

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK, et al.,

Plaintiffs,

v.

CASE NO. 1:19-CV-286

HON. ROBERT J. JONKER

ROBERT GORDON, et al.,

Defendants.

ORDER SETTING RULE 16 SCHEDULING CONFERENCE

IT IS HEREBY ORDERED:

1. Rule 16 Scheduling Conference: A scheduling conference under Fed. R. Civ. P. 16 is scheduled for **June 26, 2019 at 3:30 p.m.**, before the Honorable Robert J. Jonker, Courtroom 699, Ford Federal Building, 110 Michigan, N.W., Grand Rapids, Michigan.

2. Matters to be Considered at the Scheduling Conference: The purpose of the scheduling conference is to review the joint status report and to explore methods of expediting the disposition of the action by: establishing early and ongoing case management; discouraging wasteful pretrial activities; establishing limitations on discovery; facilitating the settlement of a case; establishing an early, firm trial date; and improving the quality of the trial through preparation.

3. Presumptive Disclosures and Discovery Limitations: Under Rules 26, 30 and 33, of the Federal Rules of Civil Procedure, the Court normally requires the following in the absence of good cause for deviation:

- (a) All Rule 26(a) disclosures will apply. Rule 26(a)(1) and Rule 26(a)(2) disclosures will be required before the end of discovery. Rule 26(a)(3) pretrial disclosures will apply and, in addition, the Court will require a preliminary lay witness disclosure during the discovery period. Rule 26(e) applies and governs the duty to supplement disclosures and discovery responses.

(b) Interrogatories will be limited to 25 per side and depositions will be limited to 10 per side, each of no more than 7 hours duration.

Rule 37 sanctions apply to disclosures and discovery responses, including inadequate supplementation of original disclosures and responses.

The court normally allows six months for discovery, but will consider a shorter or longer period at the scheduling conference.

4. Meeting of Parties and Preparation of Joint Status Report: At least seven days before the Rule 16 conference, counsel (or unrepresented parties) shall meet to discuss the following: the nature and basis of the parties' claims and defenses, the possibilities for a prompt settlement or resolution of the case, the formulation of a discovery plan, and the other topics listed below. Plaintiff shall be responsible for scheduling the meeting, which may be conducted in person or by telephone. After the meeting, the parties shall prepare a joint status report which **must be e-filed no later than June 19, 2019**. **The following form shall be used:**

A Rule 16 Scheduling Conference is scheduled for June 26, 2019 at 3:30 p.m., before the Hon. Robert Jonker. Appearing for the parties as counsel will be:

Plaintiffs:

Lori Windham
Nicholas Reaves

State Defendants:

Toni L. Harris
Joshua S. Smith

Federal Defendants:

Christopher Bates

(1) Jurisdiction: The basis for the Court's jurisdiction is:

Plaintiffs: This action arises under the Constitution and laws of the United States. According to Plaintiffs, the Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1361.

State Defendants: As stated in State Defendants' Memorandum of Law in Support of Motion to Transfer or, Alternatively, to Dismiss, this Court lacks subject matter jurisdiction over Plaintiffs Chad and Melissa Buck or Shamber Flore and lacks jurisdiction over several of Plaintiffs' claims against State Defendants. (Doc. 30, PageID. 570-578.) Furthermore, because Plaintiffs challenge a consent decree entered in *Dumont v. Gordon*, No. 17-cv-13080 (E.D. Mich., Borman, J.), this case should be transferred to the Eastern District of Michigan. (Doc. 30, PageID. 553-558.)

Federal Defendants: Federal Defendants intend to file a motion to dismiss arguing lack of jurisdiction on June 19, 2019. In their motion, Federal Defendants will argue that Plaintiffs' Complaint should be dismissed as to Federal Defendants for lack of subject-matter jurisdiction because Plaintiffs' claims against Federal Defendants are not ripe and because Plaintiffs lack standing to sue Federal Defendants. Federal Defendants request that the Court delay the commencement of discovery until after this motion is resolved and Defendants' respective Answers are filed.

