: No, I don't think that's what we're saying. What I'm saying is that PA 53 can constitutionally create an opportunity where agencies that are faith-based can continue to work with the state government just the way the Supreme Court has always said faith-based agencies can work with government and still live by their religious principles, and you won't have any entanglement by making sure the line is drawn at a referral.

THE COURT: I understand.

MR. BURSCH: So moving to the merits of the claims. They fail to state a claim in each respect.

With respect to the establishment clause, you know, if you want to look at it at a 10,000-foot level, you have an establishment clause violation when the State actually adopts a particular religion or presses that religion on people who don't want it. Michigan's approach does the opposite. It

promotes pluralism not a particular set of beliefs. The plaintiffs' approach drones out religion entirely. It acts on hostility to religion which is something that the Supreme Court just rejected in the *Masterpiece Cakeshop* case.

THE COURT: Well, let's wait a minute and talk a little about that. In *Masterpiece*, the majority opinion says *Masterpiece*, 138 Supreme Court at 1719, at 1727: "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can and in some instances must protect them in the exercise of their rights." And then it goes on to say: "At the same time religious and philosophical objections to gay marriage are protected views and in some instances protected forms of exclusion. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections would not allow business owners and other actors in the economy," here it's even a statement, "to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."

What we have, an applicable law with regard to protecting individuals and we also have individuals who are deprived of the services of the agencies if they're same-sex couples. Am I reading that right?

MR. BURSCH: You read that correctly, but there's lots

to unpack there. So if you'll indulge me, I have several responsive points.

THE COURT: Okay.

MR. BURSCH: First, when you say that we have laws that protect against discrimination, of course, under neither Michigan law or federal statutory law is there any prohibition on discrimination or differential treatment based on sexual orientation. It's in the contract, but as we just discussed, that applies only once a referral of a child has been accepted.

And so this is shifting to the second count, the only nondiscrimination law that the plaintiffs can rely on is the equal protection clause. And in the Sixth Circuit, which the plaintiffs agree that you're bound by, the test that you apply is rational basis, as you know, the easiest to satisfy equal protection doctrine. And it's within the realm of rational speculation, which is the test, to believe that driving out faith-based CPAs will reduce the number of participating families available to place children --

THE COURT: When you say driving out, that's not the plaintiffs' complaint --

MR. BURSCH: Well, it's actually a legislative finding, Your Honor. This is Section 14e(a)(3) of the act, and unlike other types of legal claims, when you're undergoing a rational basis argument, you don't get a trial and you can't simply allege that a legislative belief is or is not true.

This isn't an --

THE COURT: You don't get discovery?

MR. BURSCH: No.

THE COURT: You get no discovery?

MR. BURSCH: Not in a rational basis case. When you have an adjudicative finding, was the light red or green, you get discovery. When you're talking about whether a state had a rational basis for a law, that's legislative fact and there is no discovery. Otherwise, you would have discovery and a trial in every rational basis case. And the Supreme Court has wholeheartedly rejected that.

THE COURT: So you're saying it opens a door on a rational basis test for you to go and proceed with legislative history and matters like that and bring that in even though the complaint doesn't talk about what you're speaking of.

MR. BURSCH: Not only. This isn't legislative history. This is a legislative finding in the statutory code itself. I'm not going into evidence. I'm giving you Michigan statutory law. In fact, I'll give you it. It's 2015 PA 53 was codified in MCL 722.124e and I'm referring to (1)(c) of that statute. However, you don't even need the legislative finding in the statute because the rational basis standard says that if you can even conceive of a possible rational reason why the State would adopt a law like this, then the State wins. There's no discovery. There's summary judgment -- I'm sorry,

or a motion to dismiss or summary judgment, either way.

THE COURT: That's the question. Is this a motion to dismiss? You're saying it's just on the law so we don't need to go further.

MR. BURSCH: Correct. Because you can conceive of a rational basis for the statute that having more agencies creates more families for more children, that's the end. You don't get to have discovery and a trial on a rational basis.

THE COURT: But their argument is that you don't have more agencies available to their plaintiffs under what you're arguing. They're saying that, no, there are fewer agencies available because we're dealing with agencies that will refuse to service their clients.

MR. BURSCH: That is their allegation, and it's not our burden to prove that to be wrong because under the Supreme Court's rational basis jurisprudence, if the State had a rational reason, even if they were wrong, it's still a constitutional act. That's how low the scrutiny is.

Now, if you go up to the Sixth Circuit or the Supreme Court and one of those courts recognizes that sexual orientation is a protected class where they get some kind of heightened scrutiny, intermediate scrutiny or strict scrutiny, then it's an entirely different ball game. But when we're talking about rational basis, you don't have to prove anything. If you can simply conceive of a rational reason, that's enough.

And that's why the Supreme Court doesn't typically endorse trials in rational basis cases.

THE COURT: So you're saying that the rational basis test which you're arguing which allows the agencies to reject applicants, same-sex couples, trumps, for example, what the Supreme Court said in *Obergefell*, O-B-E-R-G-E-F-E-L-L, *v. Hodges*, which is that the right -- "When that sincere and personal opposition becomes enacted law and public policy, a necessary consequence is to put the imprimatur of the State itself on the exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right. The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from the amendment's guarantee of equal protection of the laws. And the due process clause and equal protection clause are connected in a profound way, though they set forth independent principles." And that's on page 2502 of *Obergefell*.

MR. BURSCH: Yes. Having argued that case, I'm well familiar with the opinion but I have two responses to that. Number one, we're not talking about a state law that discriminates based on sexual orientation or anything else. All the State law says on its face is that it protects the

ability of faith-based agencies, whatever their belief might be, to continue participating as partners with the State in these endeavors just like the Supreme Court in the *Bowen* case that we cite in our reply brief.

THE COURT: Spell it.

MR. BURSCH: B-O-W-E-N, page 5, has recognized for years that there's no obstacle to faith-based organizations, whether they're hospitals, relief organizations, shelters, to collaborating with the government and they're not required by the First Amendment to leave their religious beliefs at the door --

THE COURT: What year is *Bowen*?

MR. BURSCH: *Bowen*?

THE COURT: Yeah.

MR. BURSCH: *Bowen* is a 1988 case.

THE COURT: Why don't you kind of wrap up because we don't want to go way, way long.

MR. BURSCH: Happy to do that.

THE COURT: Thank you.

MR. BURSCH: So just in conclusion, Your Honor, it's incredibly important to your ruling to understand that the discrimination and the stigma that the plaintiffs are claiming comes from the actions of parties who cannot be attributed to the State as a state actor. I think once you cross that line and reach that conclusion, then the establishment clause and

equal protection clause claims necessarily fail.

So we would respectfully ask that you dismiss all the claims under our motion to dismiss, but also ask that if any claim does survive as a result of the Court's ruling, that you certify that ruling for interlocutory appeal under 28 U.S.C. Section 1292 and Federal Rule of Civil Procedure 5(a)(3) because any such ruling would necessarily involve a controlling question of law as to which there is a substantial ground of difference of opinion and an immediate appeal would materially advance the ultimate determination of the litigation. The U.S. Supreme Court precedent in the areas we're talking about could change, but until they do, we think that you're bound by what they've said. Thank you.

THE COURT: Thank you. Okay.

Miss Cooper?

MS. COOPER: Good morning. May it please the Court.

THE COURT: Good morning.

MS. COOPER: Leslie Cooper for the plaintiffs.

I want to start briefly by addressing the 2015 law that the State says would permit discrimination by state-contracted agencies who receive inquiries or applications from couples seeking to adopt. It is clear in the statutory language that services are defined to exclude services provided -- sorry, foster care case management and adoption services provided under contract with the department and the

contracts specifically include recruiting families. So the suggestion that the statute took -- the 2015 statute actually authorizes the discrimination that the State is allowing these agencies to engage in, I think, is wrong. Now, as a matter of constitutional law, it doesn't matter.

Our complaint, because we read the statute that way, challenges the State's practice of allowing discrimination by agencies under contract with the State, funded by taxpayer dollars and using religious criteria in the performance of public --

THE COURT: The clock doesn't start running until they accept someone and do the workup and, therefore, if they reject someone, the clock hasn't started running on the matters that we're dealing with here about getting children.

MS. COOPER: The statute allows an agency to decline a referral of a child's case based on religious objections. The statute specifically carves out contracted work, case management work with the department, and that includes foster care recruitment. So, again, our reading of the statute is, and I think the only logical reading, is that it doesn't authorize discrimination. The only religious-based discrimination it authorizes is refusing to accept a child's case referral. Again --

THE COURT: Is that what we have here?

MS. COOPER: We don't have a refusal to accept

referrals of children's cases. We have agencies refusing --

THE COURT: Right.

MS. COOPER: -- to accept applications to foster coming from the community.

THE COURT: Okay.

MS. COOPER: And so, again, our view is the statute doesn't allow this but even if it did, of course, then that takes us to the constitutional questions that bring us here. Because regardless of what the statute says, the State is taking the position apparently that the statute does allow it or for whatever other reason it is permitted to authorize religious criteria being used to exclude families in the public child welfare system and that is what we're challenging.

I want to address some of the standing arguments that were made --

THE COURT: What about the State action argument? I guess that would be helpful.

MS. COOPER: Sure. The State largely relies on case law like *Rendell* that -- *Rendell-Baker* I think is the name of the case, and a number of other cases that stand for the proposition that you can't hold a private entity liable as a state actor under Section 1983 unless these, you know, various criteria are met. We're not suing any private agencies. We're not suing anyone other than the State. And the -- there's nothing in the cases cited by the defendants that say that the

government cannot be held liable for delegating a government function to religious organizations to be performed in a religious manner or funding religious activity of those -- conducted by those organizations. And, in fact, the Supreme Court and the Sixth Circuit made clear that it can both in the *Bowen* case that the State mentioned and the *Teen Ranch* case in the Sixth Circuit. Both of those cases --

THE COURT: Cite on the *Teen Ranch?*

MS. COOPER: Sure. The *Teen Ranch* citation, sorry, let me get my --

THE COURT: Okay. I can get it out of your brief probably. Here we are.

MS. COOPER: *Teen Ranch* is 479 F.3d 403 from 2007.

And those cases directly make clear that the government can --

THE COURT: Spell *Teen Ranch* to just help me.

MS. COOPER: Sure, T-E-E-N, Teen, Ranch, R-A-N-C-H.

THE COURT: And I'm looking at your response in opposition and I don't see *Teen Ranch* listed as one of them there.

MS. COOPER: Oh. You know, it may be -- *Teen Ranch v. Udow*, U-D-O-W. We did cite that in our brief.

THE COURT: In your brief. I'm just looking at the list of cases.

MS. COOPER: Uh-huh.

THE COURT: Did you need the spelling of Udow, Mrs. Lizza?

MS. COOPER: Excuse me?

THE COURT: Marianne Udow, M-A-R -- and what is the last name?

MS. COOPER: Udow, U-D-O-W.

