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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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MELISSA BUCK, et al.,  
Plaintiffs,  
vs. DOCKET NO. 1:19-cv-286  
ROBERT GORDON, et al.,  
Defendants.

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TRANSCRIPT OF RULE 16 SCHEDULING CONFERENCE  
BEFORE THE HONORABLE ROBERT J. JONKER, CHIEF JUDGE  
GRAND RAPIDS, MICHIGAN  
June 26, 2019

Court Reporter: Glenda Trexler  
Official Court Reporter  
United States District Court  
685 Federal Building  
110 Michigan Street, N.W.  
Grand Rapids, Michigan 49503

Proceedings reported by stenotype, transcript produced by  
computer-aided transcription.

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14 \* \* \* \* \*

15 Grand Rapids, Michigan

16 June 26, 2019

17 3:59 p.m.

18 P R O C E E D I N G S

03:59:19 19 *THE COURT:* We're here on the case of Buck against  
20 Gordon, 1:19-cv-286, for a Rule 16.

21 Let's start with appearances, please.

22 *MS. WINDHAM:* Lori Windham for plaintiffs.

23 *THE COURT:* All right.

03:59:30 24 *MR. REAVES:* Nicholas Reaves for plaintiffs.

25 *THE COURT:* All right. Thank you.

*MR. SMITH:* Assistant Attorney General Joshua Smith  
for the state defendants, Your Honor.

*THE COURT:* All right.

03:59:39 *MR. BATES:* Christopher Bates for the federal

03:59:41 1 defendants.

2 *THE COURT:* Okay. Thank you.

3 Nobody wants to sit in the first chair on the defense  
4 side, is that it?

03:59:46 5 *MS. OSTRAGER:* Your Honor --

6 *MR. SMITH:* I'll do it.

7 *THE COURT:* You don't have to. It's okay. They all  
8 work.

9 Go ahead.

03:59:53 10 *MS. OSTRAGER:* Your Honor, my name is Ann-Elizabeth  
11 Ostrager.

12 *THE COURT:* Get to a microphone, if you would, just  
13 so that we can hear you well. Thank you.

14 *MS. OSTRAGER:* Thank you, Your Honor. My name is  
04:00:03 15 Ann-Elizabeth Ostrager from Sullivan & Cromwell, and I  
16 represent the proposed intervenor defendants Kristy and  
17 Dana Dumont along with my colleagues from the ACLU who are  
18 available should Your Honor want to entertain any discussion of  
19 any of the papers filed by the intervenors.

04:00:19 20 *THE COURT:* All right. Can you spell your name for  
21 me, the last name?

22 *MS. OSTRAGER:* O-S-T-R-A-G-E-R.

23 *THE COURT:* Thanks.

24 *MS. OSTRAGER:* Thank you.

04:00:29 25 *THE COURT:* Okay. And just sit at the table because

04:00:31 1 then you'll have a microphone. I don't know if you'll have  
2 anything to say or address anyway, but you might as well be  
3 there.

4 The main thing that I wanted to hear from the parties  
04:00:41 5 today is to try to understand the trajectory of the case a  
6 little bit. And in particular whether from a preliminary  
7 injunction point of view that's really where both sides are  
8 going. And depending on how that comes out, whoever loses is  
9 going to go straight to the Court of Appeals, which I would  
04:00:59 10 expect. And if that's the trajectory, as opposed to, you know,  
11 really getting a preliminary injunction and then litigating the  
12 rest of the case to final judgment as we might in a, you know,  
13 employment case, for example, it's going to change the shape of  
14 where we're going.

04:01:15 15 So can you give me some insight into that? I take it  
16 where both of you want to go eventually is upstream, and I  
17 don't know how much, if any, desire either side has to litigate  
18 here past the preliminary injunction before we hear from the  
19 Court of Appeals.

04:01:31 20 But let me start with plaintiff, and then we'll get  
21 the other people's position.

22 *MS. WINDHAM:* Certainly, Your Honor. We believe that  
23 the preliminary injunction motion is fully briefed. It's ripe  
24 for decision at any time. We're happy to present argument on  
04:01:44 25 that today or at any time.

04:01:46 1 As Your Honor has noted, there's an extensive record  
2 on that already, and so we hope to receive a decision on that  
3 soon, because it is urgent for our clients. And I -- as far as  
4 plaintiffs go, we don't have any objection to holding off on  
04:02:02 5 discovery while that is decided and if there is any appeal  
6 after that.

7 *THE COURT:* Okay. Well, I'm pretty sure there will  
8 be an appeal no matter what, but maybe not.

9 Go ahead.

04:02:14 10 *MR. SMITH:* Thank you, Your Honor. Although the  
11 motion for preliminary injunction is fully briefed, I think  
12 that in order for plaintiffs to make a sufficient evidentiary  
13 showing, that they would have to present proofs, Your Honor,  
14 and that they would need a hearing on that. We, of course, are  
04:02:28 15 prepared to argue that today. But to the extent that they do  
16 not present proofs, I don't think that they will have made a  
17 sufficient evidentiary showing for preliminary injunction.

18 Now, I would agree with plaintiffs' counsel, though,  
19 that to the extent this Court wants to hold a hearing and/or  
04:02:44 20 decide the preliminary injunction, then we could certainly hold  
21 off on discovery.

22 As indicated in our comments on the proposed  
23 scheduling order, there's been a very extensive amount of  
24 discovery on this case from the related Dumont litigation that  
04:03:02 25 occurred in the Eastern District before Judge Borman. So there

04:03:05 1 is certainly a strong record of discovery in this case already.

2           *THE COURT:* All right. Well, from your -- both sides  
3 have submitted significant evidentiary support in the form of  
4 affidavits at least on the preliminary injunction issue

04:03:20 5 already, and sometimes that's enough for a preliminary  
6 injunction decision either way. Sometimes it's not where  
7 there's significant factual dispute. And I can't say I've  
8 looked through all of the 1,700 pages that we already have on  
9 the record, but I think I've skimmed enough to see I don't see

04:03:40 10 a lot of factual disputes between the parties in their  
11 evidentiary submissions. What I see is people emphasizing  
12 different things.

13           So what do you think or what do you expect to dispute  
14 factually? I know you both disagree on the law, but what are  
04:03:54 15 the factual disputes that you see at the heart of the  
16 preliminary injunction?

17           *MR. SMITH:* Is that addressed to me, Your Honor?

18           *THE COURT:* Yes.

19           *MR. SMITH:* Well, I think there's several. I mean,  
04:04:04 20 first of all, plaintiffs either do not understand or  
21 mischaracterized the regulatory role of the State of Michigan  
22 vis-a-vis child-placing agencies.

23           *THE COURT:* All right.

24           *MR. SMITH:* They mischaracterize whether the  
04:04:16 25 nondiscrimination clauses in the contract, which have been

04:04:21 1 there for nearly four years I believe in the case of the  
2 adoption contract and for nearly three years in the case of the  
3 foster care contract for St. Vincent, they mischaracterize as  
4 new policies resulting from the Dumont consent decree. But I  
04:04:36 5 think there's a basic factual dispute there.

6 *THE COURT:* Well, what's the fact -- why isn't that  
7 at least a mixed question? I mean, how are we going to learn  
8 anything from you cross-examining the plaintiffs about that, or  
9 how are they going to learn anything from you cross-examining  
04:04:49 10 your people on that? Don't you just disagree on the legal  
11 significance of those things?

12 *MR. SMITH:* I think it's more than a disagreement on  
13 the legal significance. I think it's a disagreement as to what  
14 do those basic facts mean. I mean, I would agree that the fact  
04:05:04 15 of the non --

16 *THE COURT:* All right. Well, let's assume for  
17 purposes of argument that the way the department is applying  
18 the language today is the way it's always been meant to apply  
19 for four years. The plaintiffs' position is that's  
04:05:16 20 unconstitutional. I mean, isn't that the gravamen of their  
21 brief?

22 *MR. SMITH:* I think that could be gleaned from their  
23 brief, Your Honor. I think that they are characterizing this  
24 as a new policy. There certainly, to the extent that they have  
04:05:29 25 any viable cause of action against Attorney General Nessel,

04:05:35 1 that they have to characterize it as a new policy because  
2 otherwise this is a policy that was put in place about three  
3 and a half plus years before Attorney General Nessel became  
4 Attorney General Nessel. She was private citizen Nessel at  
04:05:50 5 that time. So certainly if that's the claim, then they have no  
6 viable cause of action against the Attorney General.

7 But on a deeper level, to the extent that they are  
8 alleging that the department has not enforced the  
9 nondiscrimination clauses, has not conducted investigations, or  
04:06:09 10 I believe in their response to our motion for preliminary  
11 injunction they allege that a government official is the person  
12 who filed the internal complaints that put in motion the  
13 investigations of Bethany Christian Services Madison Heights,  
14 Bethany Christian Services East Lansing, and St. Vincent  
04:06:36 15 itself, that's simply not true. What put that in motion was  
16 the filing of the Dumont Complaint by the Dumonts, the  
17 Busk-Suttons, and Ms. Ludolph who was later dismissed in that  
18 case. But my client's position is when they received that  
19 Complaint, they had a duty pursuant not only to contract but a  
04:06:55 20 duty pursuant to the licensing rules for CPAs to investigate  
21 those matters.

22 Now, as stated in the affidavits and as stated in our  
23 motion, the fact that they didn't release those investigations  
24 is related to the ongoing litigation in Dumont, and now it's  
04:07:13 25 related to the ongoing litigation in the Buck case. So --

04:07:19 1           *THE COURT:* All right. Well, the regulatory role  
2 issue in your view is a factual one at least in part, but what  
3 do you expect the plaintiffs to produce by way of evidence? It  
4 sounds more like it's an evidentiary proffer from your people  
04:07:35 5 who will get on the stand and say that's the way it's always  
6 been and there's been no change.

7           *MR. SMITH:* I think that's a fair characterization,  
8 Your Honor.

9           *THE COURT:* All right. So from the plaintiffs, what  
04:07:45 10 do you dispute in the basis that they have submitted on the  
11 evidence? I mean, what would you need an evidentiary hearing  
12 for?

13           *MR. SMITH:* Well, with all due respect, I think they  
14 need an evidentiary hearing to prove their case.

04:07:59 15           *THE COURT:* Well, I'm saying you want to  
16 cross-examine their affidavits basically? Is that what you're  
17 saying?