- (2) Jury or Non-Jury: This case is to be tried before the court as trier of law and fact.
- (3) Judicial Availability: The parties do not agree to have a United State Magistrate Judge conduct any and all further proceedings in the case, including trial, and to order the entry of final judgment. [**Note to Counsel:** If the parties' consent to the jurisdiction of a magistrate judge, pursuant to 28 U.S.C. § 636(c), and so state in the Joint Status Report, an Order of Reference will be issued transferring the matter to the magistrate judge and allowing appeals to be taken to the United States Court of Appeals for the Sixth Circuit, in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73 (c).]
- (4) Statement of the Case: This case involves:

Plaintiffs' Statement:

This case involves claims brought by St. Vincent Catholic Charities and the individual plaintiffs alleging that the State of Michigan's non-discrimination policy (which it claims is required by both State and Federal law), violates Plaintiffs' First Amendment rights under the Free Exercise, Establishment, and Free Speech Clauses, as well as the Fourteenth Amendment's Equal Protection Clause. Because the State has relied on its enforcement of a federal regulation as one justification for this policy, Plaintiffs have also sued the federal government (HHS and Defendant Azar) over the regulation that the State alleges requires it to undertake these actions. Plaintiffs' claims against the federal defendants include both constitutional claims and statutory claims under the Religious Freedom Restoration Act.

The main legal issues in this case include a determination of Plaintiffs' constitutional rights as against the State and the federal defendants, as well as Plaintiffs' rights under the Religious Freedom Restoration Act as against the federal defendants. This Court will also have to determine whether the federal defendants are appropriate defendants in this action; whether this matter should be transferred to the Eastern District; and whether Proposed Intervenors should be permitted to enter the case as defendants. Plaintiffs' preliminary injunction motion is also fully briefed and pending before the Court.

State Defendants' Statement:

This case does not belong in this Court. Plaintiffs Melissa Buck, Chad Buck and Shamber Flore (the "Individual Plaintiffs") and St. Vincent Catholic Charities ("SVCC" and collectively, "Plaintiffs") filed this lawsuit to challenge a consent decree in another case in a different court. In *Dumont v. Gordon*, No. 17-cv-13080 (E.D. Mich. Sept. 20, 2017) ("*Dumont*"), Plaintiffs were defendant-intervenors, who came into the case in order to protect their rights and, among other things, "immediately appeal and protect their interest" in the event of a settlement between the *Dumont* plaintiffs and defendants. (*Dumont* Doc#18, Br. ISO Mtn. to Intervene, Page.ID.439.) *Dumont* was settled. However, Plaintiffs failed to assert any claims and opted to not challenge the Consent Decree entered in that forum. Instead, they came to this Court and filed a new suit, asserting the same harms they alleged in *Dumont*, seeking a declaration that the terms of the Consent Decree should not be enforced against them.

For this Court to grant Plaintiffs the relief they are seeking, this Court must require Defendants Robert Gordon and JooYuen Chang (the "Dumont defendants") to violate the Consent Decree they only recently entered in *Dumont*. Because the *Dumont* court retained jurisdiction over the enforcement of the settlement agreement, the best forum for raising this challenge and deciding this issue – i.e., whether Dumont defendants should be enjoined from fulfilling the obligations as set forth in the settlement agreement – is in that court, where all of the same parties, other than Attorney General Nessel, were named. Accordingly, this Court should exercise its discretion to transfer this matter to the Eastern District of Michigan, pursuant to 28 U.S.C. §1404(a). This is all the more necessary because *Catholic Charities West Michigan v. Michigan Department of Health and Human Services*, No. 19-cv-11661 (E.D. Mich. June 5, 2019), which raises the same or substantially similar issues to the present case, has been transferred to the Eastern District of Michigan and is currently before Judge Denise Page Hood.

Alternatively, if this Court retains this case, it should be dismissed for multiple other reasons. First, Plaintiffs' Religious Freedom Restoration Act claim should be dismissed as to State Defendants because it can only be asserted against the federal government. Second, no viable claims are asserted against Attorney General Dana Nessel, and as the advocate for the state, she is immune from suit. Third, because the claims Plaintiffs now raise were the subject of the *Dumont* action, res judicata bars subsequent litigation of those claims, or any claims that could have been brought in *Dumont*. Fourth, this court lacks subject matter jurisdiction because the Individual Plaintiffs – as foster parents and volunteers – lack standing to bring a challenge against the provisions embodied in the State's contracts. Finally, Plaintiff SVCC lacks standing to represent foster care children and no plaintiff can seek damages, nominal or otherwise, against State Defendants.