THE COURT: Right. Okay. *Ranch v. Udow*. Western District of Michigan case, right?

MS. COOPER: Right, and it was affirmed by the Sixth Circuit in the citation that I gave you.

THE COURT: Right, okay.

MS. COOPER: Okay. And in *Bowen*, that was establishment clause challenge to teen pregnancy prevention grants to religious groups. And the Supreme Court explained in that case that it has struck down funding programs where there was an unacceptable risk that funding would be used to advance the religious mission, and it in that case rejected a facial challenge to the program because it said there was no indication that grantees were not capable of carrying out their functions under the program in a secular manner. And it remanded that as-applied challenge instructing the district court to consider whether any grants were being used to fund religious activities. Here some of Michigan's contracted agencies are unwilling to carry out their government functions in a secular manner and government money is being used to fund

screening of families based on religious --

THE COURT: Stop you one second.

(Short pause.)

THE COURT: Okay. Why don't you just repeat your last sentence because I was fussing with the computer.

MS. COOPER: Sure. In contrast to --

THE COURT: You're talking about state agencies.

MS. COOPER: Right.

THE COURT: And carrying out...

MS. COOPER: And I was discussing the *Bowen* case from the Supreme Court.

THE COURT: Yeah.

MS. COOPER: Which is quite instructive here where the court has explained in that case that it has struck down funding programs where there was an unacceptable risk that the funding would be used to advance the religious mission and it denied the facial challenge in that case because there was no indication that the grantees were, quote, not capable of carrying out their functions in a secular manner. And it remanded the as-applied challenge to -- and instructed the district court to consider whether grants were being used to fund religious activities. Here, some of Michigan's contract agencies are unwilling to carry out their functions in a secular manner and government money is being used to fund the screening of families based on religious doctrine.

I'll just add that in the *Bowen* case the Court also recognized that religious discrimination in the provision of services by a government-funded organization is one form of impermissible advancement of religion with government funds. The Court referred to a case about government funding of a Catholic hospital and said in that case it was not a violation of the establishment clause, quote, in the absence of any allegation that the hospital discriminated on the basis of religion.

So this goes back to a theme that the State is arguing then that there's a long history of government partnering with religious organizations. Of course, there is and there's nothing unconstitutional about that. But the Supreme Court has made clear in a long string of cases that that is fine as long as that funding is not used for religious purposes and that the government is not delegating government functions to be performed in a religious manner.

The teen --

THE COURT: So you're arguing that this -- children, wards of the State who are deemed in need of foster care, adoption, cannot be cabined in such a way that the -- losing access to possible same-sex families that say to go to a CPA that says we will not process you because you're same sex?

MS. COOPER: Absolutely. This is absolutely a government function. The State is responsible for children in

the foster care system having removed those children from their families because of abuse or neglect. They are wards of the State. The State is responsible for finding families for them. The State cannot, obviously, DHHS could not say we will not place children with families based on religious objections to those families. The State could not, say, have any religious litmus test for prospective families. Because it can't do it, it can't then hire someone else to do that. It matters not for the establishment clause purposes whether the conduct is carried out at the hands of state employees or private entities that the State has hired to perform this government service. This is purely a government function.

The State talked about the history of adoption by faith-based agencies. He's talking about private adoption. Private adoption is a different adoption than public adoption where you have children who are wards of the State and it is the State that has the responsibility to care for them. There is no history of religious criteria being used in public adoption just like there and, of course, there could not be because the Supreme Court has made clear, *Bowen* and numerous other cases, that the government cannot use religious criteria in the performance of government services.

And the delegation cases like Larkin against Grendel's Den, that's L-A-R-K-I-N, against Grendel's Den, G-R-E-N-D-E-L, apostrophe, S, Den, D-E-N, as well as *Kiryas Joel*, K-I-R-Y-A-S

J-O-E-L, made clear that when the government delegates a government function to a religious entity, it must not allow that function to be performed using religious standards.

The Sixth Circuit has made the same point in *Smith v. Jefferson County*. The Court distinguished between delegating government functions to religious entities that performed those functions in a secular manner which does not violate the establishment clause and delegating government functions to religious entities that perform those functions in a nonsecular manner which would. And the Court specifically explained on page 594, quote, unlike *Larkin* and *Kiryas Joel* where there is a potential and even arguably the purpose of allowing governmental divisions to be made for religious reasons, there was no such risk in the present case because Kingswood School carried out its service in a secular manner.

Here the State is permitting agencies to carry out a government service in a nonsecular manner. It's not just at risk that it will happen, which was too much for the Supreme Court to tolerate in *Larkin*, it's happening. It's actually happening.

And while we're talking about the establishment clause claim, we've identified at least three different reasons that the State authorizing religious criteria in the public child welfare system violates the establishment clause. The first is what I just articulated, the delegating government function

performed in a religious manner. The second is the funding of religious activity. The *Bowen* case that we talked about is a good example of what's wrong with that.

But I also wanted to explain a little bit further that the *Teen Ranch* case decided by the Sixth Circuit that I mentioned earlier is almost on all fours with this case. There the Court held that state funding of a residential care program for youth in state custody that included religious programming in its services to youth would run afoul of the establishment clause. Just as the State can't place children in the care of agencies that incorporate religious programming and use tax dollars to fund those programs, it cannot place children in the care of agencies that incorporate religious child placement standards and use tax dollars to fund those programs.

THE COURT: Let me circle back to defense counsel's argument that the only thing you've pled in the complaint is just the taxpayer standing issue.

MS. COOPER: Yeah. I was baffled by that argument because the complaint alleged facts stating that plaintiffs Kristy and Dana Dumont and Erin and Rebecca Busk-Sutton reached out to two agencies and were turned away based on religious objections to same-sex couples. There is no rule that I have ever seen that the complaint needs to then put the word "standing" in the complaint to say, oh, and this establishes standing. That's not a pleading requirement that I've ever

seen. The standing is, of the couples, is quite clear. And on that topic it is surprising to me that the State tries to insolate itself from responsibility by saying that the actions are not fairly traceable to it by arguing that it's based on conduct of third parties and remarkably relying on the fact that the contract prohibited discrimination based on sexual orientation while in the next sentence acknowledging that it contracts with agencies that for religious reasons only work with opposite-sex couples. The injury --

THE COURT: You mean won't work --

MS. COOPER: Only work with opposite-sex couples. Won't work with same-sex couples.

The injury could not have occurred but for the State permitting such conduct by its contracted agencies. Private agencies don't independently provide public child welfare services. It's called child public welfare services because it's a state function and they can't do that work without being done in partnership with the State.

I want to talk about the *Blum* case that the State relied on. That case is not applicable for a couple of reasons. First, the court in that case said that there was no challenge to any government regulation or procedures. The issue concerning transfer of nursing home residents --

THE COURT: Right.

MS. COOPER: -- was made by doctors that had nothing

to do with any challenge -- any policy or practice of the government. Here we're challenging directly a state practice of allowing the use of religious criteria in the public child welfare system. Also, again, we are talking about public adoption of wards of the State. There is no way to view the placement of these children as anything but work of the State.

The other standing argument that the State makes is, well, there are other agencies. Your Honor raised at the top of the morning the point that we have to stay within the allegations of the complaint, the four corners of the complaint. Their assertions about what agencies may have existed or how they may have treated our clients cannot be accepted on a motion to dismiss. They cannot be determined without discovery and without the ability to develop factual record and, in fact, plaintiffs dispute the characterization offered by the State and the intervenors. But it's important to say regardless of whether other options were available, it's an injury to be turned away by an agency providing a government service solely because of your sexual orientation.

THE COURT: Let me ask one question, then you can go back on this. You talked about the rational basis test. Do you want to respond to that, where he said if there's anything, you know, that's rational, just by what is involved, then we win.

MS. COOPER: Yeah. I have a number of things to say

about that. Thank you, Your Honor.

First of all, their assertion that, which I understand to be that if the State did not allow agencies to exclude families based on religious objections, those agencies would shut down and there would be fewer agencies available to find families for children and, therefore, fewer families. This directly contradicts the allegations in the complaint in paragraphs 1, in 51 through 56 that the state's practice of allowing such exclusions reduces the number of families for children. This factual assertion that they offer cannot be credited on a motion to dismiss, and the *Davis against Prison Health Services* case makes clear that that standard applies equally even in a rational basis case.

THE COURT: Can you give a cite to *Davis*?

MS. COOPER: To *Davis*?

THE COURT: I'll look at your brief.

MS. COOPER: Can I ask counsel to look that up for me so I don't take up Your Honor's time?

THE COURT: No, that's okay.

MS. COOPER: We have it in our brief.

In that case the Sixth Circuit reversed dismissal --

THE COURT: I have it. It's 679 F.3d 433 --

MS. COOPER: Thank you.

THE COURT: -- Sixth Circuit, 2012. Okay.

MS. COOPER: There the Sixth Circuit dismissed, sorry,

reversed the dismissal of an equal protection claim involving sexual orientation discrimination in a rational basis analysis and said that the Court was required to treat the plaintiffs' allegations not the contested statements relied on by the defendants as true. But I also want to say more about this because it is -- the state's attorney talked about you can rationally speculate and you don't need courtroom fact finding. Now, even under the rational basis test, and by the way, the *Obergefell* decision establishing the right to marry for same-sex couples, that case actually I think makes heightened scrutiny applicable because married same-sex couples are being treated differently than married opposite-sex couples in the public child welfare system in Michigan.

But even in the world of rational basis review, it's not sufficient to merely assert a state interest. Under rational basis review it must be rationally furthered and any speculated interest must be based in reality. The *Heller v. Doe* case makes that point clear.

And I would say the Orwellian notion that allowing agencies to turn away qualified families will result in more families is not, quote, rational speculation. It requires the speculation that the only agencies capable of meeting the needs of children in the foster care system is a subset of agencies that feel compelled by their religious beliefs to depart from well-accepted --

THE COURT: He's not saying the only agencies. He's saying they should be included.

MS. COOPER: Right. But they're saying they should be included because if they're not included that we're not going to have enough families for children --

THE COURT: Right, I understand.

MS. COOPER: -- that they're going to close and we won't then have the ability to get enough families. For that to make any sense, that requires the assumptions that other agencies wouldn't fill in the role if they chose to close shop because they could not comply with the constitutional standards. And there is -- the supposition that it would be impossible to find other agencies or they wouldn't find other agencies or the only agencies available feel compelled by religious beliefs to depart from well-accepted professional child welfare standards of placing children based solely on the needs of children and not excluding families based on religious beliefs of the agency, there's -- that is not rational speculation that just can be accepted.

