UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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MELISSA BUCK, et al.,

Plaintiffs,

DOCKET NO. 1:19-cv-286

vs.

ROBERT GORDON, et al.,

Defendants.

_____/

TRANSCRIPT OF HEARING ON

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

BEFORE THE HONORABLE ROBERT J. JONKER, CHIEF JUDGE

GRAND RAPIDS, MICHIGAN

August 22, 2019

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

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A P P E A R A N C E S:

FOR THE PLAINTIFFS:

MS. LORI WINDHAM
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire, N.W., Suite 700
Washington, D.C. 20036
Phone: (202) 955-0095
Email: lwindham@becketlaw.org

MR. NICHOLAS ROBERT REAVES
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire, N.W., Suite 700
Washington, D.C. 20036
Phone: (202) 349-7212
Email: nreaves@becketlaw.org

MR. WILLIAM R. BLOOMFIELD
CATHOLIC DIOCESE OF LANSING
28 North Walnut Street
Lansing, Michigan 48933
Phone: (517) 342-2522
Email: nwbloomfield@dioceseoflansing.org

FOR THE STATE OF MICHIGAN DEFENDANTS:

MR. JOSHUA SEAN SMITH
MICHIGAN DEPARTMENT OF ATTORNEY GENERAL
525 West Ottawa Street
P.O. Box 30758
Lansing, Michigan 48909
Phone: (517) 335-7603
Email: smithj46@michigan.gov

MS. ELIZABETH R. HUSA BRIGGS
MICHIGAN DEPARTMENT OF ATTORNEY GENERAL
525 West Ottawa Street
P.O. Box 30758
Lansing, Michigan 48909
Phone: (517) 335-7603
Email: briggse1@michigan.gov

MS. PRECIOUS SYNOTT BOONE
MICHIGAN DEPARTMENT OF ATTORNEY GENERAL
525 West Ottawa Street, 3rd Floor
Lansing, Michigan 48933
Phone: (517) 335-7603
Email: boonep@michigan.gov

FOR THE UNITED STATES OF AMERICA DEFENDANTS:

MR. CHRISTOPHER ALAN BATES
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Phone: (202) 514-3307
Email: christopher.a.bates@usdoj.gov

FOR THE PROPOSED INTERVENORS KRISTY AND DANA DUMONT:

MS. LEILA R. SIDDIKY
SULLIVAN & CROMWELL, LLP
125 Broad Street
New York, N.Y. 10004-2498
Phone: (212) 558-3805
Email: siddikyl@sullcrom.com

MR. JAY KAPLAN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
2966 Woodward Avenue
Detroit, Michigan 48201
Phone: (313) 578-8600
Email: aclu@aclumich.org

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Grand Rapids, Michigan

August 22, 2019

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P R O C E E D I N G S

THE COURT: All right. We're here on the case of Buck v. Gordon, 1:19-cv-286. We have a number of motions that have been briefed and argued, and most of them interrelate in one way or another.

Why don't we start with appearances and go from there.

MS. WINDHAM: Certainly. Lori Windham for the plaintiffs.

THE COURT: All right.

MR. REAVES: Nicholas Reaves for the plaintiffs.

THE COURT: Okay.

MR. BLOOMFIELD: Will Bloomfield for the plaintiffs.

THE COURT: Thank you.

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

THE COURT: Okay.

MS. BRIGGS: AAG Elizabeth Briggs for the state defendants.

THE COURT: Thank you.

MS. BOONE: Assistant Attorney General Prescious Boone for the state defendants.

THE COURT: All right.

MR. BATES: Christopher Bates for the federal defendants.

THE COURT: Okay. Is there anybody here for the amicus parties today?

MS. SIDDIKY: Yes, Your Honor.

THE COURT: Okay. Go ahead and identify yourself.

MS. SIDDIKY: Yes, Leila Siddiky from Sullivan & Cromwell on behalf of the Dumonts.

THE COURT: Siddiky?

MS. SIDDIKY: Yes.

THE COURT: Thank you. All right. And are you as well?

MR. KAPLAN: Jay Kaplan, Your Honor, on behalf of the ACLU of Michigan.

THE COURT: All right. Thank you.

So we've gotten about 1,500 pages or so so far. That was through yesterday. I didn't have time to load the most recent ones in my files here. But obviously, I hope people didn't come just planning to repeat everything in there because we wouldn't have time for that.

What I hope to do is give you each a time window where you can use the time to highlight what you think is most important to me in my decision-making and to your clients. And the round that I'm planning to do is to start with the United States and Mr. Bates, give you 10 minutes, because your motion is probably the most unique in the issues it raises. There are certainly some things that relate to the other issues, but I'd like to hear that first.

And then I'd give the plaintiffs 30 minutes, give the defendants 30 minutes, and you can cede up to 10 minutes of that if you want to to the amicus parties. I'll leave that between you and the amicus.

Then we'll do a rebuttal round, give Mr. Bates about five minutes, give the plaintiffs 15 minutes, and the defense

15 minutes, again with the option to cede up to five minutes of their time to the amicus parties. And hopefully in the course of going that route each of you will get a chance to make sure you've highlighted what you most want me to think about in deciding these motions.