For these reasons, this matter should be transferred, pursuant to 28

U.S.C. § 1404(a), to the district court that approved the settlement agreement and retained jurisdiction to enforce it, or in the alternative, be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1). (See Defendants' Motion to Transfer or, Alternatively, to Dismiss, Doc. 29, PageID.525; Brief in Support of Defendants' Motion to Transfer or, Alternatively, to Dismiss, Doc. 30, PageID.529.)

Federal Defendants' Statement:

Plaintiffs in this case are St. Vincent Catholic Charities, a religiously affiliated child placing agency in Lansing, and several individual plaintiffs who have adopted children through St. Vincent or otherwise received services and support through St. Vincent. Plaintiffs allege that State Defendants—the Director of the Michigan Department of Health and Human Services, the Executive Director of the Michigan Children's Services Agency, and the Michigan Attorney General—have threatened to terminate St. Vincent's adoption and foster care contracts with the State of Michigan because St. Vincent declines to recommend same-sex couples as potential adoptive or foster parents on religious grounds. In addition to raising a variety of free exercise, free speech, and equal protection claims against State Defendants, Plaintiffs also seek relief against Federal Defendants—Secretary of Health and Human Services Alex Azar and the federal Department of Health and Human Services (HHS)—on the ground that the Michigan Attorney General has pointed to a federal non-discrimination regulation as one of the reasons for Michigan's alleged threat to terminate St. Vincent's contracts. The regulation does not operate directly on St. Vincent, but rather places conditions on Michigan's use of federal funds, and is subject to the granting of exceptions by HHS. Plaintiffs seek a declaration that the federal Religious Freedom Restoration Act prohibits Defendants from using the federal non-discrimination regulation to substantially burden Plaintiffs' religious exercise and an injunction prohibiting Defendants from penalizing Plaintiffs for their religious beliefs, speech, and practices regarding marriage.

Plaintiffs have not properly invoked the Court's jurisdiction as to Federal Defendants because Plaintiffs' claims against Federal Defendants are not ripe and because Plaintiffs lack standing to sue Federal Defendants. As to ripeness, there is no imminent threat of enforcement by Federal Defendants, who recently granted an exception to South Carolina for a faith-based foster care agency operating in that State and other similarly situated subgrantees. As to standing, Plaintiffs' alleged injuries are neither traceable to Federal Defendants nor redressable by the relief sought against Federal Defendants. Plaintiffs also have not actually stated any claims against Federal Defendants because Plaintiffs have not pointed to anything the Federal Defendants have allegedly done—or not done—that has violated Plaintiffs' rights or contravened any requirement of law.

Plaintiffs propose that parties file all motions for joinder of parties to this action and to file all motions to amend the pleadings by July 12, 2019.

State Defendants propose that such motions be filed by August 30, 2019.

Federal Defendants are amenable to either of these proposals.

(6) Disclosures and Exchanges:

Rule 26(a) mandates particular disclosures that apply on a self executing timetable in the absence of contrary court order. Describe in the Joint Status Report what the parties propose regarding these categories of disclosure. In addition, this Court will require a preliminary disclosure of potential lay witnesses earlier than Rule 26(a)(3) would otherwise require. Propose a date for this disclosure in the Joint Status Report. NOTE: Rule 26(e) provides the duty to supplement applicable disclosures and discovery responses. All parties must comply with this duty, and Rule 37 sanctions apply.

(i) Fed.R.Civ.P. 26(a)(1) disclosures:

Plaintiffs propose that initial disclosures be made 14 days after the service of the Answers, which should be due at the time specified by Fed. R. Civ. P. 12(a)(4).

State Defendants propose that initial disclosures shall be made 30 days after Defendants file their respective Answers, which should be due 30 days after this Court's ruling on State Defendants' Motion to Transfer or, Alternatively, to Dismiss, should this Court retain this case and/or not dismiss. (Doc. 29.)