In the *Cloverleaf Creamery* case, it's *Minnesota against Cloverleaf Creamery*, that the Supreme Court made clear that plaintiffs are entitled to put on evidence to demonstrate that the government actually is irrational, and plaintiffs are prepared to do that. In fact, our brief, we noted reports of what happened in other states when some agencies left the

public child welfare --

THE COURT: Massachusetts, the District of Columbia --

MS. COOPER: And Illinois, that's right. When some agencies felt compelled to leave the public child welfare arena because they had a conflict between their religious beliefs and meeting the accepted child welfare standards in that state --

THE COURT: Let me ask a question. What about defense counsel's argument that it's a legislative fact with regard to the so-called rational basis and, therefore, I have to accept that as being a legislative act?

MS. COOPER: Whether they -- whether it's -- comes out of the mouth of the legislature or anywhere else, it still has to be based -- rational speculation and that speculation has to be based in reality and plaintiffs have the opportunity to present evidence to refute that -- or to demonstrate that that is irrational. If we were, you know, looking at summary judgment after the development of a record, that would be one thing. But right now on a motion to dismiss, *Minnesota v. Cloverleaf Creamery* makes clear that we get the opportunity to refute the -- demonstrate the rationality of that interest.

I would also add one additional point on that. Even if at the end of the day it turned out it were true that religious objections to same-sex couples were so prevalent among agencies that the State could not find agencies to do this work if they were not permitted to disqualify that class

of families, deference to disapproval of others is not a permissible basis for government to allow discrimination. And I refer the Court to the *Palmore against Sidoti* case. That's P-A-L-M-O-R-E v. Sidoti, S-I-D-O-T-I, as well as City --

THE COURT: Cite?

MS. COOPER: Sorry?

THE COURT: Is that in your brief?

MS. COOPER: I don't recall if I -- if that is in our brief. I don't know if --

THE COURT: Can you give us a cite?

MS. COOPER: If we can't get that for you right now, we will send that to you, Your Honor.

THE COURT: Sure.

MS. COOPER: And the other is City of Cleve --

THE COURT: Supreme Court?

MS. COOPER: The Supreme Court case from the 1980s, and I'll talk about that in a moment. And then another case, *City of Cleburne against Cleburne Living Center*, and Cleburne is spelled C-L-E-B-U-R-N-E. Those cases stand for the proposition that while the government can't prevent private biases or disapproval of a group of people nor can the government give them effect.

And the *Palmore* case is -- I think it's worth talking a little bit about the specifics of that case. That is a child custody case where a family court transferred child custody

from the mom to -- from the mom to the dad because mom had entered into an interracial marriage and the court said the child will be subjected to stigma and pressure of living in an interracial household. The Supreme Court case said, reversing that decision, look, we understand, this was in the 1980s, we understand that those pressures are probably real and probably exist. Notwithstanding that, while the government cannot control private biases nor can it give them effect and that it violated the equal protection clause for the family court to defer to that view in changing custody.

So here, first of all, there's, again, as I said earlier, no basis for the speculation that the only agencies who can do this work are agencies who are unwilling to accept all qualified families in accordance with accepted child welfare practices. But even if there were widespread discrimination among agencies based on religious objections to same-sex couples or, say, religious objections to interracial couples or non-Christians because the same standard would apply, that the government and the State is not permitted to defer and say we're going to allow our agencies to turn away gay couples for religious objections, we're going to allow our agencies to turn away African Americans or interracial couples or non-Christians because of religious objections. The government cannot defer to that.

One argument that the State has raised in its briefing

but I don't think came up here today was they offered a second asserted rationale for allowing religious-based exclusions in the public child welfare system. The first was that it was necessary to have a larger pool of families that we just discussed. The second is that it was necessary to avoid violating the constitutional rights of agencies. And this -- there is no constitutional right of agencies to enter into state contracts that conform to their religious beliefs. This is not about accommodating religion like the *Amos*, A-M-O-S, case and the *Hosanna Tabor* case, H-O-S-A-N-N-A, Tabor, T-A-B-O-R. Those cases were cases in which the Supreme Court said that religious accommodations had to be permitted and exceptions from generally applicable law had to be permitted for religious organizations engaged in their own private activities. But allowing state-contracted agencies to use religious eligibility criteria in performing public child welfare services, the State is not merely accommodating an organization's religion practice in its private affairs, it is allowing eligibility for participation in a government program to turn on religious criteria which clearly violates the establishment clause.

In the *Kiryas Joel* case that I mentioned earlier, the court distinguished between allowing religious communities and institutions to pursue their own interests free from government experience on the one hand and unconstitutionally delegating

government authority to religious groups to be carried out in a nonsecular manner.

I want to say just a few words -- I have a few more minutes --

THE COURT: You do.

MS. COOPER: -- on the establishment clause claim. The religious criteria that are being permitted to be used here happen to be the exclusion of same-sex couples. But all of the defendants' arguments in support of allowing such religious-based screening in the public child welfare system would apply equally if a state-contracted agency had a religious objection to placing children with non-Christians or people of a particular race or interracial couples. But it is hard to imagine anyone seriously arguing that in the provision of a government service, government child welfare service, a state-contracted agency paid with tax dollars to provide these services should be permitted to turn away African Americans or interracial couples or --

THE COURT: Well, I think that the defense counsel's argument also points out the history of racial accommodation which the Supreme Court has been, you know, even in *Obergefell* they spoke about that, as in *Masterpiece Cake* as well. So the parallel between a racial exclusion and a religious one, while the impact upon the people who would be disserved would be the same, I think that his argument seemed to be that the Supreme

Court and the history of their decisions talks about some type of accommodation but then the question is can the accommodation turn itself into exclusion of individuals, same-sex couples from state services.

MS. COOPER: Well, again, whether we talk about analogies to race discrimination or discrimination against non-Christians which is, again, would be the same thing, we're talking about using religious criteria in the provision --

THE COURT: Right.

MS. COOPER: -- in the provision of child welfare services. And in numerous cases including *Larson v. Valente*, I'm not sure if we cited that. It's L-A-R-S-O-N v. Valente, V-A-L-E-N-T-E. It's a Supreme Court case. It's one of many where the Supreme Court has made clear that the courts and the government cannot prefer some religious views over others. That is a clear violation of the establishment clause. So if defendant's position were accepted and Michigan is allowed to permit the use of religious screening out of same-sex couples in the public child welfare system, agencies with other religious objections would have to be treated precisely the same way lest the State run into a violation of the establishment clause.

I'm sure we will discuss this further when speaking with the intervenors' counsel, but *Trinity Lutheran* was also another case that the State relied on to say it needs to defer

to prevent violating the constitutional rights of agencies. And I just want to clarify what *Trinity Lutheran* said and what it didn't say.

There the court, the Supreme Court, said that the government can not deny a public benefit to a religious organization because of its religious identity. If you have a public benefit available, you can't say we won't give it to you because you're Catholic or you're Jewish, right? But the -- first of all, the Sixth Circuit in the *Teen Ranch* case we've discussed said that state contract for youth services is not a public benefit, so *Trinity Lutheran* doesn't apply for that reason. But even if a contract to perform government services were considered a public benefit, in *Trinity Lutheran* the court held that the government cannot disqualify an organization from that benefit because of its religious identity and it emphasized that its holding addressed only religious identity, and the court made clear in Footnote 3, I believe, that it was not addressing religious uses of funding. Thus, even if a state contract to perform a government function could be considered a public benefit, unlike in *Trinity Lutheran*, the issue here is not about the identity of who may receive the benefit. Plaintiffs are not challenging the state's contract with faith-based agencies. Rather, the issue is the religious use of that government funding, religious child placement criteria, religious exclusions from licensing.

And just if I have a couple more minutes, I want to address taxpayer standing since the State discussed that. The State seems to be drawing the line between -- in suggesting that there's no taxpayer standing to bring an establishment clause claim if the funding was -- flowed through, was administered by an executive agency. But that is completely at odds with the Supreme Court's decision in *Bowen* and in *Flast* itself where the money flowed through, was administered by an executive agency.

The *Hein* case, H-E-I-N, that the State cited is distinguishable because that program was created by executive order only. There was no legislative appropriation. Here the legislature annually appropriates funds for the child welfare program for the foster adoption work that the State does. And the legislature's precise knowledge about the details of the challenged spending is irrelevant. In *Bowen*, the taxpayer had standing to challenge the program though the act was, quote, neutral with respect to the grantee's religion.

In any event, the legislature was well aware of HHS's practices when making the relevant appropriations. The 2015 law that we discussed, the statute specifically talks about faith-based agencies. And in the legislative debate about the 2015 law, the legislature heard from a representative from St. Vincent saying that they would not work with same-sex couples.

THE COURT: What is the legislative funding statute that you're speaking of?

MS. COOPER: I'm sorry. I don't have that citation. I know in our complaint we say that the legislature appropriates funds every year. I don't have that for you now.

THE COURT: Does that funding statute say anything about religion?

MS. COOPER: No, not that I'm aware. But, again, in *Bowen*, it didn't either. It was neutral with respect to religion.

If Your Honor has no other questions, I think that's --

THE COURT: Thank you.

MS. COOPER: Thank you.

THE COURT: Okay. We have a real five minutes for rebuttal.

MR. BURSCH: Your Honor, I'll do my best to speak slowly but, frankly, there are a lot of clarifications of misstatements I need to make in that time.

She started by saying the statute is the problem. They haven't challenged the statute in their complaint or in the brief because the statute is a religious accommodation statute which on its face is entirely appropriate and doesn't direct the conduct of any third party.

She tried to distinguish *Blum* --

THE COURT: Are you saying that the third party then on his own, that Mr. Lyon and Mr. McCall on their own, are interpreting it and letting --

MR. BURSCH: The third parties --

THE COURT: -- the agencies refuse to deal with the same-sex couples?

MR. BURSCH: The third parties I'm talking about are the CPAs which the legislature specifically said the agency had to accommodate. And under *Blum* the agency's conduct isn't attributable to the State. It doesn't make their actions the State actions. And what my friend says is that the proposition in *Blum*, the holding -- or it's distinguishable because there the government didn't tell the contractors what to do. The government is not telling the contractors what to do here. The Department of Health and Human Services is not telling St. Vincent Catholic Charities how they should recruit families. So *Blum* just completely blows up the plaintiffs' argument.

THE COURT: You're saying here's the money and do what you want to do in terms of bringing couples --

MR. BURSCH: We're going to refer you children --

THE COURT: What --

MR. BURSCH: We're going to refer you children who need to be adopted and placed in foster care and if you have a family, then great, we will enter into a relationship. That's

the only instruction coming from the State. There's no affirmative command to include or exclude anybody.

And *Teen Ranch*, the holding there --

THE COURT: If there's no state reason to include or exclude, why do they put in Public Act 53 language?

MR. BURSCH: So that faith-based agencies can continue to participate as providers and not conflict with their religious beliefs, whatever those might be.

THE COURT: If -- even if they discriminate?

MR. BURSCH: Even if because of their religious beliefs, they cannot authorize a same-sex couple as a family that can be adopted.

THE COURT: Okay.