So with that let me invite you to begin, Mr. Bates. Yeah, just go to the podium and that way everybody will be able to hear you clearly. I don't know if anybody is using the projection. We had an earlier hearing today where people were. If that's in your way, you can just collapse it and slide it into the drawer.

Go ahead. Whenever you're ready.

MR. BATES: Thank you, Your Honor.

So as you have noted, we have an addition to our opposition to the plaintiffs' motion for a preliminary injunction. We have also filed a motion to dismiss in this case. Our arguments in our motion to dismiss largely track the arguments in our opposition to the plaintiffs' motion for a preliminary injunction, so we think it is appropriate to discuss both today. And as you noted also, our motion to dismiss is now fully briefed up. So in addition to denying the plaintiffs' motion for a preliminary injunction, we would also ask the Court to grant our motion to dismiss.

As you noted as well, Your Honor, our motion identifies issues that are separate from many of the issues

that appear in the briefing between the plaintiffs and the state defendants. The arguments we make are largely jurisdictional, ripeness, and standing grounds.

And I would start by noting that the federal defendants' presence in this case is perhaps somewhat unusual, and I'll quote a statement from the plaintiffs' memorandum in support of their motion for preliminary injunction. They say in their brief -- this is at page 49 -- that they have asked for injunctive relief not just against the state defendants but against the federal defendants as well "so that Michigan cannot use the perceived threat of federal enforcement as an excuse to violate plaintiffs' rights." And with respect, Your Honor, we would submit that that is not a sufficient basis for entry of injunctive or declaratory relief against the federal defendants.

Now, as I mentioned, we've argued both standing and ripeness as reasons to dismiss and as reasons not to grant a preliminary injunction against the federal defendants.

I think I would start with redressability, Your Honor, because I think that that is probably the most intuitive point or the most intuitive reason why it is not appropriate for the federal defendants to be in this case, and that is that granting the relief requested against the federal defendants would not redress plaintiffs' alleged injuries.

There are several reasons for this. Just a few

points that I would highlight for Your Honor's attention.

First, as we note in both of our briefs, the nondiscrimination provisions in the state's contracts, which are really at the heart of this matter, they predate the promulgation of the federal regulation. So to the extent that there are arguments that those provisions were included because of the federal regulation or are there as a result of the federal regulation, as a matter of simple -- the history of this case, that is not correct. Those provisions are not there because of the federal regulation. In fact, they predate it.

Michigan did not change its policy. Or I know there's some dispute about whether there's been a change in policy. Michigan did not seek to enforce its policy, I think we can all agree on that, until over two years after that regulation became effective.

Granting the plaintiffs' requested relief against the federal defendants and invalidating the regulation as to them would not wipe away the Dumont settlement agreement which purports to give the state a contractual obligation to enforce those nondiscrimination provisions. So relief is not relevant to removing the Dumont settlement agreement.

And then lastly, I would highlight that the Attorney General of Michigan, as plaintiffs note, has in the past expressed opposition to past efforts to accommodate child-placing agencies' religious beliefs.

I would cite the Court to paragraph 92 of the plaintiffs' Complaint, which quote the Attorney General as saying that there's "no viable defense" to the 2015 religious freedom law and that the law's "only purpose is discriminatory animus."

At page 24 of the plaintiffs' memo in support of their motion for a preliminary injunction plaintiffs quote the Attorney General as saying that the purpose of that 2015 religious freedom law is "to discriminate against people."

And then at page 36 of their memo they quote the Attorney General as saying "If you are a proponent of this type of bill, you honestly have to conclude you just dislike gay people more than you care about the needs of foster kids" and that "these laws are a victory for the hatemongers."

And so we would submit that those statements which indicate opposition by the Attorney General and by the State of Michigan to past efforts to accommodate child-placing agencies' religious beliefs indicate that the state would not change its position or its efforts to enforce those nondiscrimination provisions against plaintiffs in the absence of the federal regulation.

I would also like to highlight for the Court, turning to ripeness, which is another reason that we have argued that we are not proper parties in this suit and that the preliminary injunction should also -- should also be denied.

We've identified several reasons why the plaintiffs' claims against the federal defendants are not ripe. I would note that in their opposition to our motion to dismiss the plaintiffs have argued that because of how we've styled some of these arguments that that suggests that we've waived some of these issues. That is not correct. And in fact if Your Honor looks at some of the more recent Sixth Circuit case law on questions of ripeness and standing in the pre-enforcement context, you'll see that the Sixth Circuit has treated those as similar inquiries and has focused the inquiry on whether there is a credible threat of enforcement. And as the federal defendants explained both in our brief in opposition to the motion for a preliminary injunction and in our motion to dismiss, there is not a credible threat of enforcement here by the federal defendants.