Federal Defendants are amenable to either of these proposals, with the caveat that if the Court adopts State Defendants' proposal, Federal Defendants' Answer should be due 30 days after this Court's ruling on Federal Defendants' forthcoming Motion to Dismiss.

(ii) Fed.R.Civ. P. 26(a)(2) disclosures:

Plaintiffs propose that expert disclosures and reports be due October 31, 2019, or one week prior to the close of fact discovery, whichever is later, and that rebuttal expert disclosures and reports be due one month later.

State Defendants propose these disclosures and reports be due October 31, 2019 for Plaintiffs, December 27, 2019 for Defendants.

Federal Defendants propose that these disclosures and reports be due October 31, 2019 for Plaintiffs and December 27, 2019 for Defendants.

- (iii) Fed.R.Civ.P. 26(a)(3)(i)-(ii) disclosures: 30 days prior to trial.
- (iv) The parties have agreed to make available the following documents without the need of a formal request for production:

The parties are unable to agree on voluntary production at this time.

State Defendants further state that, given the extensive discovery in *Dumont*, there is no need for written discovery in the present matter. To the extent that this Court allows written discovery, it should be very limited and narrow in scope.

- (v) Initial Disclosure of potential lay witnesses: 30 days prior to the close of discovery.

(7) Discovery:

The Plaintiffs agree that discovery should begin after the service of the initial disclosures, with proposed dates noted above. Plaintiffs believe that all discovery proceedings can be completed by November 8, 2019, or 120 days from the date of the initial disclosures, whichever is later.

State Defendants propose discovery should not begin until the initial disclosures are served, which should be 30 days after Defendants file their respective answers to the Complaint, to the extent that this Court retains this case and/or not dismiss. Otherwise, State Defendants propose that, to the extent that this Court limits discovery in light of the *Dumont* discovery, all discovery proceedings can be completed within 180 days of service of the initial disclosures. To the extent that this Court orders more expansive discovery, State Defendants propose that discovery be complete within 240 days of service of the initial disclosures.

Federal Defendants do not anticipate serving discovery, but reserve the right to do so if it becomes necessary or appropriate in light of the other parties' discovery requests and/or the Court's rulings. Federal Defendants agree with Plaintiffs and State Defendants that discovery should not begin until after Defendants have filed their respective Answers, following the Court's resolution of Defendants' respective motions to dismiss.

The parties recommend the following discovery plan:

As required by Fed. R. Civ. P. 26(f), set forth proposed plan of discovery, including subjects on which discovery may be needed and whether discovery should be conducted in phases or be limited to or focused on certain issues. Also set forth any recommendations as to limitations on discovery. Limitations may include the number of depositions, interrogatories, and requests for admissions, or limitations on the scope of discovery pending resolution of dispositive motions or alternative dispute resolution proceedings. State whether the

presumptive limits for interrogatories; (Rule 33(a) (25 single part questions)) and depositions (Rule 30(a)(2)(A) (10 depositions per side); Rule 30(d)(1) (one day of seven hours per witness)) should be modified in this case.

Plaintiffs: Discovery may be needed as to the State's foster care and adoption contract policy requirements; its enforcement of those policy requirements; the State's reasons and motivation for enforcement of those requirements; the State's application, interpretation, enforcement of and compliance with state law, policies, and contracts governing religious child welfare providers; the State's application, interpretation, enforcement of and compliance with state law, policies and contracts governing other contractors who serve families in children or who partner with DHHS; general information about how the State's foster care and adoption system works; how the State's foster care and adoption system serves or fails to serve children in need; foster care and adoption licensing and certification, payments for foster care and adoption, and outcomes for children in the State's foster care and adoption system; State policies and practices, both current and prior, governing transfers of child welfare cases and referrals; options for same-sex couples within the State's child welfare system; State approval of or acquiescence in transfers of child welfare cases; the impact of agency closure upon children, families, and prospective foster and adoptive families; and any other information relevant to the State's affirmative defenses.