18           *MR. SMITH:* I think it would be beneficial.

19           *THE COURT:* What do you think are wrong in those  
04:08:07 20 affidavits? What do you expect to show that's factually  
21 inaccurate?

22           *MR. SMITH:* Well, I think part of the problem is that  
23 as far as the individual plaintiffs go, they simply lack  
24 standing to bring the suit.

04:08:19 25           *THE COURT:* I understand your argument. What I want

04:08:22 1 to know is what do you dispute factually? So they don't have  
2 standing because of what? They are not interested in adopting  
3 through St. Vincent anymore or something else?

4 *MR. SMITH:* Well, I think their allegation is that  
04:08:32 5 at least on behalf of the Bucks that they are only interested  
6 in adopting through St. Vincent and they have at least put  
7 forward the belief that they would be unable to adopt a sibling  
8 of one of their adopted children through anybody other than  
9 St. Vincent if St. Vincent decides to no longer provide foster  
04:08:51 10 care services under contract with the State of Michigan. So I  
11 think that that's what their claim is, and I think that claim  
12 is simply untrue for several reasons. One, by their own  
13 admission in the Complaint they can adopt through the Michigan  
14 Adoption Resource Exchange.

04:09:05 15 *THE COURT:* Okay. If it's already in the Complaint,  
16 then -- what I'm trying to get at is why do we need to take the  
17 time to hear the plaintiffs call the four or five people that  
18 they have already got affidavits from, say what they said, and  
19 then have you cross-examine to find out stuff that's already in  
04:09:24 20 the Complaint? And then on the same side why do we need to  
21 have your people come and recite what they have already said so  
22 that the plaintiff can cross-examine? If we already have  
23 through the submissions of the parties a reasonably complete  
24 factual record, why can't we get to the legal issues? And if  
04:09:42 25 we need time to dispute genuine issues that have been framed in

04:09:46 1 the affidavits, okay, I get that. But, you know, time is a  
2 precious resource, and I don't want to spend a lot of time  
3 doing things that are already part of the 1,700-page record and  
4 not materially going to change anything.

04:09:59 5 *MR. SMITH:* I understand that, Your Honor. I mean,  
6 obviously if you're prepared to make a decision based on the  
7 submissions to the Court, certainly it's your right to do so.

8 *THE COURT:* Well, I'm prepared to do what I need to  
9 do, but the point is, I need to understand what I'm going to  
04:10:14 10 learn in that process or what I need to learn. So, you know, I  
11 mention an employment case where we get a lot of preliminary  
12 injunction practice. There's often dramatically different  
13 factual issues between the parties about whether certain  
14 information was taken or not taken from computer systems, and  
04:10:31 15 there's really no way to deal with that effectively on paper.  
16 And I haven't read everything. We're in trial right now, so I  
17 definitely haven't had time to read everything. But what I  
18 didn't seem to see was that kind of factual clash in the  
19 affidavits each side submitted, and that's why I'm trying to  
04:10:49 20 get a focus on it.

21 *MR. SMITH:* I think that there is sufficient factual  
22 clash.

23 *THE COURT:* All right. So regulatory role --

24 *MR. SMITH:* Regulatory --

04:10:57 25 *THE COURT:* -- whether plaintiffs have articulated

04:10:59 1 facts that support standing. Other categories?

2 *MR. SMITH:* And I would say just to perhaps  
3 recharacterize what I said earlier, their lack of standing is a  
4 legal issue. I think that that is in fact a legal issue.

04:11:13 5 *THE COURT:* I'm trying to focus on the factual issues  
6 right now.

7 *MR. SMITH:* I understand.

8 *THE COURT:* I want to understand what, if anything,  
9 we're going to gain through an evidentiary hearing.

04:11:22 10 *MR. SMITH:* Well, I think as I said at the outset,  
11 the plaintiffs very much mischaracterized the regulatory role  
12 of the State of Michigan.

13 *THE COURT:* All right. So we've already got that.  
14 Other than regulatory role?

04:11:31 15 *MR. SMITH:* The history of the nondiscrimination  
16 clauses.

17 *THE COURT:* Well, is there a disputed factual history  
18 on that, or are we just going to say here is the way the  
19 clauses rolled out and then you're going to dispute with them  
04:11:44 20 when the interpretation changed or if it changed?

21 *MR. SMITH:* I think that is an issue of fact.

22 *THE COURT:* Well, isn't that the same thing as the  
23 regulatory role I guess I'm getting at? And we've already  
24 talked about that.

04:11:58 25 *MR. SMITH:* I don't think it's quite the same thing

04:11:59 1 because the allegation they are making with regard to the  
2 regulatory role is that the State of Michigan has not been  
3 uniformly enforcing those nondiscrimination clauses or that it  
4 has granted many exceptions. Now, for an example --

04:12:14 5 *THE COURT:* Okay. So what other than that? To me  
6 that's part of what you were talking about earlier, at least as  
7 I understood it. But what else?

8 *MR. SMITH:* Well, if you look at their allegations  
9 regarding the exceptions themselves --

04:12:24 10 *THE COURT:* Well, don't look at -- tell me what you  
11 need factually, what you need to contest factually in what they  
12 have submitted.

13 *MR. SMITH:* Well, they have -- part of that is they  
14 have submitted in their filings that there are several types of  
04:12:39 15 CPAs, child-placing agencies, that specialize in particular  
16 populations. Now, their contention is that that specialization  
17 somehow means that the State of Michigan allows them to  
18 discriminate based on protected characteristics. Now, that is  
19 a fact issue. We do not allow them to do that. Some of these  
04:13:01 20 are not --

21 *THE COURT:* So you're talking about their reference  
22 to people that focus on young men and people that focus on  
23 young women individually or exclusively?

24 *MR. SMITH:* Yeah. The boys to men --

04:13:12 25 *THE COURT:* Do you disagree with that factual claim,

04:13:15 1 that there are certain people that you allow to deal only with  
2 young boys and only with young women? Or do you disagree  
3 with -- you do disagree with that?

4 *MR. SMITH:* We disagree with the factual claim, yes.

04:13:25 5 *THE COURT:* So what's your factual claim on that  
6 point?

7 *MR. SMITH:* Well, first of all, two of the  
8 institutions they name are not child-placing agencies, they are  
9 child-caring institutions. They have a different set of rules,  
04:13:33 10 they have a different set of contracts. They are not  
11 comparable to a child-placing agency.

12 *THE COURT:* So you agree that they only deal with  
13 boys or only deal with girls, but it's irrelevant in your view  
14 because they are not child-protection agencies or  
04:13:44 15 child-placement agencies?

16 *MR. SMITH:* Correct. I don't know if they only deal  
17 with boys or not, what I do know is they are not child-placing  
18 agencies.

19 *THE COURT:* Well, I'm not talking about the factual  
04:13:52 20 issues. Whether they are a child-placement agency or something  
21 else, that's not going to be a factual dispute, is it? Aren't  
22 we just going to be able to look at a list and figure that out?

23 *MR. SMITH:* I think that you could, Your Honor. I  
24 will concede that. Their claim, however, is that they are all  
04:14:06 25 in the same category, and I would say that claim is factually

04:14:09 1 incorrect.

2           *THE COURT:* So what other factual disputes do you  
3 expect to see framed if we go to evidentiary hearing?

4           *MR. SMITH:* Well, they also claim that certain  
04:14:19 5 child-placing agencies -- they seem to claim at least that they  
6 only serve certain populations by specializing in them, and  
7 that is simply not true. Instead they are subject to the same  
8 set of rules and they are subject --

9           *THE COURT:* Again, you would agree with them  
04:14:37 10 factually, but you'd just say they are overcharacterizing it or  
11 mischaracterizing it, that serving one population isn't the  
12 same thing as discriminating based on a protected  
13 characteristic?

14           *MR. SMITH:* I would disagree with their assertions of  
04:14:50 15 fact.

16           *THE COURT:* I see.

17           *MR. SMITH:* I think those assertions are simply  
18 wrong.

19           *THE COURT:* Okay.

04:14:53 20           *MR. SMITH:* And I think the evidence would show that  
21 they are wrong. You can certainly give credence and I think  
22 you should give credence to our sworn affidavits because the  
23 people who have provided affidavits --

24           *THE COURT:* That's my point. They are already there  
04:15:06 25 in the record, so what do you want to cross-examine in the

04:15:10 1 plaintiffs' evidentiary submission? And I'm hearing regulatory  
2 role including some of the things you're touching on now. What  
3 else?

4 *MR. SMITH:* Well, again, I want to reiterate, we  
04:15:19 5 don't have a burden of proof.

6 *THE COURT:* Please, please, please don't argue with  
7 me. Do you think I don't know that? Look, you're a half an  
8 hour late to start with. I'm in trial. I've got plenty of  
9 other things to do. And I've got 1,700 pages in the record  
04:15:32 10 already. Just answer my questions so we can frame how we  
11 proceed. That's what I want to know. That's all we're doing  
12 today.

13 So, of course, they have the burden of proof. We  
14 know that. I'm trying to understand in practical terms what  
04:15:45 15 both of us, all parties and the Court, are going to gain or not  
16 gain from an evidentiary hearing. That's all. So what else do  
17 I need to know that you're going to dispute factually?

18 *MR. SMITH:* I think that those are probably the main  
19 areas, Your Honor.

04:15:57 20 *THE COURT:* Okay. Let me go to the plaintiffs. I  
21 heard in your opening comments that things were fully briefed  
22 and ready for decision, that you were ready to go on the paper  
23 record, but maybe I overread that. Do you think there are  
24 factual disputes from your perspective that need evidentiary  
04:16:14 25 hearing?

04:16:14 1           *MS. WINDHAM:* Your Honor, we are prepared to rest on  
2 the factual record. This is our motion and our burden of proof  
3 on most issues. And we believe that there's more than enough  
4 here for Your Honor to grant a preliminary injunction to my  
04:16:27 5 clients.

6           I'm happy to cross-examine the State's witnesses if  
7 that's what they want to do, however, what I'm concerned about  
8 here is the timing. As we said in the Seyka declaration, which  
9 is attached to our reply brief, my client, St. Vincent, is  
04:16:44 10 already dealing with employees who are leaving because they  
11 don't know if the agency is going to be open after  
12 September 30th. They are dealing with foster and adoptive  
13 families coming to them wondering what's going to happen and if  
14 they are going to continue to have this agency there to serve  
04:16:58 15 them. And so time is of the essence for my clients, and I'm  
16 concerned about the delays, unnecessary delays that would be  
17 created if we were to have to have an evidentiary hearing on  
18 this.