MR. BURSCH: The holding in *Teen Ranch* was that government funding could not risk advancing a religious mission. That's not at all what's happening here. And nor is it the case that the wards of the State are losing the opportunity to be adopted by parents who are same sex. We discussed or I guess you discussed with St. Vincent's counsel and opposing counsel at the intervention hearing that they can go to services not only to other places but if they do that and they want to adopt a child in St. Vincent's care that they don't have a family for already, then they can adopt that --

THE COURT: There's no record in this case, though, in terms of the complaint, so that was the separate issue --

MR. BURSCH: Well, the complaint also does not allege that children are losing the opportunity to be adopted by same-sex couples and it would be ridiculous to allege that.

THE COURT: Why? Why would it be ridiculous?

MR. BURSCH: Because there are agencies that will --

THE COURT: Go somewhere else.

MR. BURSCH: Right, exactly.

THE COURT: Get away from here and go someplace else.

MR. BURSCH: That's not what I'm saying, Your Honor. What I'm saying, it is factually wrong to say that there's a single child who will lose the opportunity to have a same-sex couple for their parents.

THE COURT: Do we need discovery to decide that?

MR. BURSCH: We don't need discovery to decide that because none of this is state action under *Blum*. She tries to get around *Blum* with the *Larkin* case.

THE COURT: Instead of "she," why don't we just say "Counsel."

MR. BURSCH: Counsel says that the *Larkin* case somehow gets around *Blum*, but there that was the liquor license context we already discussed. It was the exclusive government exception to *Blum*. The case that you should be looking at is the *Brent* case which we discussed where this very court --

THE COURT: Judge -- not this very court. A judge in this court.

MR. BURSCH: A judge in the Eastern District of Michigan --

THE COURT: Is not binding.

MR. BURSCH: -- held that the adoption in foster care services was not a traditional and exclusive public function. And he was absolutely right to make that holding.

Counsel says that she was surprised that we would say that they were only alleging taxpayer standing in their complaint. Well, if you look at paragraph 64, 69 and 74 where they state the basis for their standing, each one says that this plaintiff or these two plaintiffs are Michigan taxpayers who object to the use of taxpayer funds to underwrite and endorse religious beliefs to which they do not subscribe.

THE COURT: Exclusio alterius. You're saying that they cabined it on taxpayer relief and the facts in there can't be read to say that there is standing for the harm that was created?

MR. BURSCH: I certainly read the complaint to cabin it to taxpayer standing, but even if you disagree, *Hein* still controls. And counsel draws the distinction that in *Hein* it was a program created by an executive order. I'm not aware of any post-*Hein* decision that has ever used that as a basis to narrow *Hein*'s holding. Holding of *Hein* in any context, whether it's executive creation or legislature creation, is that you need a specific appropriation that you're challenging. And the

reason why is because you have to ask what happens to the funding if you take out the religion. And here the funding would stay, you know, under their allegations which you're going to accept as true, exactly the same. Because religious organizations would go out, someone else would come in to fill the gap. We rationally don't believe that to be true. But if they're right and you accept that allegation, then the money hasn't changed.

The rational basis test, the test is whether the state's belief is based in reality. It is certainly based in reality to believe that if you exclude a significant portion of the provider network that there will be less families for children. And you probably know that we have more than 13,000 children in the system, and we're in Judge Edmunds court every six months right now because we don't have enough families now to provide for all these kids. It was rational for the State to believe that continuing a long-time practice of having faith-based providers in that network is good for children.

THE COURT: Okay. That's sufficient. Thank you.

MR. BURSCH: All right. Can I --

THE COURT: We went through a lot.

MR. BURSCH: Can I just add a closing sentence?

THE COURT: Yes, sure.

MR. BURSCH: In *Masterpiece Cakeshop* I think Justice Kennedy's opinion was clear that as a society we need

to do a better job balancing and accommodating the interest of both same-sex couples and religious believers, and what the State did here in enacting PA 53 was exactly the kind of thing that he was aiming for because it allows same-sex couples to continue to adopt and have loving families and it continues to allow faith-based providers to participate in finding homes for children. There's nothing unconstitutional about that.

THE COURT: Thank you.

MR. BURSCH: Thank you.

THE COURT: We're going to take a 15-minute break. If you want to use a washroom, you got to go up eight or six. And there's a place that sells -- do the vending machines allow people without those fancy cards?

THE LAW CLERK: Yes, credit cards.

THE COURT: So there's something on four where they have vending machines. But you can't bring pop or food or stuff in here. So we'll reconvene at 11:45 for the intervenors. Thank you.

(Court in recess, 11:27 a.m.)

(Back on the record at 11:50 a.m.)

THE COURT: Please be seated. This is defendant intervenors' motion to dismiss. It's still morning. Good morning.

MS. BARCLAY: Good morning, Your Honor. Stephanie Barclay on behalf of defendant intervenors. May I reserve ten

minutes of my time for rebuttal?

THE COURT: Okay.

MS. BARCLAY: I'd like to start by addressing standing and I know this court has already discussed that at some length, so what I'd like to do is slow it down a little bit and point out that in some instances plaintiffs are mixing and matching different types of injury with different types of redressability or causation, and when you break each down to their separate category, each has to meet all three elements of standing: Number one, an injury in fact; number two, it has to show a causal connection between the injury and the conduct complained of that is fairly traceable to the challenged action: And, number three, that it must be likely as opposed to merely speculative that injury will be redressed by a favorable decision.

And, in particular, Your Honor, for the first category I'll talk about which is their injury that they have not alleged in their complaint, that they bring it in their briefing regarding an obstacle to adoption. What plaintiffs are asking this court for is injunctive relief, and that's their only requested relief is injunctive and declaratory relief.

And the Sixth Circuit has been quite clear and the Supreme Court has also been clear that there are heightened standing requirements for injunctive relief as far as what

needs to be pled. So, for example, the fact that plaintiffs plead nowhere in their complaint that they face current practical barriers preventing them from using any other options to adopt, that is fatal for their request for injunctive relief.

THE COURT: Aren't they alleging a continuing practice? On page 21 in the complaint, "the State's practice of allowing state-contracted taxpayer-funded child placing agencies to disqualify prospective families headed by same-sex couples based on the agency's religious beliefs." So they want the Court to declare that, right? And that's a continuing injury?

MS. BARCLAY: I would submit that for injunctive relief related to a taxpayer standing injury, that's sufficient. But if they're asking for injunctive relief to redress a current obstacle preventing them from adopting, they say nothing about that. And, again, we have to break down each type of injury.

THE COURT: Don't they say they went to try and get services from the agency, St. Vincent's, and they were -- said no. Do they have to keep going back and back and back?

MS. BARCLAY: Under *Fieger v. Michigan*, it's a Sixth Circuit case, 553 F.3d 955, 2009, the Sixth Circuit said that for declaratory relief that is not available unless the plaintiff can, quote, demonstrate actual present harm or a

significant possibility of future harm.

Also, in the Supreme Court case *Friend of Earth v. Laidlaw* --

THE COURT: Spell Laidlaw to help Mrs. Lizza, please.

MS. BARCLAY: Certainly. Laidlaw, L-A-I-D-L-A-W, and that is 528 U.S. 167.

THE COURT: Let me ask this question and then you can continue. Are you saying that St. Vincent no longer has that policy?

MS. BARCLAY: What I am saying is that if their injury is that they face a real obstacle to being able to adopt at all, then they have to plead facts showing the need for this court to offer injunctive relief. The requirement assures that, quote --

THE COURT: The question is if they go to St. Vincent's now, will they be processed?

MS. BARCLAY: The answer to that question is St. Vincent's religious beliefs haven't changed and --

THE COURT: They won't be processed at St. Vincent's if they go there now.

MS. BARCLAY: St. Vincent won't perform a written recommendation for them as part of their groundwork, that's correct. But if their injury is that we want -- we're having an obstacle to be able to adopt at all, they've alleged nothing regarding that injury and the court has made clear that, quote,

there needs to be demonstration that there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.

Moving beyond that point about injunctive relief, and plaintiffs have never alleged that they have been able to use other alternatives that other agencies in the State could not serve them or that they could not have even been certified with other agencies to adopt children in St. Vincent's care.

As far as another category, a problem that they run into for all of their standing claims regarding the nontaxpayer standing issue, they have a real problem for redressability and traceability to the government action. This Court has already heard about the case of *Blum*, but I would also like to draw this court's attention to another case we briefed and that is *Simon v. Kentucky Welfare Rights*. It is 426 U.S. 26. And in that case there were plaintiffs who had been denied services from hospitals that received government funding. And plaintiffs were challenging a government policy that subsidized actions of these hospitals that turned away plaintiffs because of their indigent status. So this was both certainly hurtful for them to not receive those services as well as an obstacle for some of these plaintiffs to receive the service at all.

But the Supreme Court said that since they were trying to pin the action of private parties on the government and since the only relief that they requested was for the

government to stop providing that subsidy, that would not be traceable to the government action because the private parties still had the choice whether to provide the service or not, and it was also not redressable because even if the court ruled in their favor and ruled that the government had to stop providing the subsidy, that didn't mean that the hospital necessarily had to provide the service. It was an independent decision for the hospital. The hospital could close. It could decide it would lose money and continue operating in a different way and because of that independent private action, the causal link was cut off. And that absolutely applies in this case, Your Honor.

What plaintiffs have asked of this court is for this court to enter injunctive and declaratory relief forbidding the State from being able to rely on faith-based agencies like St. Vincent alongside other agencies. And plaintiffs at best hope to the extent we're talking about being able to have more options to adopt, the best they're hoping that St. Vincent will stay open and continue offering services but they recognize in their complaint in paragraph 45 that St. Vincent may, in fact, close. And so to the extent -- relief, they're saying that they need it to be able to adopt and that they are asking for this option to adopt or more options to adopt, that relief is not redressable by the injury they seek and so they have no standing.

THE COURT: Let me ask a question. The *Simon* case, is

Simon versus Kentucky, it's 426 U.S. 26. What is the year of it?

MS. BARCLAY: It's 1976. So this has been established long ago by the Supreme Court that even if private parties receiving government funding or doing something that is offensive or if they're denying important services that are important, if that is not something that the government is requiring and if there's an independent choice of the private parties, then there's no standing to bring a claim when the relief is against the government exactly as we have here.

Moving on to -- also, the point about obstacles, Your Honor, it's relevant to point out that in the contract, again, plaintiffs are relying on in this case, the contract specifically says that if an agency has certified another family, if that family wants to adopt a child in a different agency's care, that the agencies will cooperate. That's ECF 16-2 at 7. And plaintiffs never allege that they have tried to adopt a child in St. Vincent's care by being certified through another agency or that for some reason that option isn't available to them. And that also undercuts any sort of claim of an obstacle to adopt any children that they would like to that are in need of adoption.

THE COURT: Well, when you say it undercuts, it means they can't go to St. Vincent's but go somewhere else.

MS. BARCLAY: It means they can adopt children in

St. Vincent's care if they receive their certification somewhere else.