As I mentioned, the challenged regulation was on the books for over two years before Michigan sought to enforce those nondiscrimination provisions against plaintiffs. There's no indication that at any time during those two years the federal defendants had taken any steps to enforce the regulation against Michigan based on the plaintiffs' religiously motivated conduct. In fact, to the contrary, earlier this year the federal defendants granted an exception to another state for a faith-based foster care agency in that state that applies religious criteria in selecting potential

foster parents. This is an action that is directly inconsistent with the idea or the notion that there is a credible threat of enforcement here by the federal defendants.

Several of the cases that we cite in our brief discussing what constitutes or what is sufficient for finding of a credible threat of enforcement talked about instances of when an agency has issued a warning letter, you'll see in cases such as Kiser, Winter, Berry, that in those cases key to the Sixth Circuit's conclusion that there was a credible threat of enforcement in those cases was that the subject agency had sent a warning letter to the plaintiff stating that their action was in violation of law, warning them against future violations, that sort of thing. There's no warning letter here that the federal defendants have sent.

And I'd like to elaborate on two of our responses to the plaintiffs' arguments regarding ripeness in their opposition to our motion to dismiss.

Plaintiffs discussed a line of precedent. A Supreme Court case being Abbott Labs, a Sixth Circuit case of Magaw saying that -- or Magaw, I'm not sure how to pronounce it -- saying that when a regulation has a direct and immediate impact on a regulated party's business that that is sufficient for ripeness.

As we explained in our reply in support of our motion to dismiss, those cases, that line of precedent is not

applicable here because the central question in those cases was whether the challenged statute or regulation "realistically can be expected to be enforced against the plaintiff."

Here the challenged federal regulation does not operate directly on the plaintiffs. This is a point we've made clear both in our -- in all of our briefing in this case, and so it does not operate on -- it does not directly operate on the plaintiffs. Federal defendants do not directly enforce it against the plaintiffs, so it cannot realistically be expected to be enforced against the plaintiffs.

But I would also like to just mention two other ways in which that line of cases, Abbott Laboratories, Magaw or Magaw, is distinguishable here is that --

THE COURT: You have about two minutes left. Just for your planning.

MR. BATES: Thank you, Your Honor.

THE COURT: Go ahead.

MR. BATES: Magaw actually expressly distinguished First Amendment cases. It says that in First Amendment cases that the central question is whether there is an imminent threat of prosecution. And it said that because Magaw was not a First Amendment case that it, therefore, applied a different test.

This here, as the plaintiffs frame the issue in their opposition to our motion to dismiss, does implicate the

First Amendment. It is a pre-enforcement First Amendment case according to the plaintiffs. And so, therefore, Magaw by its own terms is not applicable because it applied a different test. And then secondarily, in Magaw the Court said that there was a clear likelihood of enforcement in that case.

The Bureau of Alcohol, Tobacco & Firearms in that case had sent out warning letters saying that they intended to conduct inventory of firearms dealers, and the court found that those warning letters indicated an intent to enforce and an enforcement was inevitable. Again, there was no warning letter here from the federal defendants suggesting that there was a clear or inevitable likelihood of enforcement or indeed any threat of enforcement at this time.

The plaintiffs also argue that subjective chill alone can make their claims against the federal defendants ripe. I would point the Court to the Berry case, the McKay case which we cite in our briefs, both of which say that subjective chill alone without some indication of enforcement does not constitute injury in fact. And as we know, and has been explained in briefs to this Court, the standing and ripeness inquiries under recent Sixth Circuit precedent are considered to be similar. And in fact if you look at McKay, McKay says the credible threat -- has said that -- the Sixth Circuit has found a credible threat where there is subjective chill plus some combination of plus factors such as a history of past

enforcement, warning letters to the plaintiff, the ability of a third party under the challenged statute to bring an enforcement action, and it's said that there is no credible threat where there's no such combination of plus factors combined with an allegation of subjective chill.

Here there is no history of past enforcement, no warning letters, no third-party enforcement activity under Huron, so for those reasons as well the plaintiffs' argument that the mere existence of subjective chill does not establish ripeness against the federal defendants.

THE COURT: All right. Thank you.

MR. BATES: Thank you, Your Honor.

THE COURT: I'll give you your rebuttal after a little while.

And we'll go to the plaintiff. And who is arguing for the plaintiff? Is it Ms. Windham?

MS. WINDHAM: Yes, Your Honor.

THE COURT: All right. So we'll give you 30 minutes now.

MS. WINDHAM: Thank you.

Your Honor, I would like to start -- since we have several motions pending here, I would like to go ahead and just begin by discussing the preliminary injunction motion and then respond a bit to Mr. Bates' argument then toward the end of my time.

THE COURT: All right.

MS. WINDHAM: Chad and Melissa Buck, Shamber Flore, St. Vincent Catholic Charities are asking this Court to let the agency keep its doors open while this case proceeds. They are asking to maintain the status quo. They are asking to continue serving children and families, as they have done for over 70 years.

Michigan has historically worked with a diverse array of agencies to serve the diverse array of children who are in its care, but now the state, leaning on regulations passed by the federal government, is arguing that it needs to exclude some of those agencies.

To make matters worse, in its attempts to exclude those agencies it's not even applying its own policies across the board. That's a violation of the Free Exercise Clause. It's attempting to compel speech outside the contours of the speech that it's actually paying for. That's a violation of the Free Speech Clause. And the state's actions here, like the federal government's actions, are causing harm today.