19           I identify three things that the State is saying it  
04:17:12 20 wants to dispute. Number one, on the question of the standing  
21 of the plaintiffs, I'm not familiar with a case where we've had  
22 an evidentiary hearing on plaintiffs' standing. That's  
23 generally judged with regard to the Complaint. But I'd also  
24 note that in their motion --

04:17:26 25           *THE COURT:* I heard him say he was going to

04:17:28 1 recharacterize that as a legal point anyway, so I thought he  
2 was taking that off the table.

3 *MS. WINDHAM:* All right. With regard to this issue  
4 of child-placing agencies versus nonchild-placing agencies, I  
04:17:40 5 believe that that is a legal point. Are the nonchild-placing  
6 agencies relevant to whether the State's policies are neutral  
7 and generally applicable under the Free Exercise Clause? I  
8 believe they are. Because if this is an important goal the  
9 State has, then the question becomes are they actually applying  
04:17:57 10 it across the board? If they are allowing others who serve  
11 children in the child welfare space to violate that. And I  
12 have not seen in any of their four affidavits that they filed  
13 any evidence -- any argument on that other than the idea that  
14 these are just not child-placing agencies. If they are  
04:18:14 15 allowing agencies to depart from that standard, then it's not a  
16 neutral and generally applicable standard.

17 Number 2, they say that child-placing agencies, even  
18 if they specialize, are still required to follow the  
19 nondiscrimination provisions. However, again, in their four  
04:18:32 20 affidavits they filed they have not identified any  
21 investigations that they have undertaken with regard to those  
22 agencies nor any sort of statewide communications and training  
23 for employees of the sort that they are doing right now to try  
24 and make sure that religious agencies are complying with the  
04:18:50 25 State's policy.

04:18:52 1 And on the first one, on the question of when the  
2 policy changed, I agree the policy is unconstitutional whether  
3 it's an old policy or a new policy. But, again, we have the  
4 State's representations that it made in federal court where it  
04:19:04 5 admitted for many years some private child-placing agencies  
6 that provide foster care and adoption services under contract  
7 with the State operate in accord with their religious beliefs,  
8 a practice now permitted expressly in law by PA 53. So the  
9 State has acknowledged that it was aware of these agencies'  
04:19:22 10 practices, that it continued to contract with them and  
11 permitted them to operate.

12 Now we know through the State's written statements  
13 and documents that it is taking a position that what those  
14 agencies are doing is improper, violates their contracts, and  
04:19:35 15 that the State can now penalize them under the law. That is a  
16 targeted action in violation of the Free Exercise Clause, and I  
17 believe it's clear from the papers what the State has done  
18 here. And so I don't believe that any further factual  
19 development is necessary in order to establish a violation of  
04:19:51 20 the Free Exercise Clause or of the Free Speech Clause.

21 *THE COURT:* All right. Do you want to respond at  
22 all? And I guess the point would be if the plaintiff is saying  
23 "We think we make our burden of proof on the written record"  
24 and you think otherwise, don't you already through your own  
04:20:14 25 arguments and submissions have framed your position as you've

04:20:19 1 just outlined it? I mean, isn't that already there?

2           *MR. SMITH:* Yeah, I would have to concede that this  
3 is plaintiffs' motion. If they don't want an evidentiary  
4 hearing, I think that their opinion has some weight on that.

04:20:32 5 My thought is that in order for them to sustain their burden  
6 for what the Sixth Circuit has characterized as extraordinary  
7 relief, they need to put on some more proofs. Particularly  
8 they plaster over the distinction between CPAs and non-CPAs.  
9 Your Honor, they have a different set of rules and they don't  
04:20:54 10 have the same contracts. They are not comparable. And I do  
11 think that's a fact issue.

12           Second, they have no evidence -- they have the burden  
13 of proof. They have said that the State has offered no  
14 evidence that we apply this uniformly. Well, we have. This  
04:21:11 15 clause was enforced in 2017 and 2018 against Catholic Charities  
16 West Michigan. They agreed to a corrective action plan. It  
17 was enforced against them. As stated in the affidavits, the  
18 Du -- or excuse me -- the St. Vincent and the Bethany  
19 investigations were not released because of the then-pending  
04:21:33 20 litigation. The St. Vincent investigation still has not been  
21 released because shortly after the Dumont case was concluded  
22 this case was filed.

23           *THE COURT:* All right. When you say as stated in the  
24 affidavits --

04:21:49 25           *MR. SMITH:* Yes.

04:21:49 1           *THE COURT:* -- you're telling me it's already in  
2 front of me, right?

3           *MR. SMITH:* Yes. Yes. There are details regarding  
4 the Catholic Charities West Michigan investigations, and there  
04:21:58 5 are also some statements regarding the two Bethany  
6 investigations and the St. Vincent investigation, Your Honor.

7           *THE COURT:* All right. From the plaintiffs' point of  
8 view are you willing to live with that, or do you feel like you  
9 need to cross-examine that to make your case on the preliminary  
04:22:14 10 injunction?

11           *MS. WINDHAM:* Your Honor, I believe that what the  
12 Court has in front of it is sufficient to make a determination  
13 on the preliminary injunction.

14           *THE COURT:* All right. Let's say we go forward, we  
04:22:26 15 have a preliminary injunction hearing, whether it's evidentiary  
16 or otherwise for now, I make my decision, whichever way it  
17 comes out, you know, I would expect whoever loses to appeal. I  
18 mean, that's what I would expect given the case so far and  
19 where I would think it's going. Maybe I'm wrong. But talk to  
04:22:46 20 me about what you envision after that in this court, if  
21 anything, before we hear from the Court of Appeals.

22           You know, if I grant the injunction and the State  
23 appeals, is there anything either side wants here by way of  
24 discovery and litigation? Or vice versa, if I deny the  
04:23:02 25 injunction and you appeal at the plaintiffs' table, anything

04:23:05 1 that needs to be done here by way of discovery or otherwise?  
2 Or does everybody think the most likely pattern will be hold  
3 off until the Court of Appeals gives us an answer one way or  
4 the other? What's your thought on that at the plaintiffs'  
04:23:20 5 table?

6 *MS. WINDHAM:* Your Honor, I think that given the  
7 substantial guidance that we've received from the Court of  
8 Appeals in that case that we would prefer to hold off on  
9 discovery until we see what the Court of Appeals says. If the  
04:23:34 10 preliminary injunction were denied, we might seek expedited  
11 consideration there so that we could mitigate the damage or try  
12 and minimize the damage to our client, but I don't see the need  
13 for discovery during that time period.

14 *THE COURT:* How about from the defense point of view?

04:23:50 15 *MR. SMITH:* Thank you, Your Honor. I would have to  
16 confer with my clients on that. I would be inclined to say  
17 that my clients are unlikely to want discovery during that  
18 period, but I can't really state that right now. That is  
19 something I would have to confer with them on.

04:24:02 20 But I would say that the motion to transfer and, of  
21 course, the motion to intervene would be important things that  
22 should be decided as well, Your Honor.

23 *THE COURT:* Okay. So far on these issues is there  
24 anything the proposed intervenors want to amplify or change?  
04:24:22 25 And I don't know if it's going to be Ms. Ostrander [sic] or

04:24:25 1 somebody else.

2 *MS. COOPER:* Your Honor, I haven't made my  
3 appearance. I'm Leslie Cooper with the ACLU.

4 *THE COURT:* All right.

04:24:32 5 *MS. COOPER:* Also for the proposed intervenors. I  
6 think the only thing we'd want to add here is that I think that  
7 the motion for preliminary injunction could be decided without  
8 any evidence because we think that it fails on likelihood of  
9 success on the merits and there's no need to put in any  
04:24:47 10 evidence.

11 However, if the Court were to engage in the balance  
12 of equities question, there are significant disputes about the  
13 impact on children should the State be forced to allow  
14 discrimination by government-contracted child-placing agencies.

04:25:07 15 The plaintiff suggests that allowing agencies to discriminate  
16 against qualified parents will get more qualified parents for  
17 children. We've put in an expert declaration that explains why  
18 discrimination in the public child welfare system is contrary  
19 to professional standards and acts as a deterrent to families  
04:25:29 20 coming forward and reduces children's chances of having a  
21 loving home. So that issue, if it does get to the balance of  
22 equities, I think there's a very serious dispute of fact.

23 I would just add, just because there was a lot of  
24 discussion before about child-caring agencies versus  
04:25:50 25 child-placing agencies, and I do think that we know that from

04:25:54 1 Lukumi that the question --

2 *THE COURT:* From what? Say again.

3 *MS. COOPER:* From the Lukumi case, Church of Lukumi,  
4 that the question is whether the government allows exceptions  
04:26:05 5 that would undermine the same interests they are asserting.  
6 And here the State has a number of reasons for requiring  
7 nondiscrimination by foster care agencies, and one of those  
8 very profound reasons is to ensure that all available families  
9 are accepted for the children who desperately need them.

04:26:23 10 Child-caring institutions that are specializing in  
11 serving particular populations of children, allowing that does  
12 nothing to undermine the State's interest in requiring agencies  
13 that are doing foster care not to discriminate against  
14 prospective families to care for those children. So I would  
04:26:41 15 just flag that I think the facts of whether those agencies that  
16 are child-caring agencies are allowed to focus on certain  
17 classes of children or not does not at all undermine the  
18 State's interest in requiring foster care agencies to accept  
19 all qualified families. So I just think that does not really  
04:27:00 20 require an evidentiary hearing.

21 *THE COURT:* All right. Thank you.

22 Mr. Bates, from the federal government's perspective?

23 *MR. BATES:* Thank you, Your Honor. So given our  
24 posture in this case --

04:27:12 25 *THE COURT:* Hold on just a second.

04:27:12 1

(A cell phone was going off in the courtroom)

2

*THE COURT:* All right. Go ahead, Mr. Bates.

3

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04:27:29 5

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*MR. BATES:* Given the federal defense posture in this case and the legal arguments that are relevant to our presence, we don't believe that an evidentiary hearing is necessary for the arguments relevant to us.

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And in terms of discovery following a decision by the Court, we don't currently plan to seek discovery in this case, and so we would not in that instance either.