As far as taxpayer standing, Your Honor, another important thing to recognize about why that argument fails, and, again, this is the only basis for standing clearly alleged in the complaint, and that fails because there aren't actually government dollars that are flowing and are going to increase or decrease in a marginal way based on the amount of home studies that St. Vincent performs or whether they refer a family elsewhere to have that home study performed elsewhere. In the legislative findings of facts, this is Michigan Compiled Laws, Section 722.124e(h), the State recognized that, quote, a private child placing agency does not receive public funding with respect to a particular child or particular individuals referred by the department unless that agency affirmatively accepts the referral.

Under the contract the way that St. Vincent receives money for adoption service, for example, is that they are paid for, quote, services related to the particular child or particular individual that the department referred to the contractor, end quote, and that each, quote, payment voucher shall be child specific, end quote.

THE COURT: So you're saying they don't get paid for doing the paperwork and evaluating the people who they do meet with, accept and they do evaluate and provide that information

to the State, right? Couples that are proper.

MS. BARCLAY: If your question is do they receive some sort of additional funding for doing that dance, no, they don't.

THE COURT: They don't? They get no funding for doing any of the work. Where do they get funding?

MS. BARCLAY: So let me explain it this way. If one agency performed five home studies and another agency performed one home study but both agencies ultimately ended up deciding that only one family was appropriate to certify for foster care and recommended for foster care, and if the State agreed with that recommendation and then the State sent them a referral and both agencies accepted the referral and placed that child with the one family that was certified, those agencies would be paid the same under the contract. There is no mechanism in the contract for St. Vincent to be reimbursed purely for the cost of conducting a home study for a family which occurs before the referral for the child to be placed with that family occurs. And, again, the legislative findings of fact say, quote, a private child placing agency does not receive public funding with respect to a particular child or particular individuals referred by the department unless the agency affirmatively accepts that referral.

So the taxpayer argument here not only fails for all the reasons that the State has articulated, but it also fails

because there's absolutely no nexus between government money and essentially what is St. Vincent's decision here to forego the opportunity to earn government funding. And there is no depletion of the taxpayer's pocketbook or the coffers of the State which is required under taxpayer standing. That's *Winn*, 563 U.S. at 136.

I'd like to turn briefly, as well, unless the Court has any questions about that --

THE COURT: Go ahead.

MS. BARCLAY: -- to *Bowen* which was also discussed before. *Bowen* is a very important case because there the Supreme Court made clear that the establishment clause did not prohibit the government from funding religious organizations for the provision of Social Services. The Supreme Court's decision made a couple of important quotes that contradict arguments that plaintiffs are making today.

THE COURT: That's for providing services. What we have here is a refusal to provide services that the contract is preventing them from getting, right?

MS. BARCLAY: Well --

THE COURT: Same-sex couples.

MS. BARCLAY: The fact that government money was being spent on activities actually makes *Bowen* a harder case than this one because for establishment clause purposes the -- what is at issue is where is the money flowing. And, in fact, *Bowen*

specifically says that the establishment clause challenge looks at how the dollars are -- how the, quote, funding a specifically religious activity, end quote, whether that's taking place or not. *Bowen* cited to *Hunt*, that's a Supreme Court case where the court allowed funding to go to a religious service provider but noted that the funding was not going -- was not actually being used on religious activities. It was being used for other things. And, again, *Bowen* even allowed in that case religious organizations to use some funding that was consistent with their religious purposes as long as it wasn't being used in an overtly securing manner.

So where there's no funding specifically flowing to the service, that is the crux of the ACLU's case, then this is a much easier case under the establishment clause than *Bowen*. This is also similar to the Supreme Court's establishment clause decision in *Zelman* where the Supreme Court said that funding to religious organizations is perfectly fine as long as it's being offered on a neutral basis and as long as it is the decisions of private parties that are triggering that funding.

I'd also like to discuss this court's --

THE COURT: Does the contract with St. Vincent's, doesn't it require various activities on St. Vincent's part as it does with any CPA --

MS. BARCLAY: Absolutely. The contract requires certain things to happen.

THE COURT: Right. Okay. So given that, do I look at everything that's done in the process and not just pick out certain parts like you see me say, well, if you don't do this and they don't do that. But the contract talks about continuing and different types of preparation in dealing with the children and providing information and things like that.

MS. BARCLAY: Well, as far as caring for the children, that's happening after the referral has been accepted. But to answer Your Honor's broader point, the Supreme Court made clear in *Bowen* and in *Hunt* and other cases cited in *Bowen* that for establishment clause purposes it is important to look at what are the dollars actually being spent on. In *Hunt* they specifically looked at having partitioned off these funds so that they're just going to a certain project and not others. And if you cannot trace government funding to religious activity, then it's a much easier case than *Bowen* was, Your Honor.

THE COURT: Well, the contractor identifies an adoptive family. Is that what the process is? Someone, a couple goes in and says we want to adopt, and what do they do?

MS. BARCLAY: Sure. Let me walk the Court through the process.

THE COURT: Okay.

MS. BARCLAY: So a family comes to an adoption agency and says we're interested in adopting.

THE COURT: Right.

MS. BARCLAY: Before the home study, they might ask a number of different questions. They might say is there a geographic reason that would be better for you to go to another agency, is there some other limitation on permission that we would perform that you would be better suited to another agency. There's nothing right now in state law that plaintiffs have pointed to that would prohibit any of those sorts of considerations. But let's assume that the agency then moves forward and decides they're going to evaluate the couple. So then the agency --

THE COURT: But if the couple, if the agency sees that they're a same-sex couple, does St. Vincent say go somewhere else?

MS. BARCLAY: St. Vincent will say we can't provide a written certification for you, other agencies can, we will direct you to those agencies. Just the same way that some agencies say we are only placing native-American children with native-American families and if you don't meet that criteria, we will refer you somewhere else. There are a range of reasons why agencies will say we can't help you but we will refer you elsewhere so you can still adopt.

THE COURT: And here St. Vincent says we can't help you because you're a same-sex couple.

MS. BARCLAY: And there is no government funding that

flows to that.

THE COURT: But being part of the system, they get millions of dollars in terms of their contracts. Looking at one for a million and a half that deals with the period in 2016 to 2019 that deals with adoption. They get, St. Vincent's gets, a million seven ninety. Well, that was an earlier one. That concluded in 2016. So they get 2,685,000, that's Exhibit Number 3, for placing agency foster care. And then -- that's a lot of money.

MS. BARCLAY: But the Supreme Court has never, ever held that an entity getting any government money, that means everything that an entity does is covered by the establishment clause.

THE COURT: No, no, no, but here we have something that seems to conflict with the law of the land in terms of the fact that you can't discriminate against same-sex couples.

MS. BARCLAY: So --

THE COURT: And those are even private, like a bake shop. But here it's state.

MS. BARCLAY: Under taxpayer standing and the merits of the establishment clause claim, both, courts pay very careful attention to how that money is actually flowing. They never say you just got a dime of government money somehow, so we're in. That's not the analysis at all. And there's no case that plaintiffs can point to to support that proposition.

And another case that is relevant is the *Salvation Army* case out of New York where this argument was made and they said just by virtue of that entity receiving government funding and providing government services doesn't mean that discriminatory actions, and there were discriminatory actions at stake in that case, does not mean that they were attributed to the government. Now, in *Salvation Army* on a separate paragraph they said there might be taxpayer standing where some of the funding actually is going directly towards the challenged religious activity at issue. But the court paid very careful attention to if that money was flowing to that challenged issue. Here that money is not.

And, also, this is relevant to compelled speech. It is the *AOSI* case, but I think it's still instructive here.

THE COURT: AO what?

MS. BARCLAY: *AOSI*. I'll give you the full cite, if I can.

THE COURT: Yes, that would be good.

MS. BARCLAY: It is -- I just gave you the acronym, but the full name is *Agency For International Development*. It is 570 U.S. 205 and the year is 2013.

There we also have a government contract that is funding a private entity and the government didn't say that it's government money and so we get to require anything we want or anything you do is covered. There that was specific

limitations on the type of conditions that the government could place on the receipt or benefit it was providing whether it was actually paying for the program or whether there were tangential conditions that outside of what the program the government was paying for essentially required the private entity to pledge allegiance to the government's message.

And what plaintiffs are asking for here where essentially they're saying if you get any government money at all, then this court should adopt a rule requiring that everything they do must be because the government itself is doing it. There is no court that has held that that I'm aware of.

THE COURT: When you're saying getting money generally. But here they're getting money for doing adoption-related foster care -- or adoption services. That's the whole -- the universe that we're dealing with here. They're not getting money to do child care. They're doing money -- getting money to do the adoption-related process, right?

MS. BARCLAY: They get money to do some aspects of the process and that's why they operate at a loss. There are many things they have to pay for as well. And, again, you have to track carefully what precise activity that money is funding and it's the state's legislative finding that it's not going towards a referral by these agencies.

If I could turn briefly to *Masterpiece*, Your Honor, and *Obergefell*. This court is correct to point out that both of those cases were concerned with protecting the dignity of LGBTQ individuals, but those cases also talked about dignitary interests of religious private parties.

THE COURT: That's why I read the whole thing, didn't read just part of it. I read that as well.

MS. BARCLAY: That's great. Maybe better than me, Your Honor.

THE COURT: No, no, no. I just wanted to follow the whole thing and it mentioned the dignity --

MS. BARCLAY: I appreciate that.

THE COURT: -- and also the -- both sides. Okay.

MS. BARCLAY: One aspect of *Masterpiece* that I think is important is that it says -- the court analogizes to someone who might be performing a wedding and contrast that to what is going on in *Masterpiece* and commerce. And it says, quote, When it comes to weddings, it can be assumed that the member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. I think this is important. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth, end quote.

That's at, I believe, page 7 of the slip opinion. Oh, excuse me, page 7 of the Westlaw citation.

This is important, Your Honor, because if we think of the spectrum of activities that might impact dignity of LGBTQ individuals, at one end we have someone performing a wedding function and on the other end we have a business operating in commerce providing goods for sale. Obviously, the commerce end of the spectrum is much more difficult. And what I would submit to this court is that the actions of St. Vincent, a nonprofit private party, fall much closer in the spectrum to where the clergy was. It's true that the clergy is a religious individual but marriage is a government function, sometimes it's even offered for a fee. There are requirements that those performing marriage have to comply with under state law as far as who is allowed to get married. Similarly here, St. Vincent has long been performing the ministry of caring for orphans and vulnerable children before it was a government program. As a nonprofit religious organization, this falls closer to that situation where an exercise of their rights could be understood and accepted by LGBTQ individuals without serious harm to their dignity.

THE COURT: Clergy is dealing with a minister who is not getting paid money from the government. Here we're dealing with a government agency where the executives are saying we're going to give you money and it's okay if you want to

discriminate against same-sex couples.

The minister or whoever is performing the ceremony here, it's a private individual and they don't have to do it if they don't want to. But there's a big difference.