St. Vincent's employees don't know if the agency is still going to be open next month and if they are going to be able to keep their jobs. Families like the Bucks and the Flores are worried about what happens to the agency they have depended on and whether they are still going to be there to support them next month.

This is irreparable harm. This also demonstrates that the balance of the equities and that the public interest is in favor of a preliminary injunction and in favor of allowing St. Vincent to continue doing its good work serving families and children in Michigan.

I want to start by talking about the Free Exercise Clause and the likelihood of success there. The leading case here is the Sixth Circuit's decision in Ward v. Polite. In Ward, of course, we've got a plaintiff who had asked to be able to make a referral for LBGTQ clients who sought counseling on their relationship issues. She couldn't do that in good conscience, she asked to refer them elsewhere, she was terminated from her program. And the Sixth Circuit overturned that decision.

What the Sixth Circuit held in Ward was that when you have individualized exemptions, that is the antithesis of a neutral and generally applicable policy. And the state is using a system of individualized exemptions here. If you look at the adoption contract, that's Exhibit 12, and the foster care contract, Exhibit 9, page 2, you will see that after a contractor has accepted a referral to provide services, they may refer that case back to the department for the reasons outlined in the children's foster care manual or -- not and but or -- upon the written approval of the county director. So the state is using a system of individualized exemptions here.

And I want to pause for just a moment. I know we have a lengthy record. I think it's worth discussing the facts regarding referrals. That word gets used several different ways in this case. It's referred to -- we use it when we're talking about St. Vincent referring an unmarried couple or a same-sex couple elsewhere to be able to work with another agency. This type of referral is referrals under state contracts. And there are actually three types of referrals that come into play. One is with foster care, one is with adoption, and another is a child-specific contract.

With regard to foster care and adoption, the referral is when an agency accepts that child's case from DHHS and agrees to provide services to that child. There's also -- that happens with adoption. It happens with foster care.

There's a third kind of referral which is a child-specific contract. This is generally what happens in the case of relative placements. And you can see this in the Seyka Declaration Exhibit B where the state would actually enter into a specific contract. Say you have a child who has been placed with her aunt. The aunt hasn't been licensed to adopt or had a home study because she wasn't planning to adopt prior to this, and the state would actually enter into a child-specific contract with an agency to complete that aunt's home study, get her licensed, and allow her to adopt her niece.

The reason I'm focusing on this -- on this area of

referrals and on the facts here is that the state has really tied its enforcement to the referral. This is how the state is, I would say, evading the 2015 state law protecting religious agencies. The state is saying, "Well, once you've accepted a referral, any referral for any child, we've got you. Now we get to control how you handle your foster care intake." And so, therefore, the fact that it's written right into the face of the contract that even after you've accepted a referral the state can take it back, the state can make exceptions, that's a system of individualized exceptions. It's a system that does not place any limits on how and when the state can use that discretion. And it is a system under which the state is saying, "We will not use that discretion to accommodate religious exercise."

Under Ward, under the Supreme Court's decision in Smith, under the Supreme Court's decision in Lukumi, that's a decision that has to face strict scrutiny.

It's not the only reason that the state's policies have to face strict scrutiny. The policy here is not neutral and generally applicable. It's not enforced across the board. And we've cited a number of different examples in our briefing. I want to point the Court to a couple of those.

There are some child-placing agencies who focus on a particular population like homes for black children. There's also the Sault Tribe which handles tribal placements, and

Michigan notes -- this is in their opposition --

THE COURT: In Michigan we say the Sault Tribe.

MS. WINDHAM: The Sault Tribe?

THE COURT: Even though it's spelled S-A-U-L-T.

MS. WINDHAM: I appreciate the correction. Thank you.

THE COURT: All right.

MS. WINDHAM: Michigan notes in its brief, and this is page ID 944, that federal law "mandates that Native American families be preferred when considering foster care and adoptive placements for a Native American child." And so the state is recognizing that the Sault Tribe agency is allowed to consider race in contravention of DHHS's nondiscrimination policy.

And just a day or two ago the state entered a number of contracts into the record. They are lengthy, but there are only three pages here that really matter. And the state has even highlighted them. It's page ID 1985, page ID 2042, page ID 2099. That's provision 2.9c of those contracts. And that's the MDHHS nondiscrimination statement. MDHHS will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability. And it goes on.

I would invite the Court to contrast that with the nondiscrimination requirements that are being placed on

St. Vincent. The state in its letter to the Court says, "However, one contractual duty that remains the same is MDHHS's commitment to nondiscrimination on the basis of sexual orientation, gender identity, religion, and other protected characteristics in the provision of services under the contract." And yet when it comes to St. Vincent's contract, it's different. It includes an extra line. You can see this on page ID 834 and page ID 1591. It's provision 2.9c of the contract, same provision, "The contractor shall comply with the MDHHS nondiscrimination statement." That line is missing from the contracts with the Ruth Ellis Center. It's missing from the contracts with Boys to Men Group Home. It's missing from the -- well, I presume that it's missing from the contract with Guiding Harbor. They have not included that in their papers. And we cited those agencies in our briefing and their websites, what they say about themselves, and we have the links in our briefing.