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*THE COURT:* Okay. Thank you.

So let me move to the transfer issue. I appreciate the parties completing their briefing. I usually like to deal with things like a transfer or an intervention motion at a Rule 16, and because we've been in trial for our second week now, I really haven't had time to get to the point where I'm ready to give you a ruling today. But since you're here, I do want to just give each of you a chance to encapsulate your position. Give me your best five minutes so I understand what I need to focus on when I get to the briefing. And let me just start with the State defendants on that on the motion to transfer. And I'm focusing more on the transfer than the dismissal aspects of it. I know we have a subject matter issue too, but focusing on the transfer.

24

04:28:35 25

*MR. SMITH:* Thank you, Your Honor. And I will give you significantly less than five minutes, I hope.

04:28:38 1           *THE COURT:* Okay.

2           *MR. SMITH:* I think the key here is this case grows  
3 out of the Dumont case. The Dumont case is more than just  
4 related litigation. It's all of the exact same parties, if you  
04:28:50 5 include the proposed intervenors, other than  
6 Attorney General Nessel, against whom we, of course, have  
7 stated there is no viable claim. So you have the same parties.  
8 You have the same issues. The CPA contracts, the  
9 constitutional issues raised by the plaintiffs. And the only  
04:29:06 10 new thing is the Dumont consent decree.

11           Now, Judge Borman stated in his order that he  
12 retained jurisdiction. I think that that is sufficient for  
13 this case to be transferred to Judge Borman who is very  
14 familiar with the issues. The issues were fully briefed in  
04:29:22 15 front of Judge Borman. They are very similar to the issues  
16 presented in this case. Judge Borman moved this case, I think,  
17 very quickly, including discovery.

18           Now, admittedly, we did not have the dispositive  
19 motions after discovery in front of Judge Borman, but I think  
04:29:37 20 he's very familiar with the case, he's very familiar with the  
21 record, and plaintiffs moved to intervene in that case because  
22 they said they wanted to protect their rights and more  
23 specifically because if there was a divergence in interests  
24 between the plaintiffs and the then intervening defendants in  
04:29:56 25 Dumont, between the State defendants and the intervening

04:29:59 1 defendants in Dumont, they wanted to be able to appeal and/or  
2 move to protect their rights. That when they had the ability  
3 to do that when that case was settled when that consent decree  
4 was entered, they didn't do that. They could have moved for  
04:30:11 5 reconsideration. They could have moved for relief from  
6 judgment. They could have simply appealed it.

7 To the extent that they are contesting that --

8 *THE COURT:* I guess part of their issue and part of  
9 the dispute between the sides on this is your reference to it  
04:30:27 10 as a consent decree. And it certainly wasn't a conventional  
11 consent decree with public notice and comment and the judge's  
12 imprimatur. It certainly got Judge Borman's dismissal. But --  
13 and certainly as between the settling parties he's retained  
14 jurisdiction to hear it. But what do you think makes it a  
04:30:50 15 consent decree as opposed to an order that I sign every day  
16 when the parties stipulate to settle and tell me to retain  
17 jurisdiction over the settlement agreement?

18 *MR. SMITH:* I think that was the intent, and that was  
19 the intent --

04:31:01 20 *THE COURT:* Well, wait, what was the intent?

21 *MR. SMITH:* For a consent decree, because that's why  
22 he retained jurisdiction.

23 *THE COURT:* Well, but I retain jurisdiction over  
24 private settlements all the time because the parties want to  
04:31:12 25 come back to where they settled the case. But if I do a

04:31:14 1 consent decree, there's usually public notice and comment and  
2 at a minimum some evaluation by the Court of the overall  
3 fairness. I didn't see that in the record. And I, again,  
4 haven't gone through everything, but . . .

04:31:27 5 *MR. SMITH:* You are correct, that is not in the  
6 record.

7 *THE COURT:* Okay.

8 *MR. SMITH:* And to the extent that those are very  
9 much procedural irregularities that make it different from any  
04:31:34 10 other consent decree, I think that those are issues that should  
11 be heard by Judge Borman. I mean, to the extent --

12 *THE COURT:* Well, Judge Borman is my friend. If I  
13 send him a 1,700-page file, he might not be anymore. Plus, I  
14 can't send it to him, you realize. I could only send it to the  
04:31:52 15 Eastern District, and then it would be up to whatever  
16 assignment they want to do.

17 *MR. SMITH:* It could go to any judge in the  
18 Eastern District. It's not directly sent to Judge Borman. I  
19 do understand that, Your Honor. And I do understand that if  
04:32:02 20 you send him a 1,700-page record, to the extent you like to  
21 golf with him, that might not happen this summer. So my  
22 apologies for that in advance. But I do believe to the extent  
23 that there are procedural irregularities that distinguish this  
24 from a consent judgment or even in fact -- or excuse me a  
04:32:17 25 consent decree -- prevent it from being seen as a consent

04:32:19 1 decree, that those are issues best heard by Judge Borman,  
2 Your Honor.

3 *THE COURT:* All right. From the plaintiffs'  
4 perspective do you want to give me your view on transfer? And  
04:32:29 5 I know you just filed your response I think fairly recently,  
6 but I've had a chance to skim it at least.

7 *MS. WINDHAM:* Certainly, Your Honor. First of all,  
8 this was not a consent decree. It doesn't say ordered and  
9 adjudged and decreed. Nothing in the language says it's a  
04:32:41 10 consent decree. Under the Sixth Circuit's binding decision in  
11 Pedreira a consent decree involves, yes, retained jurisdiction,  
12 but it also involves the court actually incorporating the body  
13 of the settlement agreement in its order. The Sixth Circuit's  
14 decision in the ReMax case says that merely using the language  
04:32:59 15 that Judge Borman used, which was submitted to him in the  
16 proposed order that the State proposed, merely using the  
17 language pursuant to the terms of a settlement agreement does  
18 not incorporate the terms of the agreement into the court's  
19 order. That's in the ReMax case.

04:33:13 20 The proposed intervenors here haven't called it a  
21 consent decree. The State's prior communications regarding the  
22 settlement didn't call it a consent decree. I think the law is  
23 abundantly clear in the Sixth Circuit that this was not a  
24 consent decree. And Judge Borman actually signed and entered  
04:33:27 25 that dismissal order within an hour of receiving it. He

04:33:31 1 certainly is familiar with the procedures for a fairness  
2 hearing and what would be involved in a consent decree.  
3 Without that argument, the State doesn't really have anything  
4 to say on venue.

04:33:41 5 Section 1391(e) governs venue. In cases involving  
6 federal defendants it must be filed in the jurisdiction where  
7 the plaintiff resides. Of course, all the plaintiffs here  
8 reside in the Western District, so do the State defendants, so  
9 do the proposed intervenors. And the State's only argument on  
04:34:03 10 that is they have said, well, it could be a jurisdiction where  
11 a defendant resides. But the law on that -- and we've cited  
12 the cases in our briefing -- indicates that a defendant there  
13 actually refers to a federal defendant. They reside in  
14 Washington, D.C., not the Western [sic] District of Michigan.

04:34:18 15 Even if the federal defendants were not in the case,  
16 venue would still be improper here because all of the parties  
17 here reside in the Western District. And the State has only  
18 offered argument with regard to Defendant Nessel.  
19 Defendant Nessel resides in the Western District. The seat of  
04:34:37 20 state government is in Lansing. The Attorney General's Office  
21 is in Lansing. And the Sixth Circuit has held twice that the  
22 state government resides in the district encompassing the state  
23 capitol. That was the O'Neill v. Battisti case where they made  
24 that ruling with regard to Ohio. And also in the Northern  
04:34:55 25 Kentucky Welfare Rights v. Wilkinson case where they made that

04:34:59 1 determination with regard to Kentucky. And so the State really  
2 doesn't have anything here to contravene that. They do cite a  
3 case Bay County, but that is a nonbinding Eastern District of  
4 Michigan case that was relying on some other venue provisions  
04:35:15 5 as well. And so this case cannot be transferred to the  
6 Eastern District because this case could not have been brought  
7 in the Eastern District.

8 Even if it could have been, all of the factors, both  
9 the private interest factors and the public interest factors,  
04:35:31 10 favor this case being heard here. All of the parties except  
11 the federal defendants are located in the Western District.  
12 The evidence is here. The depositions would be here. Access  
13 and ease to -- relative ease of access to the sources of proof,  
14 availability of process isn't really an issue, cost of  
04:35:55 15 obtaining witnesses, all of these favor this case being heard  
16 in the Western District.

17 And if you look at the public interest factor, it's  
18 talking about the enforceability of the judgment. Practical  
19 considerations affecting trial management. The judgment is  
04:36:08 20 most enforceable in the district where all of the parties  
21 except the federal defendants reside.

22 The State hasn't really made an argument that any of  
23 these factors favor the Eastern District, merely that some  
24 factors might still be permissible in the Eastern District.  
04:36:25 25 None of this is enough to rebut the plaintiffs' choice of forum

04:36:31 1 which under the law is to be given paramount consideration on  
2 these issues.

3 *THE COURT:* All right. Thanks.

4 Do you want to respond particularly to the things  
04:36:38 5 other than the consent decree that came up?

6 *MR. SMITH:* Yes.

7 *THE COURT:* Go ahead.

8 *MR. SMITH:* Very briefly, Your Honor. I think that  
9 they mischaracterized the defendants' presence -- or excuse  
04:36:48 10 me -- residence as being only in the Western District. These  
11 are State officials sued in their official capacity. They have  
12 offices throughout the State of Michigan.

13 Attorney General Nessel, for instance, has an office  
14 in Detroit. Director Gordon, Ms. Chang all have offices in  
04:37:03 15 Detroit. The Department of Health and Human Services has an  
16 office in every county. So these are individuals in their  
17 official capacity whose presence is, quite frankly, throughout  
18 the State of Michigan.

19 *THE COURT:* You want to be careful where you go with  
04:37:16 20 that argument because you could wind up on that theory being  
21 sued in Antrim County for every single state case. Do you  
22 really want that?

23 *MR. SMITH:* We -- at least in the federal -- in  
24 federal courts, Your Honor, we are sued throughout the state.

04:37:31 25 *THE COURT:* Well, I'm not talking about that. I

04:37:34 1 mean, if your theory is the State resides in every county so  
2 every county is a fair place to go, you've got to deal with the  
3 reality of state litigation too, and I don't know if you really  
4 want the State exposed to official litigation in every county  
04:37:47 5 in the state as opposed to Ingham County.