MS. BARCLAY: Sometimes clergy members absolutely do get funding, Your Honor. And again, in *Simon*, the hospitals were getting government funding and they were turning away private individuals which was both an obstacle to their ability to get service and I'm sure hurtful and affecting the dignity of those indigent individuals who were not being accepted for service. And the court did not say, well, we gave those hospitals a dime of government funding so we're going to attribute that all to the government. So the Court said exactly the opposite.

Now, *Masterpiece* is bookended, of course, with *Obergefell*, citing to *Obergefell* and pointing out that the First Amendment insures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths and to their own deep aspirations to continue the family structure that they have long revered. It is at *Obergefell* at page 2607.

Here what St. Vincent is objecting to, they're not trying to prevent any couples, unmarried, same sex or otherwise, from being able to adopt, they are simply saying --

they're not even trying to prevent those couples from adopting children in their care. They're simply saying we cannot provide a written endorsement making a recommendation about a relationship that directly contradicts our religious beliefs.

THE COURT: So they're preventing that couple that comes to them to have the services performed saying go away, we're not going to do it, so that literally they are preventing that couple from doing it through St. Vincent's and St. Vincent's is getting funded by the State, correct?

MS. BARCLAY: That's correct. They're saying we can't do that groundwork to recommend your licensing through us. And, again, in *Masterpiece* the clergy is saying you can go get married somewhere else, you can't do it through me and that's acceptable. In *Simon* the hospitals are saying you can go get services elsewhere and not through me. That wasn't attributable to the government.

THE COURT: Here it's the government who's saying it.

Your time is over. I'll give you five more minutes and I'll give you ten at the end because you want ten.

MS. BARCLAY: Thank you, Your Honor. Were you asking a question earlier?

THE COURT: No, no. I just said that here the government -- the government is being sued not a private entity, right?

MS. BARCLAY: That's correct. And in *Simon* the

government was also being sued. It was officials in the treasury and there they were saying that if -- they were suing to force the government to remove its program providing funding to those hospitals. That is almost exactly what plaintiffs are asking for here. They're saying, Court, please remove the funding to faith-based agencies that are operating with religious criteria that we disagree with. And just as there was not redressability or a causal link there, particularly for injunctive relief, which is a heightened standard, the same applies here. Even if this court ruled in their favor, there's no -- it would not have additional options or at least there was certainly a chance that they recognize on page 45 of their complaint, they would not have additional adoptions in which to adopt. They still wouldn't be able to have that certification performed through St. Vincent. They would just insure that no other family can. And the State has already entered legislative findings rationally based that say that it is better for Michigan and for children when we bring in more options, when we have a diversity of agencies that can help identify and recruit different populations and address their needs.

THE COURT: Even if you violate the constitutional rights of some people that seek to adopt utilizing that agency to do the prep work?

MS. BARCLAY: I dispute that there is a constitutional

right violated when purely private parties are acting. So, for example, when the agencies that provide services to native-American families would refer elsewhere a family based on a racial distinction, the native-American heritage, that's not violating the Constitution. And they are able to serve a different subset and have a different strength as an agency. And I would submit that that is a good thing for the procedural pluralism and for the ability to bring in the most families possible when the State has a shortage of those families right now.

THE COURT: Okay. You've got ten minutes.

MS. BARCLAY: Thank you, Your Honor.

THE COURT: We'll bring you back.

MS. COOPER: I'll start by addressing some of the comments regarding standing. The intervenors are suggesting that in order to establish injury and continuing harm that the plaintiffs would have had to plead that they contacted every single agency in the state and had been turned away and were, therefore, unable to adopt. They do not need to demonstrate that they can't adopt anywhere. The relief they are seeking is the same options that are available to other families in Michigan who seek to adopt children out of the public welfare system. And in addition to the stigma, well, actually starting with stigma, I just want to say a few more words about that. Supreme Court, of course, has recognized in *Heckler*, and other

cases that --

THE COURT: Spell *Heckler* to help Mrs. Lizza, please.

MS. COOPER: Sorry. H-E-C-K-L-E-R.

THE COURT: Thank you.

MS. COOPER: That being told that your kind is unacceptable, unworthy, that is a stigmatic harm that is an injury. And the injury of state-sanctioned discrimination is not cured by the possible existence of other agencies that don't discriminate. Even outside of government services, when African Americans through restaurants and other business establishments were being turned away, the courts didn't say you didn't have standing, you weren't injured because you could have gone to another restaurant.

And in the *Heart of Atlanta*, H-E-A-R-T, *Heart of Atlanta* case, the Supreme Court recognized the humiliation that comes with being refused service because of who you are. And in *Masterpiece*, more recently, the Supreme Court recognized that's no different if you're being refused service because you are a same-sex couple, that that is a significant stigma to those couples. And here the message that they get by being turned away is that their kind is unsuitable to be parents. It's hard to think of a more stigmatizing message than that.

But in addition to the stigma, we talked about the fact that it's a practical barrier of being offered fewer agency options. In the -- I'll point the court to the

Northeast Florida Contractors case where the Supreme Court said "Making it more difficult to obtain a benefit is an injury for equal protection purposes."

THE COURT: Do you have the cite? Is that *Adarand*?

MS. COOPER: No, it's called *Northeast Florida General Contractors* against -- I'm sorry. I don't have that right here.

THE COURT: Okay.

MS. COOPER: We'll get that to you.

THE COURT: That's fine.

MS. COOPER: But would anyone seriously argue there's no injury and ongoing injury from a state system set up to say Christians get 25 agencies to choose from but if you're not Christian, you have to accept there's a smaller number that will welcome your kind? That's what's happening here. And that would be true, an injury, even if all of the agencies were fungible. But the intervenors themselves insist most strenuously that the agencies are not fungible. In fact, they allege that the services that they provide are so unique that the Bucks would not have adopted without getting the particular kind of services they provide, but yet on the same -- on the other side of their mouth they say that plaintiffs are not injured by not getting the full range of options that others can get.

And I would just also note on DHHS's web page for

prospective parents, they recognize the significant differences among the various agencies and advise families to talk to the different agencies, to learn do they have a mentoring program, do they let you call for after-hours support, what are their training schedules. There are different reasons that different agencies may be more convenient, more appropriate, more suitable to different families. Some agencies place babies; some agencies only place older children. There are some reasons. So to say that they could just go to another agency and they shouldn't get the same range of options available misses the point here. And, again, what plaintiffs are seeking for is the same options that every other family in Michigan has when proceeding to move forward with adopting a child out of foster care.

The intervenors say a lot about plaintiffs and other same-sex couples being able to adopt children in St. Vincent's care if they get licensed by another agency. This directly contradicts allegations in the complaint that agencies generally place children with families they have licensed which is in paragraph 34 of the complaint. So that can not be accepted, that new fact supplied by plaintiffs' counsel -- I'm sorry, by intervenors' counsel, cannot be accepted on a motion to dismiss. But, in fact, even if you look at that outside of the complaint information that they rely on for this in their papers which is an affidavit of a St. Vincent official, it says

families working with other agencies could be matched with St. Vincent children through the MARE program.

THE COURT: M-A-R-E.

MS. COOPER: M-A-R-E, all capitals. That is a program if you -- by statute, by regulations that is for children who need to have a family recruited for them. These are the hard-to-place kids.

THE COURT: Right, right.

MS. COOPER: This is not all children. So the Court cannot on a motion to dismiss accept their assertion that there are kids that can be placed with --

THE COURT: Let me ask you a question. Do you dispute the issue of exactly when the funds flow --

MS. COOPER: Yeah, I do.

THE COURT: -- and how and is this a question of fact or is this --

MS. COOPER: Well, there are some questions of fact in there that certainly that representation cannot be accepted on a motion to dismiss. But also stepping back, they are attempting to parse out the home studying part of their contracted services --

THE COURT: Right.

MS. COOPER: -- and say that's not really this delegated government function, that's not really the funded activity, because the payment arrangement they have --

THE COURT: Right.

MS. COOPER: -- with the State is they get paid by per diem rates for the children that they actually place. But the contracts themselves specifically call for recruitment and licensing of families and, in fact, we allege in the complaint in paragraphs 25 and 32 that recruitment is a part of that work that they're contracted to do. You can't get funding by placing kids if you don't have families to place them with. And you can't have families to place them with if you don't do the licensing process which necessarily includes a home study. Home studying is not some independent thing they do for fun on the side that's unrelated to the contract. It's part and parcel to that contract. I could not show up and start doing home studies for children in Michigan -- I'm sorry, families seeking to foster or adopt children in Michigan. They get to do that because they are contracted by the State to perform adoption and foster care services, so --

THE COURT: It's like a loss leader at a supermarket where you sell something for free to get people to come and then they get paid for the other stuff.

MS. COOPER: I don't even see it that way. I think they are getting paid for providing child welfare services for the whole package of what they're providing, and the manner in which the State and the agencies have agreed to provide that payment was based on a per diem rate for children in their

care. It's simply a matter of payment. It's not that it's different service. It's all part and parcel to the same service.

Sticking with standing, I also want to talk about the redressability argument, that they say no redressability because if St. Vincent's chooses to close shop because it's required to accept all qualified families, then plaintiffs wouldn't be able to work with them. This is not a complaint seeking to work with St. Vincent. This is a complaint where plaintiffs are seeking the opportunity to -- that everyone else in Michigan gets to go to any agency that is available for other families and be considered and have the same options. And if the relief we request is granted, plaintiffs will no longer have any risk that they are going to be turned away if they approach another agency and they will be treated just the same as everybody else.

THE COURT: So you're saying look at the whole contract that the CPAs have with the State. And they have some things that they don't get paid for but they are involved in other things that they are getting paid for and in the unity of the whole process.

MS. COOPER: Yes. I would say they're getting paid for all of it and it's just the manner of how they determine the payment.

I also would point the Court to some regulations in

the Michigan Administrative Code that were cited in the complaint in paragraph 26 that the -- it says that provision 400.12301(1) and 400.12701, that the department has given authority to private agencies to make decisions regarding licensing foster parents and certifying adoptive parents as well as the placement of the children into foster and adoptive homes. That's what those professions provide and with this authority comes the obligation of child placing agencies to maintain ongoing recruitment programs, quote, to insure an adequate number of suitable and qualified homes, closed quote, to meet the needs of the children served by the agency, and that's regulation 400.12304(1) and 400.12706.

So, again, this suggestion that the home study is some independent thing that's not part of this state-delegated state-funded work does not change anything. And, again, it's -- even if they weren't paid for it, by the way, it's still a delegation. If they did it out of the goodness of their hearts, and I'm sure they are motivated by the goodness of their hearts, I don't mean to question that, but if they did that without accepting any government funding, it would still violate the establishment clause because it is a delegation of a government function. And the fact that it, you know, if they choose not to accept money for it or don't get paid for it, it is still a government function being performed in a religious manner. But, in addition, they are accepting government

funding, lots of it, millions of dollars to perform these services and this home study work can not be separated out from that.