Ruth's House is a licensed and contracted nine-bed residential care facility specifically for self-identifying LGBTQ youth between the ages 12 to 17.

"Boys to Men Group Home is privately owned. We are licensed by the State of Michigan to house up to six boys ages 12 to 18 years."

Guiding Harbor, the Girls Town program, is an open residential program that offers therapeutic residential care

for girls ranging from 12 to 17 years of age.

These are agencies the state is contracting with. These are agencies the state represents have to follow the MDHHS nondiscrimination statement. But Ruth Ellis Center is discriminating according to sexual orientation and gender identity, according to the MDHHS statement, also according to age. Boys to Men Group Home is discriminating according to sex and to age. Guiding Harbor is discriminating according to sex and to age.

This is not a neutral and generally applicable policy. This is not applied across the board. And under binding Sixth Circuit law when the state is not applying its policies across the board and when it burdens religious exercise, that has to pass strict scrutiny.

I would also note that we listed several other child-placing agencies who specialize in certain service areas. There is no argument from the state that they are engaging in the same sort of enforcement efforts that they are attempting to engage in against St. Vincent.

The state's actions have to face strict scrutiny because they use individualized exemptions because they are not neutral and generally applicable and also because there's evidence here of religious targeting.

Stacie Bladen, in her declaration, she's a high-ranking state official, you can see at page ID 994 she

acknowledges that she filed a complaint against St. Vincent Catholic Charities. As we explained in our papers, she did that after she read about the Dumont lawsuit in an ACLU press release. This is a state official who is charged with helping to enforce these contracts against St. Vincent, and she is filing complaints herself when the Dumonts did not even attempt to do that.

We also have Attorney General Nessel who has made statements, said that the 2015 law was a victory for hatemongers, that there's no viable defense to the law, that its only purpose is discriminatory animus. That if you are a proponent of this type of bill, you honestly have to concede you just dislike gay people more than you care about the needs of foster kids. She later said the AG's office can be used as a bully pulpit in order to educate on issues, referring to LGBTQ issues. This is evidence that the state's new policy is not neutral. That it is in fact targeted at a particular unpopular and disfavored religious exercise.

This is also clear from the face of the policy itself which discusses what activities are prohibited and gives examples such as declining to complete a home study for an LBGTQ couple. That's exactly the action that St. Vincent was being investigated for. That's exactly the action that was involved in the Dumont litigation. And that is what the state's policy is singling out for disfavor. That's evidence

that its policy is in fact targeted at religious exercise in a way that has to face strict scrutiny under the First Amendment. And the state cannot possibly hope to pass strict scrutiny.

Hear what state law says, "Children and families benefit greatly from the adoption and foster care services provided by faith-based and nonfaith-based child-placing agencies. Ensuring that faith-based child-placing agencies can continue to provide adoption and foster care services will benefit the children and families who receive publicly funded services." This is Michigan State law, and the state is no longer -- no longer permitting these agencies to continue living out their faith, to conscientiously object to actions that they cannot participate in, and is attempting to penalize these agencies knowing full well that it will end up shutting these agencies down.

Michigan law also recognizes that private child-placing agencies, including faith-based child-placing agencies, have the right to free exercise of religion under both the state and federal constitutions. Under well-settled principles of constitutional law this right includes the freedom to abstain from conduct that conflicts with an agency's sincerely held religious beliefs.

And so the state has recognized as a matter of law the importance of accommodating religious exercise in this arena. They are not general statements, they are discussing

specifically the actions of faith-based child-placing agencies. And so the state cannot possibly hope to survive strict scrutiny here.

The state has argued that it has interest in prohibiting discrimination and yet the state's own uneven behavior when it comes to its discrimination statement demonstrates that however compelling that interest might be in the abstract, it cannot be compelling here where the state has refused to pursue it across the board.

This is like what the Supreme Court encountered in Lukumi where it acknowledged that for many of the same reasons the Hialeah's ordinances were not neutral and generally applicable. They also could not serve as a compelling government interest under the Free Exercise Clause.

I also want to note, because I know the state has focused on the contract provisions, that the contract provisions also discuss and mention the state law protecting religious agencies and say nothing in this contract limits or expands the application of this public act. Also acknowledge that the contract is governed, construed, and enforced according to Michigan law, and so the state is also undertaking to follow that law and to comply with it in the terms of this contract.

I want to turn for a moment to the free speech arguments as well. Home studies are speech. They are not

checking a box. They are intensive and invasive and personal inquiries into someone's life, and they are lengthy written reports about a person's life. I believe it's Exhibit A to the Seyka Declaration is a home study form, and you can see all the things that are included there.