6 *MR. SMITH:* Most of the cases against the State  
7 wherever they arise will go to the Court of Claims which has  
8 jurisdiction over most claims against the State. So even if a  
9 case arises in Antrim County, typically that would be brought  
04:38:02 10 in the Court of Claims, which would be --

11 *THE COURT:* Well, I know where it's typically  
12 brought, I'm just talking about the implications of your  
13 argument. That simply because the State has an office in a  
14 county that's an appropriate venue or place for suit.

04:38:13 15 *MR. SMITH:* The Department of Health and Human  
16 Services is typically sued based on the county offices, just as  
17 the Department of Corrections is often sued based on where the  
18 prisons are located, Your Honor, so I do understand that.

19 *THE COURT:* All right. Anything else from your  
04:38:27 20 perspective on transfer? That you want to highlight. I mean,  
21 I realize you've all got briefing.

22 *MR. SMITH:* Yes. And I have reviewed their filings.  
23 They make a very technical argument based on the statute. They  
24 cite a lot of cases. Now, I will point out that that statute  
04:38:42 25 was amended in 2011 and a lot of the cases they cite predate

04:38:45 1 that amendment so very well could be based on that. But I  
2 think in terms of at least the State defendants, very much they  
3 reside in the Eastern District and the Western District, and I  
4 don't think it causes any harm to any of the potential  
04:39:01 5 witnesses to have it transferred.

6 And as for Secretary Azar and the federal Department  
7 of Health and Human Services, once again, I mean, I think that  
8 their official residence may be in D.C., but they in fact as  
9 officers of the United States practice business throughout the  
04:39:20 10 United States. So, yes, I think that they could be sued in the  
11 Eastern District, Your Honor.

12 *THE COURT:* All right. Mr. Bates, do you want -- I  
13 don't know if you have a dog in this fight or not.

14 *MR. BATES:* Thank you, Your Honor. We have not taken  
04:39:32 15 a position on this motion. As you know, our position is we  
16 don't belong in this case and that sort of the factual issues  
17 at the heart of this case don't really implicate us in terms of  
18 discovery. So we haven't taken a position on the motion.

19 I would just note for the information of the Court  
04:39:48 20 that the federal defendants do agree with the plaintiffs that  
21 the federal defendants do not reside in the Eastern District.

22 *THE COURT:* All right. Thank you.

23 Do either of the proposed intervenors want to add  
24 anything? I know you've asked not just to intervene but to  
04:40:02 25 intervene and transfer.

04:40:05 1 *MS. OSTRAGER:* Yes. Thank you, Your Honor.

2 From the proposed intervenors' perspective, the two  
3 issues are actually very closely related. In the Dumont  
4 litigation the Buck plaintiffs represented to Judge Borman that  
04:40:16 5 if they were not allowed to intervene in the Dumont litigation,  
6 their right to separately litigate their interests would be  
7 cold comfort. The Buck plaintiffs had ample, you know, legal  
8 recourse to protect their interests in the Dumont case once  
9 they knew that the State and the Dumonts were in settlement  
04:40:37 10 discussions and even after the settlement agreement was  
11 executed, but they didn't do that, they instead did sort of an  
12 end-run around the Eastern District, filed this new action in  
13 this court. And because of all of the briefing and discovery  
14 that took place in the Eastern District, we think that, you  
04:40:59 15 know, this type of end-run is unnecessarily duplicative and not  
16 an efficient use of court or party resources and also that the  
17 plaintiffs' choice of forum here should not be given the type  
18 of substantial weight that it might be given in an ordinary  
19 case where we didn't have this original litigation in the  
04:41:21 20 Eastern District.

21 In terms of, you know, the intervention interests,  
22 it's clear that the motion is timely, that the Dumonts have a  
23 substantial legal interest in this action not only because of  
24 the settlement agreement but also because their constitutional  
04:41:39 25 rights are at stake in this new litigation and may be impaired

04:41:45 1 without the opportunity to intervene as, you know, the  
2 resolution of this case could leave the State with inconsistent  
3 obligations to the Dumonts and St. Vincent and could preclude  
4 the Dumonts from enforcing the settlement agreed to in exchange  
04:42:02 5 for the dismissal with prejudice of their constitutional  
6 claims.

7 No other party in this case adequately represents the  
8 Dumonts' interests because the State has not made all of the  
9 constitutional arguments that the Dumonts would raise and in  
04:42:17 10 fact has made certain different arguments than we would make on  
11 behalf of the Dumonts.

12 In terms of venue, plaintiffs' position is not  
13 correct because the venue statute as amended by the federal  
14 court's Jurisdiction and Venue Clarification Act of 2011 says  
04:42:40 15 that a case can be brought anywhere in which a defendant is an  
16 officer or employee of the United States or an agency thereof,  
17 may be brought in any judicial district in which the defendant  
18 resides. And until 2011 with that act there wasn't any  
19 statutory guidance for what that meant, but in 2011 Congress  
04:43:04 20 amended the venue statute and 1391(c) which formerly defined  
21 residence only for corporate defendants, was amended to provide  
22 in relevant part that for all venue purposes an entity with the  
23 capacity to sue and be sued, whether or not incorporated, shall  
24 be deemed to reside if a defendant in any judicial district in  
04:43:28 25 which such defendant is subject to the court's personal

04:43:32 1 jurisdiction. So 1391(c) defines residence for all venue  
2 purposes, including for purposes of determining where a federal  
3 government agency resides under 1391(e), and plaintiffs don't  
4 cite any case after 2011, so all of the cases that they do cite  
04:43:51 5 are inapposite because they refer to the unamended statutory  
6 text.

7 I think just -- you know, I think because of the  
8 original procedural history plaintiffs should not be permitted  
9 to dodge the earlier action and essentially, you know, attack a  
04:44:18 10 settlement agreement. We don't think it matters that the  
11 settlement agreement is not a consent decree for purposes of  
12 the transfer or the intervention analysis because the  
13 settlement agreement reflects, you know, a procedural history  
14 in which there was an adjudication of a motion to dismiss that  
04:44:39 15 was denied and the settlement agreement reflects that the  
16 parties dismissed their constitutional claims in exchange for  
17 that agreement. In the context in which the plaintiffs here  
18 intervened in that action because they recognized that that  
19 litigation and subsequent settlement affected their legal  
04:45:02 20 rights.

21 *THE COURT:* All right. That went a little beyond the  
22 transfer, but that's where I was going next anyway on the  
23 intervention.

24 Do you want to address the plaintiffs' position on  
04:45:14 25 that?

04:45:16 1           *MS. WINDHAM:* Certainly, Your Honor. If I can say  
2 just very briefly on venue, and my colleague here is prepared  
3 to address the intervention, the relevant statute is 1391(e)  
4 when we're talking about federal defendants. I'll note the  
04:45:31 5 citation we had to Wright & Miller discussing this thing that  
6 it applies only to proper federal defendants and was not  
7 intended to allow a federal agency or official to be sued in  
8 any judicial district in which a nonfederal defendant might  
9 reside. That's a reference to the 2011 amendment.

04:45:47 10           With regard to the prior litigation, you see the  
11 proposed intervenors are not arguing this as a consent decree.  
12 St. Vincent, the Buck family, and Ms. Flore intervened there to  
13 try and protect their rights. They were part of that case.  
14 They were trying to persuade the court to protect their rights.  
04:46:05 15 Instead the state and the plaintiffs there decided to enter  
16 into a private out-of-court settlement agreement. Neither of  
17 them asserted any claims against my clients, and my clients did  
18 not assert any claims against them. Everyone you see in this  
19 courtroom today except the federal defendants is based in the  
04:46:21 20 Western District. My clients were well within their rights to  
21 choose to litigate their claims against the State based on  
22 their relationship with the State, which happens in Lansing in  
23 the Western District, and I've heard nothing here from the  
24 other side that would change that analysis.

04:46:38 25           I'll allow my colleague to respond on the motion to

04:46:40 1 intervene.

2 *THE COURT:* All right. Mr. Reaves.

3 *MR. REAVES:* Thank you, Your Honor. I'd like to turn  
4 mostly to the interests that the proposed intervenors allege in  
04:46:49 5 this litigation. Proposed intervenors are two private  
6 individuals who are seeking to enforce a state policy, and  
7 that's a really unusual situation. They claim both a  
8 contract-related interest and they claim a stigmatic or  
9 practical harm. And I'll address those both very briefly.

04:47:10 10 On the contract claim, I believe that the Blount-Hill  
11 and the U.S. versus Tennessee cases are most relevant. In  
12 those cases the Sixth Circuit found that contracts which were  
13 directly affected by a court order in a subsequent case did not  
14 give the proposed intervenors a sufficient interest to  
04:47:28 15 intervene in the underlying litigation. And I believe that's  
16 similar to the situation here, Your Honor. The private  
17 out-of-court settlement agreement that they entered into does  
18 not give them the right to go around as private attorneys  
19 general in the state enforcing the state's own policies.

04:47:48 20 On the second interest they claim, I think the  
21 roundabout way in which they describe it is -- it kind of gives  
22 away the fact that it's not really a direct interest. The  
23 quote from their other interest is that the Dumonts would be  
24 subjected to the practical and stigmatic injuries of having to  
04:48:04 25 pursue their desire to adopt a child from the foster care

04:48:07 1 system in a system in which agencies may discriminate against  
2 them. That really is the textbook definition of a generalized  
3 interest. They haven't put on any allegations of fact as to  
4 wanting to work directly with St. Vincent or adopt from  
04:48:23 5 St. Vincent. And I think that really distinguishes the Grutter  
6 case. Your Honor, in the Grutter case the proposed intervenors  
7 had either applied to or intended to apply to the University of  
8 Michigan for admission, and that's very different from here.  
9 Their interest is just a generalized interest in adopting a  
04:48:41 10 child from the state and that really doesn't get them a  
11 substantial legal interest in how St. Vincent contracts with  
12 the State of Michigan.

13 Turning to whether their interests are impaired, I  
14 think similarly they really focus on how this litigation would  
04:48:59 15 undermine their private contract with the State. But as  
16 explained above, it's simply not valid to the extent the  
17 contract is inconsistent with the law or the court order. And  
18 that's specifically stated in the settlement agreement,  
19 Your Honor. And I would also note that plaintiffs in this  
04:49:18 20 case, the Buck plaintiffs, who were intervenors in the prior  
21 case, are specifically excluded from the settlement agreement.  
22 The agreement says that we are not parties -- that my clients  
23 are not parties to that settlement agreement.