I want to address a few cases, this will be a little scattered, just to make sure we don't miss them. In the *Simon* case that intervenors cite, that was not, as I recall, religious-based discrimination. It wasn't denial of service based on religious criteria. So that is a different issue. And also my understanding of that case is that it was government funding but it wasn't providing a government service. So it's not analogous to the case here where we're talking about delegating a government function to a religious organization to be carried out in a religious manner and there's no funding being used in a religious manner either.

The *Lown* case, L-O-W-N, it's a district court case from New York, I think strongly supports our position here, and that case --

THE COURT: What is the cite?

MS. COOPER: What's that? The *Lown* case that I have, that was one of the intervenors' cites. That is, excuse me, 393 F. Supp. 223, Southern District New York, 2005.

THE COURT: And it's spelled?

MS. COOPER: L-O-W-N.

THE COURT: Thank you.

MS. COOPER: That case dismissed a claim against

Salvation Army saying that it didn't meet the state contractor requirements for viability under 1983 but the court did not dismiss the claims against the State for that government program being performed by private agencies being conducted in a religious manner. So I think that case actually strongly supports our case and our position.

And to the extent the intervenors are saying that there's no taxpayer standing because they don't get money if they don't have a placement because they've turned away some families, I think that completely misunderstands the doctrine of taxpayer standing. The issue is whether the State is funding religious activity, and it is when the funds -- when it funds agencies that use religious criteria in providing public child welfare services. I just wanted to --

THE COURT: So you're saying even if they don't get funds particularly designated to the study that they do at the beginning, their contract deals with everything and they get funds for doing other factors or other parts of the adoption process.

MS. COOPER: Yeah. Recruitment, training, licensing is all part of their contract.

THE COURT: Supervision, yeah.

MS. COOPER: Now, I do want to talk some about the free exercise claim that intervenors made. You know, they take the position that an order barring the State from permitting

state-contracted agencies from using religious criteria in the public child welfare system would violate their rights under the free exercise clause. I just want to very quickly dismiss with that because the *Teen Ranch* case that we talked about from the Sixth Circuit forecloses this argument. Again, to go over that circumstance, the state -- a state-contracted agency that provided residential services for Michigan youth in state custody sued the state because it ended its contracts with this agency because it used and incorporated religious programming and that agency claimed it violated their free exercise clause to not allow to use religious programming.

The Sixth Circuit affirmed the district court's decision holding there was no burden on the agency's exercise of religion because the mere nonfunding of religious programs doesn't burden the free exercise of religion. No one is compelled to enter into a -- multimillion dollar state contracts to perform a government function. That's a choice that St. Vincent and other agencies have chosen to make and that's fine, but if they enter into those contracts to perform a government function, they don't get to dictate how that government function is carried out.

As the Supreme Court put it in the *Agency for International Development* case that the intervenors talked about, as a general matter, if a party objects to a condition on the receipt of government funding, its recourse is to

decline the funds.

Now, this is not as they suggest, in discussing their free speech argument, the government using the funding requirement to gag speakers on a range of issues outside of the program. That *Agency for International Development* case does make clear and distinguishes between conditions that specify the activities that the government wants to subsidize and conditions that seek to leverage funding to regulate speech outside of the contours of the program itself.

If Michigan were telling St. Vincent, you know, outside of your work under the child welfare contract you can't talk about certain topics, you know, that would be a very different question. But what they're talking about is precisely within the contours of the funded program, that it is not their speech, it is, as the Sixth Circuit said, again, rejecting precisely this claim in the *Teen Ranch* case, that when a government entity contracts out public functions under contracts, the services under those contracts are not private speech. As the court said, quote, The decision to contract out its child services did not create a forum for private speech, closed quote. Rather, the government is, quote, using private speakers to transmit information concerning the government's own program.

So the government is entitled to decide what its program is. The free exercise clause and the free speech

clause do not give government contractors a right to change or decide how they want to provide services in a government-funded program.

The intervenors' counsel talked about *Masterpiece*. Defendants -- or intervenors' counsel really cherry-picked some phrases from *Masterpiece* to really represent that case as holding something that it -- that barely resembles the case. But there, the Court held only that a commission selectively enforced a nondiscrimination law based on antireligious bias. The court did not say there's any free exercise right to discriminate against same-sex couples or anyone else. To the contrary, Your Honor, nor did -- the court began its analysis by saying gay couples cannot be treated as social outcasts or as inferior in dignity and worth.

And the court, clearly, in *Masterpiece* said nothing to support the intervenors' position that the free exercise clause gives religious organizations the right to enter into government contracts to perform government services in a way that conforms to their religious beliefs. The Court said nothing to suggest it was overruling a long-standing line of establishment clause precedent prohibiting delegation of government funds -- I'm sorry, delegation of government functions to be performed in a religious manner. It said nothing to suggest it was overruling its cases that say the government can't fund religious activities performed by

grantees or contractors.

And the intervenors' attempt to analogize state-contracted government services to private clergy members performing religious wedding ceremonies --

THE COURT: That doesn't track.

MS. COOPER: Yeah. And then I will just leave that one there.

The intervenors also talked about other -- what they call referrals that agencies can make and they gave -- starting with the example of native-American children. I want to clarify the specific practice regarding -- native-American children are governed by a federal statute called the Indian Child Welfare Act which requires that children who are -- meet the criteria to membership in a tribe have certain restrictions on who can adopt them or who the priority for -- who can adopt them is and that has to be generally other people who are members of the tribe.

So that is -- the way native-American children are dealt with is based on the children having certain needs based on the law to be cared for or, if possible, adopted by native-American families. It's not about agencies being able to turn away families based on issues unrelated to ability to care for a child.

And the other referral example such as I think they gave examples like, you know, not having children of the type

that a family is looking for currently in their care or distance. Apples and oranges. There is no, as far as I'm aware, and the complaint certainly does not mention this, there's no other examples of the State permitting agencies to turn away classes of families based on criteria that have nothing to do with the children's needs. If an agency had a policy of refusing to accept non-Christians and, quote, refer those families to other agencies labeling this exclusion as a, quote, referral doesn't make it any less discriminatory. And clearly on a motion to dismiss, to the extent intervenors asserting that there are other types of groups who can be turned away, that's a factual question that would need discovery in a development of a factual record.

Also, the implications of the defendants' free exercise position are quite staggering when you think about it. If a state-contracted agency's religious beliefs give it the right to dictate how it provides government services under contract with the State, in other words, we're going to exclude a class of families we have a religious objection to despite the contract, that would apply equally to an agency that has a religious objection to anyone. But, also, it would seem that that should apply equally to any agency that has a religious belief that prevents it from providing medical treatment to children who are sick or injured or an agency that has a religious belief regarding a biblical view of corporal

punishment that violates state child abuse laws.

The freedom of religion entitles religious organizations to participate in a government program on equal terms as other contractors. It does not entitle faith-based agencies or faith-based government contractors to alter the government services provided to conform with their religious beliefs. And as another analogy and another faith-based agency like in *Teen Ranch* had a religious belief that it needed to include religious programming in the care in the youth -- for the youth in their care, if intervenors' free exercise argument is accepted, *Teen Ranch* would have to be decided differently.

I just want to make sure I thoroughly address one point that I've already touched on which is this suggestion that the couples should just go elsewhere. Both the State and intervenors repeatedly say there is no problem because they can go elsewhere. I've already talked through the stigma of being turned away and the inability to get the same options, that those are harms in and of itself. But I just want to also say that this factual assertion that there are other agencies out there and how they would treat them can't be decided on a motion to dismiss. The court can't take judicial notice of which agencies mentioned by the defendants, most of which are faith based, would accept same-sex couples and whether they are equivalent suitability for defendants -- I'm sorry, for plaintiffs' circumstances. And, in fact, plaintiffs will offer

evidence that when the Dumonts tried to apply, there were no viable options in their county but for the two that turned them away, St. Vincent and Bethany.

Religious belief, if I may have another moment.

THE COURT: You do. You have another three minutes.

MS. COOPER: Oh. I don't think I'll need all that.

The State's counsel mischaracterized in his reply argument a couple of the arguments that I made and I just want to clarify. We never were relying on the state statute, the 2015 statute, as the basis for our claim. We always challenged the practice of the State to allow religious criteria to exclude same-sex couples in the public child welfare system regardless of what the statute says. I was addressing just to clarify the interpretation issue, but we've never relied on the statute.

And the State also mischaracterized my distinction of the *Blum* case. I don't believe I ever said that here we're telling government -- telling -- the government is telling agencies what they should do. The difference in *Blum*, the issue was that there was no challenge to any state practice. Here we are challenging the state practice of allowing the agencies they hire to perform this government function to exclude families based on religious criteria, specifically the religious criteria opposed to same-sex couples. So I wanted to clarify that was never our position, that the State is telling

St. Vincent or any other agency what to do. The problem for the equal protection and establishment clause purposes is that they're permitting this. They're aware that this is happening. They are contracting with them and responsible for the whole system yet they're permitting, on their watch, they are permitting the use of religious criteria to exclude qualified families from fostering or adopting.

THE COURT: Thank you.

Okay. Counsel for intervenors, ten minutes.

MS. BARCLAY: May I have just a moment?

THE COURT: You want to organize your papers, go right ahead.

MS. BARCLAY: Thank you. Thank you, Your Honor.

I'd like to start where plaintiff started and that is describing the injury. They said that their injury is that they want to be able to contract with the same options as every other couple, but not every couple has the opportunity to contract with every agency. As plaintiffs' own complaint recognizes, paragraph 43, unmarried couples are also not able to be certified through some agencies as they recognize there's federal law that requires that some families who are not of native-American ancestry can't be certified through some agencies. Judicially noticeable facts would indicate, if Your Honor looked at them, that there are homes for black children, agencies that focus on that. There are agencies that

specialize on recruiting and serving the LGBTQ population. And I would submit that this is --

THE COURT: This is going really outside -- Indian thing was mentioned. But I think you're going way outside the complaint.

MS. BARCLAY: Would it be appropriate to cite the two other cases to the Court taking judicial notice at the 12(b)(6) stage?

THE COURT: Ah, you can cite, sure. But they're facing the Sixth Circuit decision in *Parsons* and I tend to follow the Sixth Circuit even though my colleagues -- because I have to.

MS. BARCLAY: I understand that, Your Honor. I will point out, though, that it seems odd if we're going outside the four corners of the complaint, for allegations that they're making and but we're not looking at government web sites. For example, as far as what -- the way that program operates and other sorts of agencies that are recognized. So I'll provide those citations for you at the end.

But that particular injury she just described standing up here, we would like to have the same options as everybody else, appears nowhere in their complaint. If you search through their complaint, look for any discussion of practical barriers being able to adopt. That also appears nowhere in their complaint. If you --

THE COURT: But they're just saying this agency, state funded, they can't get in the front door or stay in the front door and get service there. Doesn't that necessarily mean that they're not talking about other matters? They're talking about this agency which is getting funds from the State and is excluding them. Isn't that sufficient?