I want to for a moment read this quote on home studies. "The criteria for home studies include a review of several factors, including the strength and weaknesses of the parents and the strengths of the relationship between the couple, including level of satisfaction and stability of the relationship and relationship history. Other factors to assess include marital and family status and history, including current and past level of family functioning and relationships, parenting skills, and child-rearing techniques, values, and the role of religion in the family." I'm reading from Michigan's opposition brief, page ID 922. This is what the state says about home studies. And the state's own statements, as well as the home study form, make it clear that this is not merely checking a box, that this is a lengthy and detailed review.

On this sensitive issue what St. Vincent has asked to be able to do is simply to remain silent, to refer couples elsewhere that it cannot serve consistently with its religious belief. Those couples are then able to have their home studies completed with other agencies. They are even able to adopt a child in St. Vincent's care by working with another agency.

St. Vincent is merely asking for the ability to remain silent. That is an ability the Supreme Court has protected since Riley v. Federation of the Blind back in the eighties where it recognized the ability not to make certain speech the government had mandated was protected under the First Amendment.

It's also something the Supreme Court protected just last term in NIFLA v. Becerra where the Supreme Court struck down a provision which would require pro-life pregnancy clinics to post a government-mandated notice in their waiting rooms. This notice was a government notice about government services. It was telling women where they could access certain services. It was speech about the state and what the state does. And even that was considered to be compelled speech under the First Amendment. So much more the home study where the state is asking St. Vincent to engage in a subjective determination of a variety of different factors.

The state -- the state has tried to argue that it is not speech. The state has tried to argue that it is not meaningful or does not violate St. Vincent's religious beliefs, but that's a determination for St. Vincent as a Catholic entity to make. It's not a determination for the state to make as to whether these actions violate St. Vincent's religious beliefs. And its fight to keep its doors open, its determination to come into court and to seek relief when it would be easier to remain

silent, when it would be easier to go along, is proof that this is something that matters, that this is a religious exercise that is important to St. Vincent.

Because the government is engaging in attempting to compel and coerce speech that it doesn't pay for, it has to face strict scrutiny.

I want to spend just a moment as well on the funding issue here because I know the state has attempted to say, "Well, it's all under a contract and so, therefore, we pay for it, we get to control what you say."

The Supreme Court in the AOC decision made it clear that just because a government funds something an organization does does not give the government the ability to control speech outside of what it is funding.

Here the government does not fund home studies. It certainly doesn't fund the act of St. Vincent providing a referral to a couple and saying here is where you can go to find services. When the state wants to pay for a home study, it knows how to do it. Exhibit B to the Seyka Declaration discusses child-specific contracts. The relative licensing situation that I mentioned earlier on. In that case you can see -- you can see the rules that the state has laid out for that. You can even see the funding schedule the state uses for those relative licensing contracts. And it demonstrates that the state knows how to pay for a home study when it wants to.

It has a provision for doing that. But in the vast majority of cases that's not what it does. St. Vincent has to fund this work on its own dime through a separate cost center, and it's only after they have completed a home study, the state has licensed the couple, and then a child is placed with that couple that St. Vincent can be compensated. And so the state's actions here are attempting to compel speech outside of the portion of the program and the actions that they are actually paying for. Because of that the state's actions must face strict scrutiny and they cannot possibly hope to pass.

Turning briefly to the other injunction factors. Under Elrod v. Burns a First Amendment violation is irreparable harm per se. I would also note and I would point the Court to the Strachan Declaration and the Roach -- the Strachan Report and the Roach Report which were attached to our reply brief. Those discuss the harms that can result when agencies are forced to shut down and the disruption that can occur to children, the harm that can be done. And I think that they demonstrate that not only irreparable harm but also that the balance of the equities and the public interest favors keeping St. Vincent's doors open, favors having a mosaic of different agencies to serve the mosaic of different children and families who are part of Michigan's child welfare system.

I'd also note in the Roach Report it discusses the fact that she is aware of same-sex couples who have been able

to -- who have been able to successfully foster and adopt without any harm or concern over St. Vincent's -- or I shouldn't say concern but without any harm due to St. Vincent's actions. The state has not been able to identify any couple who has been unable to foster or unable to adopt because of St. Vincent's religious beliefs. In fact, it's required under law that if St. Vincent must step aside, that they provide a referral so that someone else can step in and take their place.

For all these reasons, St. Vincent is likely to prevail on the merits. It has established that the public interest, the balance of the equities favor the entry of an injunction, and it's established irreparable harm.

I want to speak for just a moment about the federal government's involvement in the case.

THE COURT: All right. You have about 10 minutes.

MS. WINDHAM: All right. The federal government here has argued -- relied heavily on ripeness cases. And I want to rest primarily on the briefing on that and just note the distinction between two Sixth Circuit cases that we've been discussing. One is Miller which the federal government relies on, and the other is Parsons that we rely on.

In the Miller case it was a very different situation. You had a plaintiff who had failed to apply for a permit and then was trying to sue when they hadn't even applied for the permit. And if they were denied the permit, it wasn't even

clear that the local government was going to take action against them.