24 *THE COURT:* I guess the practical question for the  
04:49:33 25 plaintiff, Mr. Reaves, if you're prepared to have them here as

04:49:39 1 amicus, what do you lose by having them here as parties if they  
2 want to be here as parties?

3 *MR. REAVES:* Your Honor, I think that really goes to  
4 the last factor I was going to address, which is whether there  
04:49:51 5 is an adequate alternative representation. And the only  
6 interest -- or the only thing they can add to the case, I  
7 believe, is their --

8 *THE COURT:* What do you lose? That's the practical  
9 question.

04:49:59 10 *MR. REAVES:* Right.

11 *THE COURT:* So if they are here as parties, how does  
12 it hurt you?

13 *MR. REAVES:* I think if we were to go through  
14 discovery -- and I know we had some discussion about that  
04:50:06 15 earlier -- but I think if this case were to go through  
16 discovery, there would be no need to allow them to be involved  
17 and take depositions, present -- you know, take discovery,  
18 present evidence, and things like that. I think the  
19 Blount-Hill case is a good example. There the court said that  
04:50:20 20 the proposed intervenors offered nothing to indicate that their  
21 contributions would add a unique value to the case. And, you  
22 know, I think if they were to intervene in perhaps a more  
23 limited sense to present legal arguments, that could be  
24 amenable to plaintiffs, but we don't think their full  
04:50:36 25 participation in the case is necessary.

04:50:38 1           The other component of this, Your Honor, is that the  
2 State is obligated, you know, by its contract with the proposed  
3 intervenors to defend their interests, so we don't think  
4 there's much daylight between those two parties.

04:50:52 5           *THE COURT:* All right. And then the practical  
6 question for your side, Ms. -- is it Ostrager?

7           *MS. OSTRAGER:* Ostrager, yes, Your Honor.

8           *THE COURT:* -- Ostrager, I'm sorry -- is what do you  
9 gain by being parties that you don't get by being here as  
04:51:05 10 amicus and arguing like you are right now?

11           *MS. OSTRAGER:* Well, a lot, Your Honor, because we  
12 wouldn't be able to, for example, take depositions. We would  
13 not be able to appeal an adverse ruling in this case. We  
14 wouldn't be able to participate as parties in the litigation.  
04:51:21 15 And we wouldn't be able to introduce or take expert testimony.  
16 And fundamentally, the relief that the Buck plaintiffs seek  
17 here, the right to obtain state funding to provide child  
18 welfare services and then employ religious eligibility criteria  
19 to exclude otherwise qualified same-sex couples, is exactly  
04:51:43 20 what was challenged in the Dumont litigation and Judge Borman  
21 determined in rejecting the motion to dismiss that the State's  
22 practice of permitting that kind of conduct constituted a  
23 cognizable injury in fact to Kristy and Dana Dumont, which is  
24 actually more than what is required to show an interest for the  
04:52:05 25 purposes of intervention.

04:52:07 1 Judge Borman found that the Dumonts plausibly alleged  
2 both stigmatic and practical barrier injuries-in-fact for the  
3 First Amendment because they had personally encountered unequal  
4 treatment at the hands of St. Vincent. And the plaintiffs are  
04:52:24 5 just wrong that evidence was required to be submitted in  
6 connection with the intervention motion, but not withstanding  
7 that fact we did put in a proposed reply with an affidavit from  
8 our clients indicating that they are continuing to try to  
9 foster or adopt and that they would seek to engage with  
04:52:49 10 St. Vincent but for the fact that that agency has already  
11 indicated and continues to indicate through this litigation  
12 that they would not work with them.

13 As a matter of law, you know, cases in this district  
14 and in this circuit say that there's no evidence required to  
04:53:07 15 support factual allegations in a motion to intervene and that  
16 the court should accept the nonconclusory allegations set forth  
17 by the movant as true. So it's not required, but it is part of  
18 the record in the Dumont litigation, and it is part of the  
19 Complaint in the Dumont case.

04:53:26 20 As to plaintiffs' argument that, you know, other  
21 parties adequately represent the Dumonts' interests, that is  
22 also just wrong. The Dumonts meet their minimal burden of  
23 showing that their substantial legal interests may be impaired  
24 if intervention is denied. The Dumonts' interests in  
04:53:47 25 preserving their settlement agreement and in avoiding further

04:53:50 1 constitutional injury can be impaired without further  
2 intervention -- without intervention because the plaintiffs  
3 here are challenging their settlement agreements which were  
4 dismissed in exchange for the relief that they sought. And  
04:54:06 5 even though Jansen in the Sixth Circuit did involve a consent  
6 decree, which is different than our case, the principles of  
7 that case are equally relevant here because it stands for the  
8 proposition that it could leave a party with, you know, an  
9 inability to vindicate its rights if they are not part of the  
04:54:27 10 other litigation.

11           There's no actual requirement that the Dumonts show  
12 that their interests will be impaired, only that they may be  
13 impaired. And that's, you know, clear from the Grutter  
14 decision. And it's also clear that the State is not going to  
04:54:49 15 make all of the arguments that intervenors propose to make.  
16 The Dumonts have, for example, argued that allowing  
17 state-contracted taxpayer-funded child-placing agencies to  
18 exclude same-sex couples based on religious grounds violates  
19 the Establishment and Equal Protection Clauses of the  
04:55:07 20 First Amendment. The State does not make those constitutional  
21 arguments and argued only that plaintiffs' Free Exercise and  
22 Free Speech claims are meritless. I mean, in other words, the  
23 State's position is it doesn't have to contract with  
24 St. Vincent, but the Dumonts' position is that it can't  
04:55:27 25 contract with them if that agency is going to discriminate

04:55:29 1 against qualified same-sex couples.

2 In the alternative, permissive intervention is  
3 plainly warranted here. That rule, 24(b), requires only that a  
4 prospective intervenor's claim or defense share a common  
04:55:49 5 question of law or fact with pending litigation and won't  
6 unduly delay the adjudication of the rights of the original  
7 parties. We are prepared to proceed on whatever schedule is  
8 ordered by the Court, and I've already put in an answer, a  
9 proposed opposition to the preliminary injunction motion and  
04:56:10 10 our transfer motion. And the Buck plaintiffs and the Dumonts  
11 both raise claims and defenses about whether the First, Fifth,  
12 and Fourteenth Amendments to the Constitution require the state  
13 to permit state-contracted child-placing agencies to violate --  
14 you know, whether the state is allowed to or must violate its  
04:56:36 15 nondiscrimination requirements in its contracts. And there's  
16 no reason that the Court shouldn't at least at a minimum grant  
17 permissive intervention.

18 *THE COURT:* Does Mr. Bates for the federal government  
19 have a position on this?

04:56:55 20 *MR. BATES:* We have not taken a position on this  
21 motion, Your Honor. We don't believe that we're proper parties  
22 in this suit, so if another party wants to join, we don't  
23 really have a dog in that fight.

24 *THE COURT:* All right. All right. Let me circle  
04:57:06 25 back to the preliminary injunction hearing. If it's going to

04:57:10 1 be here, and we talked about evidentiary hearing or not, does  
2 either side need or believe they need more information from the  
3 other side before the hearing? Regardless of whether it's  
4 evidentiary or not. Are you thinking you need anything else at  
04:57:27 5 the plaintiffs' table?

6 *MS. WINDHAM:* No, Your Honor.

7 *THE COURT:* And defense?

8 *MR. SMITH:* No, Your Honor.

9 *THE COURT:* All right. And I'll just give each side  
04:57:35 10 a few minutes if you want to sum up anything that you haven't  
11 had a chance to say yet today, and then my plan will be to deal  
12 with the intervention and transfer issues as fast as I can and  
13 then make a call on the preliminary injunction issue, if the  
14 case stays here, on whether it ought to be evidentiary or not  
04:57:56 15 and send out a scheduling order if it's going to be here.

16 Hopefully sometime -- we'll give everybody time for preparation  
17 and for decision before hard deadlines. But let me hear if  
18 there's anything else somebody wants to summarize from their  
19 position starting with the plaintiff.

04:58:19 20 *MS. WINDHAM:* Certainly, Your Honor. I just want to  
21 emphasize that the plaintiffs here are asking for something  
22 very simple. They are asking to be able to continue the same  
23 religious exercise and the same service to children and  
24 families in Michigan that they have been carrying out for  
04:58:32 25 decades under the same terms they have been carrying it out for

04:58:36 1 decades.

2 Right now the State is saying that it is going to  
3 penalize them, that it is going to end its contractual  
4 relationship with St. Vincent. Shutting down -- which would  
04:58:46 5 effectively shut down St. Vincent's long-standing adoption and  
6 foster care ministries and would deprive the Buck family and  
7 Ms. Flore of their ability to receive ongoing support and to  
8 continue to serve others together with St. Vincent. So that's  
9 why we've asked that this Court enter a preliminary injunction  
04:59:05 10 and also that it move expeditiously in doing so because the  
11 effects of the State's unlawful action are already being felt.  
12 We've already had two employees depart St. Vincent because they  
13 don't know if their jobs are going to be here this fall. We  
14 have families who are coming to them and wanting to know what's  
04:59:24 15 going to happen and whether there's going to be more disruption  
16 for the children who they are caring for who have already faced  
17 a great deals of disruption in their lives. So that's why  
18 we've asked this Court to go ahead and rule on the preliminary  
19 injunction.

04:59:37 20 With regard to the intervention and venue, I believe  
21 we've covered that and we've covered that extensively,  
22 particularly in our briefing, but I would just note once again  
23 that venue was not proper in the Eastern District under the law  
24 under the federal venue statute, so it could not be transferred  
04:59:52 25 there. Even if this Court were to consider transferring venue

04:59:56 1 there, all of the transfer factors actually favor this case  
2 being heard in the Western District where everyone in this room  
3 except the federal defendants reside.

4 *THE COURT:* All right. Thank you.

05:00:08 5 Mr. Smith.