MS. BARCLAY: No. They have to demonstrate how whatever injury it is that they're claiming is caused by the government action and will be redressed by the government action. So if they're saying we want to get in the door with this agency because we want the same options as everybody else, the order from this Court forbidding the State from relying on those agencies would not allow them to have that option. It would just remove that option from other families.

To the extent their claim is that they face stigma, and you can search for that word in the complaint, it appears nowhere. This is only in their briefing.

THE COURT: It's also in the Supreme Court decisions that talk about the impact of laws that treat same-sex couples in the improper way.

MS. BARCLAY: That's true, Your Honor, and in *Obergefell*, there was no question that there was state action there because it was the government who was not recognizing marriages of same-sex couples. So all of the cases recognizing stigma have done so when that stigma is flowing from government

action. There is no case where stigma is flowing from a purely private denial.

THE COURT: Right, but government is even worse. This is government action, right?

MS. BARCLAY: No, there is no government action here that is causing them the stigma.

THE COURT: The government is giving -- they're not suing St. Vincent's, they're suing the government for giving money to an agency that treats them with stigma -- that won't accept their request to be processed.

MS. BARCLAY: Well, I mean that wasn't enough in *Simons*. In *Simons*, purely private parties, hospitals, are saying we're unwilling to serve you because you're poor.

THE COURT: Understand.

MS. BARCLAY: Surely that is stigmatizing for their private parties to do that. And yet the Supreme Court said that's a private action, it is not traceable to government action. If the government had said that, if the government had said we won't serve you because you're poor or if the government had said we will refer you elsewhere because of your sexual orientation, I would not be standing up here today, Your Honor, arguing that there's no stigma. That would be a completely different case. That is not the case that they have pled and there's --

THE COURT: Isn't the government saying Act 53, are

they saying, you know what, you can go and not treat people because of your religious preferences or religious following and we're still going to give you money?

MS. BARCLAY: What the government said in their legislative findings is it is in the interest of children and families to have more options, bringing in more families and that if it didn't offer protection to faith-based agencies, being able to operate consistent with their religious mission, then they were operating with legislative history that plaintiffs refer to at the closure of those other agencies and other jurisdictions and the State's concern that they would face the same closure here which would be detrimental to children and families. There is no allegation in the complaint that the State was motivated by animus which also distinguishes some of the cases that they were relying on including *Davis*, for example, where there was a real debate about whether the government's action was motivated by sexual orientation or health reasons. Here there's been no allegation that the State was motivated by animus, and its legislative findings are clear that it was motivated to help children and families. That's a permissible secular purpose under the establishment clause.

THE COURT: You got to slow down a little because Mrs. Lizza -- its been a long day for her.

MS. BARCLAY: Thank you, Your Honor.

That's a permissible motivation under the

establishment clause and those legislative facts are surely rational. And this court in the *Packnett* decision on a motion to dismiss said even if we assume that the plaintiffs' allegations are true and that the government was wrong, that is not a sufficient basis to contradict legislative facts because plaintiffs haven't pled that at the time the State enacted that policy that there was no rational basis for that policy. So plaintiffs fall far short, and for a motion to dismiss that is argument that does not have any traction on the merits.

THE COURT: So if there were a statute dealing, say, with schools and there were schools that accepted both African-American and white students but some schools just accepted white students and the State says, well, you can't take away the money from the others because you're getting more schools even though they won't accept African-American students, in the larger picture you're getting more schools, is that rationale basis? Is that what you're speaking about here, that the State can say rational basis, go about your feelings, express your religion and how it falls is that -- the result is that same-sex couples do not have the option of getting processed by these agencies that are getting funded by the State, and the State sits back and says go ahead and do that.

MS. BARCLAY: Well, for the hypothetical Your Honor raised about schools making racial distinctions, then we would be dealing with a suspect class. Under the equal protection

we'd have to look at -- and the Supreme Court has actually addressed some of the similar situations and said no, that that is problematic when the government is allowing its state programs to be used as a tool of advancing racial discrimination. But there's no dispute here. Plaintiffs do not dispute that the clear black letter law of the Sixth Circuit is that we're not dealing with a suspect classification. We're dealing with rational basis review which is an entirely different basis. And I would submit that the State's interest here in bringing in more options for families and children is more than rational, that is compelling reason to try and provide homes for children where there is already a shortage and when closing those agencies would do nothing to offer more options to the plaintiffs --

THE COURT: Well, we don't know. If they closed, others might open to be amenable to same-sex couples.

MS. BARCLAY: The very fact that we don't know, Your Honor, means that it is not redressable.

THE COURT: The fact that we don't know doesn't mean that it is necessarily a given.

MS. BARCLAY: It's their burden, and so in *Simon* the Supreme Court said if plaintiffs being able to get what they want, here more options, if that is up to actions of independent third parties and they haven't proved fact to indicate how the relief they seek will require that action of

independent third parties, they have not drawn the traceability connection, they have not connected the dots with their injury nor have they shown it's redressable, and that is a serious hurdle that plaintiffs have never overcome in this case.

Now, when they talk about stigma, one point that they bring up is the Civil Rights Act and how even though that was private, surely there was a private right of action against --

THE COURT: They also bring up the Supreme Court decisions in *Obergefell*.

MS. BARCLAY: And I'll address those as well, Your Honor.

THE COURT: I'll give you five minutes. Mission of mercy for Mrs. Lizza here who has the toughest job in this courtroom.

MS. BARCLAY: Thank you.

THE COURT: Thank you.

MS. BARCLAY: The Civil Rights Act did provide a private right of action and did prevent discrimination. One thing that is relevant is plaintiff said here standing up here that the State's program should be able to say what they want it to say as far as being the law with regard to discrimination. But there is also case law in this circuit that says that the government is entitled to deference with interpretation of its own contracts and with the interpretation of its own policies, and this court heard the government's

position is that there has not been a violation of the contract or some policies. And without that law there is no private right of action that plaintiffs are pointing to; that's why they have to rely on equal protection clause and cannot do so when there's no state action giving rise for that equal protection problem.

If we also turn briefly, Your Honor, to the *Teen Ranch* case which she relies on heavily. The reason that case had a problem under the First Amendment is because it was the government who assigned the teen to the entity with religious programming. And the Court said that there was, quote, no true private choice, end quote. There has been no allegation that plaintiffs don't have private choice or any other individual doesn't have private choice. Individuals are able to choose to go to St. Vincent and only if they do will funding flow to them.

THE COURT: But you say I can take judicial notice of certain things on a motion to dismiss. I don't think so under *Parsons*.

MS. BARCLAY: Well, let's talk about what you don't need to take judicial notice for. Oh, I'm sorry, just so you have it, the Eastern District of Michigan case is a 2018 Westlaw 1535394, and that says that in ruling on motion to dismiss, the Court --

THE COURT: I can take judicial notice. That's what

you're saying?

MS. BARCLAY: This case says you can.

THE COURT: Right. Okay. I was --

MS. BARCLAY: But even if you don't, the contract is part of the record and the contract says that if another agency wants to help a couple adopt through a different agency, then they have to cooperate. So that's part of the record. This court does not need to take judicial notice for that.

THE COURT: Okay.

MS. BARCLAY: The way in which some of these native-American agencies operate, that's actually in the code. This court doesn't need to take judicial notice of that either.

And as far as payment goes, again, and how the funding flows is also in the contract and there have been legislative findings about the fact that when an agency makes a religious referral, they do not get government funding. Now --

THE COURT: We were just talking about the judicial notice. Was there a case cite that the gentleman gave you on that screen that he took away or did you want to cite a particular case?

MS. BARCLAY: He did and I read it.

THE COURT: He's got it right there. So just throw in the case cite so we have a complete record here.

MS. BARCLAY: I'll give you two, Your Honor. There is --

THE COURT: Slowly.

MS. BARCLAY: 2018 Westlaw 1535394.

THE COURT: And the case is?

MS. BARCLAY: And that is *ZMC Pharmacy*.

THE COURT: Okay. And that's the Sixth Circuit case?

MS. BARCLAY: That is Eastern District of Michigan, a 2017.

THE COURT: Okay.

MS. BARCLAY: Or excuse me, 2018. And that was one of your decisions, Your Honor.

THE COURT: Okay.

MS. BARCLAY: And then another Eastern District case taking judicial notice on a 12(b)(6) motion is 2017 Westlaw 4535290.

THE COURT: And the name of that case?

MS. BARCLAY: *Webasto Thermo*.

THE COURT: That's mine also. Okay. Thank you.

MS. BARCLAY: I just want to talk about funding for a minute because what she is saying is that it's all bound up in the same activity and so the fact that you're getting funding somewhere over here is flowing to the home study. But there's two different problems with that. First of all, there is no marginal difference in funding that one agency gets if they perform 40 home studies and another agency gets if they perform just one. And a home study doesn't necessarily translate into

that family being licensed. The State has reserved to itself the power to disagree with that recommendation.

THE COURT: Right. But they require the home study and then they can disagree with it, but they require the home study before they put someone on the roster.

MS. BARCLAY: They do require it but they don't pay specific money for it. And if a family that received a home study moved or decided they didn't want to adopt, there would be no funding attaching to that home study. But more than that, there is no dispute that they would choose to make referral elsewhere. There's no funding that goes with that. And taxpayer standing requires, black letter law, that there has to be a depletion of the coffers of the taxpayer, that you have to show an actual decrease in funds. Here that's not happening.

As far as --

THE COURT: Okay. The last call. Go ahead.

MS. BARCLAY: Okay. I'm trying to find the best one for you, Your Honor.

THE COURT: Okay.

MS. BARCLAY: I just want to point out that under the *AOSI* case and the *Trinity Lutheran* case, the Supreme Court is saying that just because the government gives funding, that doesn't mean it has the power to require anything at all involved with that contract, for that program. There are

limits on the conditions that the government can attach to funding. Here the State doesn't even want to put limits on its funding. It does not interpret its contract to mean what plaintiffs say it means. They don't tell agencies how to recruit. If an agency wants to specifically recruit from and service the LGBTQ population or if they want to recruit homes for native-American families or a range of other specialties, the State doesn't tell them not to. And so there's nothing that they are doing that is requiring that condition, and if they did under both free exercise clause and the compelled speech clause, the government would be forced to facially target religions because they would have to say only referrals based on religious criteria are now prohibited and they would be engaging in uneven application of their own requirements which is why the relief plaintiffs request is prohibited here.

THE COURT: Thank you. I want to thank counsel for excellent argument, and the Court will take it under advisement and render an opinion. Thank you.

(Proceedings concluded, 1:10 p.m.)

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CERTIFICATION OF REPORTER

I, Leann S. Lizza, do hereby certify that the above-entitled matter was taken before me at the time and place hereinbefore set forth; that the proceedings were duly recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to either party, nor interested in the event of this cause.

S/Leann S. Lizza 7-17-2018

Leann S. Lizza, CSR-3746, RPR, CRR, RMR Date