Discovery may also be needed as to the federal defendants' enforcement of its regulations governing the State's payment of funds to St. Vincent for foster care and adoption; the State's reliance upon federal funds for its child welfare system; federal enforcement or non-enforcement of 45 C.F.R. § 87.3(a), 45 CFR § 75.300(c), and other relevant regulations; the Federal Defendants' exemption and enforcement decisions under 42 U.S.C. § 2000-bb; as well as information regarding any other requirements imposed on the funding of foster care and adoption services by the federal defendants; and any other information relevant to the Federal Defendants' affirmative defenses.

State Defendants: Plaintiffs and State Defendants engaged in significant written discovery in *Dumont v. Gordon*, No. 17-cv-13080 (E.D. Mich.), which involved the same or substantially similar claims and/or issues. Over the course of several months, State Defendants produced 64,272 pages and 9,004 documents in *Dumont*, all of which were also served on Plaintiffs. Under these circumstances, there is no need for further written discovery. To the extent that this Court allows written discovery, it should be very limited and narrow in scope.

Federal defendants: As noted above, Federal Defendants do not anticipate serving discovery, but reserve the right to do so if it becomes necessary or appropriate in light of the other parties' discovery requests and/or the Court's rulings.

The presumptive limits for discovery requests, applied per side and not per party, are appropriate for this action. Parties also agree to a limit of 25 single-part requests for admission per side and to a presumption that during a deposition, each side will be given an equal amount of time to question the witness.

Plaintiffs agree to these limits on written discovery, and agree that limits on written discovery should apply to each set of jointly-represented defendants. But plaintiffs believe that depositions should be limited to 10 per side, not 10 per set of separately-represented parties.

State Defendants agree to these limits, but propose the limits should separately apply to each set of jointly-represented Defendants. Accordingly, Plaintiffs would have 25 single-part interrogatories, 25 single-part requests for admission and 10 depositions of up to seven (7) hours each on both State Defendants and Federal Defendants. In turn, State Defendants would have 25 single-part interrogatories, 25 single-part requests for admission and 10 depositions of up to seven (7) hours each on both Plaintiffs and Federal Defendants. The same would follow for Federal Defendants' discovery.

Federal Defendants agree to the presumptive limits set forth above, but propose that the limits should separately apply to each set of jointly represented Defendants.

Plaintiffs propose the following schedule:

Deadline to serve document production requests: August 9, 2019, or 90 days before the close of fact discovery, whichever is later.

Document discovery closes (all documents requested must be turned over to opposing party by): September 16, 2019, or five weeks after deadline to serve document production requests, whichever is later.

Deadline to notice depositions or serve third-party subpoenas: September 23, 2019, or one week after the close of document discovery, whichever is later.

Fact discovery closes: November 8, 2019, or 120 days after the deadline to serve initial disclosures, whichever is later.

Expert discovery closes: Three weeks after service of rebuttal expert reports.

Plaintiffs propose that privilege logs be served two weeks prior to the close of discovery.

State defendants propose the following discovery schedule:

- a Expert disclosures and reports shall be due as noted above, under State Defendants' statement in § 5(ii).
- b Oral fact discovery to be completed by the close of discovery. The parties must produce privilege logs by the close of discovery.
- c All interrogatories, requests for admissions, and other written discovery requests must be served no later than 60 days before the close of discovery.
- d Lay witness list due 30 days before the close of discovery.
- e Oral expert discovery to be completed by the close of discovery.

Federal defendants do not propose an alternative schedule at this time because they do not anticipate serving discovery.

- (8) Motions: The parties propose that all dispositive motions be filed by the dates noted below. The parties acknowledge that it is the policy of this Court to prohibit the consideration of non-dispositive discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion.

Plaintiffs propose that all dispositive motions be filed by December 17, or five weeks after the close of discovery, whichever is later.

State Defendants propose that all dispositive motions be filed no later than 60 days after the close of discovery.

Federal Defendants propose that all dispositive motions be filed no later than 60 days after the close of discovery.

- (9) Alternative Dispute Resolution: The parties recommend that this case be submitted to the following method(s) of alternative dispute resolution:

(Set forth each party's position with respect to the preferred method, if any, of alternative dispute resolution. Methods used in this district include, but are not limited to, voluntary facilitative mediation (W.D. Mich. LCivR 16.3), early neutral evaluation (W.D. Mich. LCivR 16.4), and case evaluation (MCR 2.403 and W.D. Mich. LCivR 16.5).)