6 *MR. SMITH:* Thank you, Your Honor. Very briefly.  
7 And let me preface this by stating I was a half-hour late. I  
8 very much apologize for that, Your Honor. I can only accept  
9 responsibility for that lateness. I appreciate your indulgence  
05:00:20 10 in hearing from me and allowing me to present my arguments.  
11 You certainly would have been well within your rights not  
12 allowing me to do so. So please accept my apologies. And to  
13 everybody in the courtroom who I kept waiting, that is  
14 unprofessional, and I apologize for it.

05:00:35 15 *THE COURT:* Thank you.

16 *MR. SMITH:* And I will briefly summarize my case.  
17 Essentially, I think, to recharacterize what plaintiffs are  
18 asking for, they are asking to breach the contracts that they  
19 agreed to with the State of Michigan in order to discriminate  
05:00:50 20 based on sexual orientation. That's what they are asking to  
21 do. And if you look at the case law on this that is very, very  
22 recent, if you look at the Fulton case from the  
23 Eastern District of Pennsylvania and from the Third Circuit in  
24 a very similar case and set of circumstances, that court, the  
05:01:09 25 district court, denied the preliminary injunction and the

05:01:11 1 Third Circuit affirmed.

2 And if you look at an even more recent case, New Hope  
3 Family Services out of the Northern District of New York which  
4 was I believe about maybe six weeks old, the same result. The  
05:01:25 5 preliminary injunction was denied and ultimately the court  
6 granted the motion to dismiss by the state of New York. Very  
7 similar cases. Philadelphia had a nondiscrimination ordinance.  
8 The state of New York had a nondiscrimination regulation. Not  
9 a statute but a regulation. Here we have nondiscrimination  
05:01:43 10 clauses. Unlike those cases, these are clauses to which  
11 St. Vincent expressly agreed.

12 I don't think that they have the right to come into  
13 this Court, ask for the right to breach that contract in order  
14 to discriminate against people like the proposed intervening  
05:02:00 15 defendants.

16 And I also want to state in support of intervening  
17 defendants' motion to intervene, St. Vincent when they moved to  
18 intervene in Dumont argued that absent intervention they would  
19 bear the brunt of any relief granted by Judge Borman in that  
05:02:20 20 case. In this case the plaintiffs are asking families like the  
21 Dumonts to bear the brunt of any relief this Court grants. So  
22 at the very least I think the Dumonts need a seat at the table  
23 not just as potential witnesses called by the State but as  
24 actual parties so that they can have their counsel advance  
05:02:42 25 their interests. Because otherwise essentially what the

05:02:44 1 plaintiffs are asking for is for the Court identified in the  
2 Santa Fe Independent School District. They are asking to  
3 exclude the Dumonts and treat them like they are not full  
4 members of the community. So I think they have a right to be  
05:02:57 5 heard and that the Court should grant that motion. Thank you,  
6 Your Honor.

7 *THE COURT:* All right. From the federal government,  
8 anything you want to summarize? You are a party right now, so  
9 I'll give you -- even though you don't want to be, I know that.

05:03:11 10 *MR. BATES:* We are at present.

11 *THE COURT:* It's sort of ironic. They're not and  
12 they want to be and you're here and you don't.

13 *MR. BATES:* We're happy to just switch places.

14 Your Honor, this is a dispute between the plaintiffs  
05:03:20 15 and the State of Michigan. It's about contracts between the  
16 plaintiffs and the State of Michigan. It's about actions by  
17 the State of Michigan. It's about actions by plaintiffs. The  
18 federal defendants are not proper parties in this suit. We've  
19 explained in our brief in opposition to the preliminary  
05:03:31 20 injunction motion that there is no standing here, that the  
21 claims are not ripe, and we'll be happy to address those  
22 arguments further in a hearing on the preliminary injunction  
23 motion. Thank you.

24 *THE COURT:* Okay. And proposed intervenors, anything  
05:03:44 25 you want to summarize?

05:03:46 1            *MS. COOPER:* Yes, thank you. The plaintiffs say they  
2 are asking for something simple here. They are asking for  
3 something quite extraordinary and unprecedented. They are  
4 claiming a right to force the government to give them a  
05:03:53 5 taxpayer-funded contract to provide a government service even  
6 though they are unwilling to provide those services in the  
7 manner the State requires under its policy. That would cause  
8 serious harms to children and families, the families who are  
9 subjected to discrimination and denied the same options to be  
05:04:10 10 able to participate in the foster care system and the children  
11 who desperately need those families. But also the consequences  
12 of their claim are staggering and go well beyond that. You  
13 know, it would mean contracted agencies could opt out of any  
14 nondiscrimination requirement, whether it's about race, whether  
05:04:27 15 it's about religion, based on religious objections, or any  
16 other contract requirement that conflicts with their faith.  
17 And I just want to flag that, again, it's not such a simple  
18 little request they are making. It's 17 states and the  
19 District of Columbia filed an amicus brief in the Fulton case,  
05:04:43 20 the virtually identical case in the Third Circuit, raising  
21 concerns about their ability to continue working with the  
22 private sector in providing government services if the argument  
23 is accepted -- by the plaintiffs would be accepted. They said  
24 the state -- if state contractors are entitled to "tailor  
05:05:02 25 contractual requirements based on religious belief to serve

05:05:06 1 only those they choose in the particular manner that they  
2 choose, such a framework would at a minimum hinder and  
3 potentially preclude altogether government agencies' reliance  
4 on contractors to deliver services." So it's not such a simple  
05:05:19 5 little request they are making here.

6 On intervention I think counsel for the State said it  
7 very well, it would be astonishing on the one hand that the  
8 Buck plaintiffs argue that they had to intervene in the Dumont  
9 case to protect their interests but now when they are seeking  
05:05:35 10 to deny the Dumonts the protections that they procured to end  
11 discrimination against them and other prospective families  
12 headed by same-sex couples that they would deny them or oppose  
13 their right to intervene to protect their interests when they  
14 are trying to pull the rug out from under them.

05:05:54 15 And on the motion to transfer, I would just add that  
16 as has been said, the Buck plaintiffs represented to  
17 Judge Borman in the Eastern District that the reason they  
18 needed to be in that case was precisely to be able to appeal in  
19 the event that exactly what happened occurred, right? That the  
05:06:10 20 State and the plaintiffs were to resolve and settle the case.

21 After Judge Borman's ruling on the motion to dismiss  
22 which rejected their arguments along with the State's, they  
23 obviously revisited that decision about where they wanted to be  
24 and have attempted to bring that issue to this Court to roll  
05:06:28 25 the dice elsewhere. That feels like the worst kind of forum

05:06:32 1 shopping that is improper. Thank you.

2           *THE COURT:* All right. There was one other thing on  
3 my list that I was going to ask and forgot. I'm sorry. I know  
4 that the case originally filed in the Court of Claims that's  
05:06:46 5 really more focused on the state statute got removed up to the  
6 Eastern District. And I know somebody made me aware of that.  
7 I don't remember who filed that. But in capsule summary -- and  
8 I know each side has addressed this in their briefing -- in  
9 your view, what, if any, role does the Michigan statute have to  
05:07:11 10 play here and is there any reason to wait to see what happens  
11 in the Court of Claims case, wherever it winds up? Go ahead.

12           *MS. WINDHAM:* Yes, Your Honor. So I note the Court  
13 of Claims case was removed to the Eastern District. It's  
14 actually pending in front of Judge Hood, not Judge Borman. The  
05:07:27 15 State made the same claims it made here about having a ruling  
16 in front of -- its consent decree in front of Judge Borman and  
17 yet the case wasn't put in front of him, it's in front of  
18 Judge Hood. And in fact Catholic Charities of West Michigan,  
19 which I believe is based here in Grand Rapids, has filed a  
05:07:43 20 motion to transfer venue to the Western District. I think  
21 that's still in the early stages. I don't know exactly where  
22 that stands.

23           With regard to the state law, where I think the state  
24 law is important is in a couple of different aspects.

05:07:56 25 Obviously we're here in federal court. We're not suing state

05:07:59 1 defendants for failure to follow state law, we're suing them  
2 for failure to follow the Constitution.

3 In the state law Michigan made determinations  
4 regarding the benefit of having religious child welfare  
05:08:09 5 agencies and the fact that children and families benefit when  
6 these agencies are able to continue serving them pursuant to  
7 state contracts, that's actually in the state law, and says  
8 that they should be protected to the fullest degree afforded by  
9 the Constitution and laws. And so what the State is doing here  
05:08:27 10 is making an end-run around that state law.

11 Having that state law in place also differentiates  
12 this case pretty significantly from the Fulton case in  
13 Pennsylvania. And full disclosure, I'm also counsel in Fulton,  
14 and so I think the Third Circuit got it wrong, we're filing a  
05:08:45 15 cert petition, but even if you are persuaded by that case, a  
16 crucial part of the Third Circuit's decision there rested on  
17 the idea that Philadelphia had this policy and that they didn't  
18 know that anybody was violating it. I disagree, but that was  
19 what the Third Circuit rested its decision on.

05:09:04 20 Here the State went into federal court and said, "We  
21 know child-placing agencies have religious obligations. We  
22 know that they have religious rules that they have to follow,  
23 and we are required to accommodate them." Now they are in here  
24 saying the opposite, saying they cannot work with them, they  
05:09:20 25 cannot accommodate them. It's going to have a very serious

05:09:23 1 impact on child welfare agencies in Michigan, but also it  
2 demonstrates that what the State is doing here is something  
3 meaningfully different than what the Third Circuit said was  
4 happening in Fulton.

05:09:35 5 I would also note that here we are governed not by  
6 the Fulton case but by the Sixth Circuit's decision in Ward v.  
7 Polite which determined that when the state had an inconsistent  
8 policy and had been changing exactly how it handled exemptions,  
9 that that was not a neutral and generally applicable law that  
05:09:52 10 had to pass through scrutiny separately -- and this is an issue  
11 that Fulton sort of left over to the side -- they said that  
12 when there are individualized exemptions available from a  
13 policy, that that also triggers strict scrutiny, it is the  
14 antithesis of a neutral and generally applicable law.

05:10:09 15 Here the state, as we have cited in our briefing,  
16 does allow individualized exemptions. And so it's Ward v.  
17 Polite not Fulton that governs here. Thank you.

18 *THE COURT:* I guess one of the subsidiary questions I  
19 have on the state issue, certainly I don't have jurisdiction to  
05:10:25 20 tell a state official to comply with state law, that's not the  
21 federal court's role, but if through certification to the  
22 Michigan Supreme Court or otherwise Michigan authoritatively  
23 said, "State law protects you, plaintiffs," and I know the  
24 defense position is, you know, it doesn't, it's not applicable,  
05:10:47 25 do you have the same constitutional concern or are you

05:10:50 1 protected then by the state law?