It's a very different situation from what happened in the Parsons case, which is far more analogous here. In Parsons you had a state -- you had a local law enforcement agency which had taken unconstitutional actions and unlawful actions against the plaintiffs. And the plaintiffs then sued not that agency but the federal government, claiming that the federal government's decision to list them as a criminal gang had prompted the unlawful actions of the local government. And the Sixth Circuit allowed that case to proceed, and the Sixth Circuit found that the traceability factor was satisfied, noting that it is still possible to motivate harmful conduct without giving a direct order to engage in said conduct.

And the same is true here. The federal government has been clear that it does not want to, is not seeking to enforce this regulation against St. Vincent at this time, which we're certainly glad to hear, but that does not change the fact that the federal government has this regulation on the books. In fact, they say in I believe it's footnote 1 of their reply brief that they acknowledge that this regulation applies to Michigan. And Michigan has gone further than the local law enforcement at issue in Parsons. Michigan has tried to lay the blame at the feet of the federal government and say it's this regulation we have to comply with. The federal government made

us do it.

Whatever the merits of that claim, it's clear here that Michigan has pointed the finger at the federal government, that the federal government does not dispute that it has a regulation on the books that applies to Michigan, and that harm is occurring today. And I think this is another distinction between our case and a number of the cases that the federal defendants cited where someone was waiting to see if the harm happened. Here the harm is happening today. The enforcement is certainly impending, and the effects of that are already being felt in terms of employees leaving their jobs, in terms of families being afraid of what's going to happen next. In terms of the impact on the agency, not to mention the deprivation of constitutional rights. And so this is not a case where there is no harm absent enforcement. There is enforcement -- an ongoing investigation and enforcement impending from the state. And that is certainly impending. Whether or not the federal government chooses to join in and enforce that regulation directly doesn't change the fact that there is harm and that the enforcement is happening right now.

There's also no guarantee that I have heard, although we'd be happy to hear one, that the federal government will agree not to enforce during the pendency of this lawsuit, which is, of course, what we're seeking in the preliminary injunction. And so while they had disclaimed any current

intent of enforcement, we don't know what's going to happen going forward.

And I would also put the question to Michigan as to whether they are comfortable were they enjoined and obligated to follow this Court's order, that the lack of current threat of federal enforcement satisfies them and their own perceived obligations.

With that I just wanted to note in closing that we've come to this Court because time is short. St. Vincent's contract is up for renewal September 30th. They don't know whether the state -- we do know that the state's policy has been that it will no longer work with agencies who have St. Vincent's religious beliefs and practices, and so we have employees and families who don't know what the future holds for them. That's causing harm right now. That's causing an urgent -- creating an urgent need for relief so that St. Vincent can keep its doors open.

What we're asking for here is the status quo. St. Vincent has been providing these services for over 70 years. They are asking to be able to continue providing them, continue working with families like the Bucks and the Flores, and so many others who depend on them while this case proceeds. And we believe we have more than satisfied the standards for being able to maintain the status quo through the pendency of this litigation. Thank you.

THE COURT: All right. Thank you.

We'll go over to -- is it going to be Mr. Smith?

MR. SMITH: Yes. Thank you, Your Honor.

THE COURT: Go ahead. We'll hear from the state. Are you planning to cede any time to the amicus?

MR. SMITH: Yes. Thank you for reminding me. I would like to cede I believe you said 10 minutes on the principal argument and five minutes on the rebuttal.

THE COURT: Very good. We'll do that. And I'll keep you posted. Go ahead whenever you're ready.

MR. SMITH: Thank you, Your Honor. Much appreciated.

The plaintiffs have the heavy burden of showing this Court that they are entitled to the extraordinary relief of a preliminary injunction. They have to show a substantial likelihood of success on the merits. They have to show that it will prevent them from suffering irreparable injury. They have to show that it will -- excuse me -- that it will not harm others, and that it is in the public interest. Essentially those last two factors are the balancing of the equities.

The plaintiffs have failed to sustain that burden, Your Honor. Not only have they failed to sustain that burden, Your Honor, but I would say that if this Court does grant the preliminary injunction, it will ultimately harm Michigan's children.

Michigan is obligated by statute to serve all

children in the foster care and adoption system based on their best interests, and sometimes the best interests of those children are being placed with a same-sex couple either in a foster setting or an adoptive setting.

To the extent that child-placing agencies are unwilling to do that and unwilling to fulfill their contractual obligations, that not only harms the state's efforts to end discrimination, but it also harms the state's efforts to serve children and their best interests.

Now I will go through my argument shortly. I did want to point out what I believe is a misrepresentation that Ms. Windham made. She referred to Stacie Bladen as a "high-ranking official" who heard about the Dumont lawsuit via an ACLU press release and then filed a complaint or initiated an investigation against St. Vincent.

That is not accurate, Your Honor. If you actually look at Ms. Bladen's affidavit, this is docket entry 34-4 at page ID 994, we're looking at paragraphs 5 and 6, what Ms. Bladen actually says there is that they treated the Dumont lawsuit, that is the Dumont complaint filed by the Dumonts and Busk-Suttons and their attorneys, as a complaint that had been filed with the department. When a complaint is filed or the department is apprised that somebody is not following either the licensing rules or the contract, the department has a legal obligation to investigate that. So really what Ms. Bladen was

doing here was she was fulfilling her obligations as a state employee by investigating a complaint about a child-placing agency.