See the court's web site (www.miwd.uscourts.gov) for the local rules regarding all forms of ADR used in this district and for lists of mediators, case evaluators, and arbitrators.

The parties do not believe ADR will be a valuable use of time in this case as the legal issues and the point of disagreement are well known to both sides.

- (10) Length of Trial: Counsel estimate the trial will last approximately days, total, allocated as follows:

Plaintiffs and State Defendants agree that 8 days should be allotted for

trial. Plaintiffs propose 4 days for Plaintiffs' case and 4 days allotted among the Defendants.

State Defendants propose 8 days allotted as follows: 2 days for Plaintiffs, 2 days for State Defendants, 2 days for Federal Defendants, and 2 days for Proposed Intervenors. State Defendants note that Plaintiffs originally proposed 3 days to present their case.

Federal Defendants defer to the Court regarding the length of trial and allocation of days in light of their arguments in their Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction and their forthcoming Motion to Dismiss.

- (11) Prospects of Settlement: The status of settlement negotiations is:

(Indicate persons present during negotiations, progress toward settlement, and issues that are obstacles to settlement.)

Given the positions laid out in the Plaintiffs' motion for preliminary injunction and State Defendants' motion to dismiss, the parties do not believe settlement discussions would be fruitful at this point. Specifically, Plaintiffs contend that Defendants' actions violate the constitution and federal law. State Defendants contend that their actions are compelled by federal law and existing contracts. Both State and Federal Defendants claim lack of standing, State Defendants claim immunity, and Federal Defendants argue the claims against them are not ripe.

- (12) Electronic Document Filing System: Counsel are reminded that Local Civil Rule 5.7(a) now requires that attorneys file and serve all documents electronically, by means of the Court's CM/ECF system, unless the attorney has been specifically exempted by the Court for cause or a particular document is not eligible for electronic filing under the rule. The Court expects all counsel to abide by the requirements of this rule. *Pro se* parties (litigants representing themselves without the assistance of a lawyer) must submit their documents to the Clerk on paper, in a form complying with the requirements of the local rules. Counsel opposing a *pro se* party must **file** documents electronically but **serve** *pro se* parties with paper documents in the traditional manner.
- (13) Other: Set forth any special characteristics that may warrant extended discovery, accelerated disposition by motion, or other factors relevant to the case.

Plaintiffs agree that discovery should not begin until initial disclosures are filed.

State Defendants propose that discovery should not begin until the initial disclosures are filed and that, to the extent that this Court determines any written discovery is necessary, discovery request should not be filed until 30 days after the filing of initial disclosures. In addition, there are several matters that require resolution before

discovery begins. As stated in § 3, Statement of the Case, this case should be transferred to Judge Borman in the Eastern District of Michigan or dismissed. Plaintiffs have also filed a Motion for Preliminary Injunction. (Doc. 5, PageID.150; Doc. 6, PageID.160.) In addition, Kristy and Dana Dumont have moved to intervene as Defendants and to transfer this case to the Eastern District. (Doc. 18, PageID.421; Doc. 19, PageID.451.) Because this Court's resolution of these pending matters will determine whether discovery occurs and, if it does, the extent of discovery, the scheduling order should be revisited within 30 days of this Court's resolution of these pending matters.

As noted above, Federal Defendants request that the Court delay the commencement of discovery until after Federal Defendants' motion to dismiss is resolved and Defendants' respective Answers are filed.

The joint status report shall be approved by all counsel of record and by any party who represents him or herself.

5. Order of Referral: A United States Magistrate Judge may be designated to assist in the processing of this case, and is invested by the powers conferred under 28 U.S.C. § 636(b)(1)(A).

6. Case Manager: Any question concerning this Order or the scheduling conference should be directed to Susan Driscoll Bourque, Case Manager, at (616) 456-2327.

Dated: June 19, 2019

/s/ Lori H. Windham

Lori H. Windham

Attorney for Plaintiffs

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