2 *MS. WINDHAM:* Your Honor, with regard to -- with  
3 regard to the preliminary injunction motion, we believe that we  
4 still need an answer on that because that is going to take  
05:11:03 5 effect and the State's actions against my clients are going to  
6 take effect before you could get any sort of ruling from the  
7 Michigan Supreme Court.

8 Were the Court to rule that the State is bound to  
9 follow state law and actually has to respect the rights of  
05:11:19 10 religious agencies as it bound itself to do in 2015, that would  
11 certainly be a great benefit to my clients, and I think we  
12 would need to consider what impact this would have on this  
13 case. But my clients are here in federal court because they  
14 are all too aware of what can happen when they are jerked  
05:11:34 15 around this way and that by the vicissitudes of politics. And  
16 that's why they are here to try and vindicate their rights  
17 under the federal Constitution to ensure that they are just not  
18 going to be yanked away the next time we have an election.

19 *THE COURT:* State.

05:11:53 20 *MR. SMITH:* Thank you, Your Honor. In terms of the  
21 state laws, I think plaintiffs either misunderstand or  
22 mischaracterize it. The state statute at issue are very clear  
23 that the definition of services under those statutes does not  
24 include foster care case management or adoption services, first  
05:12:08 25 of all. That's the entire --

05:12:10 1

*THE COURT:* Well, services under contract.

2

*MR. SMITH:* Under contract, yes. Those are the

3

entire universe of contracted services that we're talking about

4

here. That is the subject matter of plaintiffs' Complaint.

05:12:23 5

Without those contracts, they don't have a relationship with

6

the State of Michigan. So those services are excepted from

7

that contract.

8

Second, when you look at what a referral means, a CPA

9

can refuse a referral --

05:12:39 10

*THE COURT:* Before you move on with that --

11

*MR. SMITH:* Yes.

12

*THE COURT:* -- and I understood from the briefing

13

that that was your position on the interpretation of the state

14

statute, but it at least seems to be true that the prior

05:12:49 15

administration saw that state law differently. And I guess we

16

know what the Attorney General's position is now. Is there any

17

daylight between her and the Governor? Because Michigan is one

18

of those states where the Governor and the Attorney General can

19

disagree.

05:13:03 20

*MR. SMITH:* I don't believe there's disagreement

21

between the Governor and Attorney General on this, Your Honor.

22

*THE COURT:* All right. Go ahead.

23

*MR. SMITH:* And a referral refers to a child. That

24

is, when Michigan has to take custody of a child because of the

05:13:15 25

failure of the biological parents or guardians, Michigan makes

05:13:18 1 a referral to a child-placing agency and the child-placing  
2 agency does not have to accept that referral. And that is what  
3 the statute says. That statute, however, does not allow a  
4 child-placing agency to discriminate against a prospective  
05:13:34 5 foster care family based on their sexual orientation or their  
6 marital status. And I think that we very much differ with the  
7 plaintiffs on that interpretation. And I think if it were --  
8 if the Michigan Supreme Court did take that up as a certified  
9 question, that it would very much agree with our position  
05:13:49 10 because that's simply in the plain language of the statute.

11 In terms of the Catholic Charities of West Michigan  
12 case that was removed to federal court, the fact that that is  
13 currently before Judge Hood does not mean that it might not be  
14 transferred to Borman. My understanding is that it was  
05:14:05 15 assigned to Hood because that's -- it's assigned on a random  
16 draw, but that Hood can make the decision in terms of whether  
17 that gets transferred to Borman or not. I don't know whether  
18 that will happen. I can't state that that will happen. But  
19 certainly the fact that it was initially assigned to Hood is  
05:14:22 20 not indicative that the Eastern District clerk didn't think  
21 that it was related to Dumont.

22 *THE COURT:* All right. Well, Chief Judge Hood is the  
23 chief judge there now, so she probably has some power to  
24 reassign things as a related case.

05:14:38 25 What if you're wrong about what the Michigan

05:14:39 1 Supreme Court says? Let's say down the road the Michigan  
2 Supreme Court says "That's not the way we see it. We think,  
3 rightly or wrongly, it compels protection for the plaintiffs'  
4 position." That certainly creates a constitutional question  
05:14:52 5 for the Dumonts, but what does it do for you?

6 *MR. SMITH:* Vis-a-vis this case I'm uncertain because  
7 the plaintiffs have raised constitutional challenges.

8 *THE COURT:* All right.

9 *MR. SMITH:* That would be something I believe we  
05:15:06 10 would certainly have to address in the Catholic Charities case,  
11 because they very much are bringing their case based on the  
12 Michigan statutes.

13 *THE COURT:* Okay. Thank you.

14 I'm sure the federal government has nothing to say on  
05:15:17 15 this issue, but if you do, I'm happy to listen.

16 *MR. BATES:* We have nothing to add, Your Honor.

17 *THE COURT:* Okay. Anything from the proposed  
18 intervenors?

19 *MS. COOPER:* Yes. Thank you. Of course we agree  
05:15:30 20 that the plain language of the statute carves out services  
21 under state contract of the type we're talking about here, but  
22 ultimately from our perspective -- and I think this may be what  
23 Your Honor was alluding to -- even if a court -- I think  
24 there's no need to wait on any determination or interpretation  
05:15:46 25 of that statute because it violates the Establishment Clause

05:15:51 1 for the State to authorize the use of religious criteria in its  
2 public child welfare system. Whether they are claiming to do  
3 it pursuant to a statute or pursuant to no statute, either way  
4 it's unconstitutional, so that would be an unconstitutional  
05:16:08 5 statute if it were interpreted that way. So I don't think  
6 there's any reason to wait on that.

7 And since plaintiffs' counsel sort of strayed beyond  
8 that question to address some questions in the Fulton case, I  
9 feel a need to respond. The Third Circuit did not say that --  
05:16:32 10 did not turn on -- the decision in Fulton did not turn on there  
11 being an existing nondiscrimination policy. In fact, they said  
12 the contract expired, we're talking about a new contract going  
13 forward, the city can put its requirements in as it sees fit.  
14 So I don't think that is a distinction there.

05:16:48 15 And also I just need to clarify that the claim that  
16 there are individualized exemptions in Michigan to contrast  
17 that with Philadelphia is false. There's a really distorted  
18 characterization of the referral provision that State's counsel  
19 referred to to suggest that that allows individualized  
05:17:08 20 exemptions from the nondiscrimination policy. There's  
21 individualized -- excuse me -- individualized exemptions to  
22 some extent to whether the agency can return a child's case  
23 back to HHS. That is not the same as individualized exemptions  
24 or any exemptions to the nondiscrimination requirements that  
05:17:30 25 are applied to all CPAs that they not discriminate against

05:17:35 1 prospective foster and adoptive parents based on race,  
2 religion, sexual orientation, et cetera. So just to clarify  
3 that point. Thank you.

4 *THE COURT:* Thank you. I do think that completed my  
05:17:45 5 list.

6 You know, normally in a Rule 16 I would give a case  
7 management order, set deadlines. Honestly, I don't think  
8 that's all that useful in this case after listening to  
9 everybody. I think that the first thing I need to decide is  
05:18:01 10 whether the case stays here or not, and that's fully briefed as  
11 far as I can tell, and I feel like I can address that. And if  
12 the case doesn't stay here, then, you know, somebody else will  
13 make the decisions anyway. If it does, I think the next order  
14 of business is to deal with the preliminary injunction.

05:18:20 15 I'll think about what I heard from the State's  
16 counsel today some more and think about it as I get back into  
17 the papers with a little more detail. But I'm inclined to  
18 simply schedule an oral argument to give each side a chance to  
19 frame the argument. And, of course, during that argument if  
05:18:40 20 part of the issue becomes, well, that's the plaintiffs'  
21 position but they are wrong factually, I think that process  
22 will ferret out what, if any, factual discrepancies there are  
23 that need to be vetted.

24 From what I see and hear so far, I just don't think  
05:19:00 25 that's really going to be the main issue at preliminary

05:19:01 1 injunction. I think it's going to be a more legally focused  
2 issue one way or the other. And in the interest of time, I  
3 think it at least initially can and should be a motion hearing.  
4 That's where I am now anyway. So for planning purposes, if the  
05:19:20 5 case stays here, that's what I expect to do. And, of course,  
6 when I deal with the transfer part of that, it will be the  
7 intervention motion too. So hopefully we'll be able to deal  
8 with that soon.

9 The trial, I think, we have going on for the last  
05:19:36 10 week or so should end by the end of this week, and then we have  
11 other things, obviously, but hopefully we can get something to  
12 you. And regardless of whether it's here or the  
13 Eastern District, you both go to the same circuit court of  
14 appeals, so it really doesn't matter at the end of the day all  
05:19:53 15 that much.

16 All right. Thanks. The traffic is terrible right  
17 now because of all the construction, so all of you are from  
18 out-of-town, you know, you can find a nice place to walk  
19 downtown and enjoy what Grand Rapids has to offer.

05:20:05 20 When I grew up in West Michigan, and I did, I would  
21 never have believed that Grand Rapids would be Beer City USA.  
22 That just was not the profile of Grand Rapids, Michigan. But  
23 it is. At least it was until I guess we were recently  
24 displaced. With good reason. There's a lot of nice places to  
05:20:23 25 visit. You don't have to drink beer, you can drink something

05:20:26 1 that won't impair your driving, and that's a good thing. But  
2 for those of you who are Ubering or Lyfting or whatever else,  
3 hopefully you can enjoy a little time on the ground. Because,  
4 frankly, you're not going to go too far for the next 45 minutes  
05:20:42 5 anyway. Maybe an hour. Good to see you all. Thank you.

6 *THE CLERK:* Court is adjourned.

7 *(Proceeding concluded at 5:20 PM)*

8 \* \* \* \* \*

9 I certify that the foregoing is a correct transcript  
10 from the record of proceedings in the above-entitled matter.

11 I further certify that the transcript fees and format  
12 comply with those prescribed by the court and the Judicial  
13 Conference of the United States.

14  
15 Date: July 1, 2019

16  
17 **/s/ Glenda Trexler**

18 Glenda Trexler, CSR-1436, RPR, CRR  
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