Now, the plaintiffs spoke at length about the child-caring institutions and child-placing agencies and the fact that some of them specialize in certain things. Now, there is a distinction between a child-caring institution and a child-placing agency, which is in the brief and I don't want to belabor that point here.

A child-caring institution essentially provides a 24-hour residential care for a child. Many of those do specialize. What they cannot do, however, is discriminate. And the supplemental exhibits that we filed I believe it was two days ago, Your Honor, show that the contractual language is in fact largely identical. Those are contractor responsibilities. They have to follow those contractor responsibilities, and one of the things included in those contractor responsibilities is sexual orientation.

I will cede to Ms. Windham that the introductory part of paragraph 2.9 is a little different. That introductory paragraph did change in subsequent versions. I attached the earliest version of that nondiscrimination clause and then the latest extension of the contract. I did not want to overburden the Court with more paperwork than it already has. I could certainly attach those and file those later if the Court would

wish.

But when we look at those agencies, they cannot discriminate. They can specialize, but they cannot discriminate. And when we look at a referral, when we look at the Michigan statutory scheme, a referral means a child entering the foster care system. So when a child enters the foster care system, it's typically through some kind of court action. Sometimes it's an emergency action in the middle of the night.

The Department of Health and Human Services takes that child into its custody and care. That child becomes a state ward. The state needs to find a placement for that child, and that process is the referral process. We refer that child typically to a child-placing agency. Some child-placing agencies are the department themselves. Some are like our private partners, St. Vincent, and are private entities.

Now, at that point under the Michigan statutory scheme for any reason a child-placing agency can refuse that referral. After that, though, they do have to provide the services under contract in a nondiscriminatory manner as they are contracted to do.

Now, when we look at the supplemental exhibit that the plaintiffs filed I believe it was Monday, they filed a corrective action plan that Catholic Charities of West Michigan filed a couple of years ago. And one of my supplemental

exhibits was another corrective action plan filed by Catholic Charities. And if you look at that, the first corrective action plan, I believe it was January of 2018, they agree that if they -- before they accept a referral, they will do an investigation to determine if it conflicts with their sincerely held religious beliefs, and if there's anything in that placement that would, they will refuse that referral. And they have the absolute right to do that.

At the same time in their I believe it was May of 2018 corrective action plan they agreed that they would have staff trainings on, amongst other things, their contractual obligation to the state and that they would continue to fulfill their contractual obligations to the state. So I think what both of those show is that we have been enforcing this policy. The nondiscrimination policy, which predates Attorney General Nessel, has been enforced since it was put in place. And it was put in place sometime for different agencies when the contracts came up between 2015 and 2016.

Now, the plaintiffs are not likely to succeed on the merits here. The Free Exercise Clause of the First Amendment absolutely protects the right of a person to believe what they will and to practice their beliefs. But what we have here is a -- is neutral kind of contractual language. There is no religious exemption. There's no nonreligious exemption. There's nothing in the face of the language that specifically

refers to religious or nonreligious providers. It's generally applicable and facially neutral.

That's very different from the Lukumi Babalu Aye case where the local ordinance in Florida banned animal slaughter but the exception swallowed the rules. People could slaughter animals for food consumption or for business purposes or for various other purposes. What it turned out, there's only one reason you couldn't slaughter an animal and that was for private religious ceremonies. That offended the Constitution because it was not neutral. It specifically singled out practitioners of the Santeria faith.

In this case it is facially neutral. And contrary to what plaintiffs have said, it has been uniformly enforced. And it is enforced against all child-placing agencies, including child-caring institutions. I would ask that the Court not take plaintiffs' detour through the Michigan Indian Civil Rights Act -- or excuse me -- the Child Welfare Act or the federal counterpart. That is a very different statutory scheme. The state of Michigan is bound by that. And it is true that foster children within -- who have Native American heritage have a different -- are treated differently under that. That's a federal statutory obligation that I don't think is at issue here. But when they contract with the Department of Health and Human Services to be a child-placing agency, they cannot refuse to serve a prospective adoptive family based on that person's

race, ethnic background, religion, or the other factors that are outlined in the nondiscrimination clause.

Essentially what the plaintiffs are asking us to do is to make a special exemption for them that we're not allowed to make. If you look at the case law like Romer v. Evans or Obergefell, states can't just accept and make exceptions for discriminating against same-sex couples or gays and lesbians. The state has to act uniformly.

Romer said that the state doesn't even have a rational basis to allow that -- excuse me -- to exempt that type of discrimination. So the idea that the state can simply exempt that I think is erroneous.

And if you look at the Michigan statutory scheme, it is narrowly tailored. And I will get to that in a minute, though.

I want to cover the Section 1.1 of the foster care contract that the plaintiffs referred to. What that language states is that either consistent with the foster care manual or subject to various approvals that a CPA can refer a child back to the Department of Health and Human Services.

The problem with plaintiffs' argument is they are trying to shift the burden. They have said that we haven't shown any proof that that isn't an exemption, but I think the problem here is they have to show proof that it is an exemption. We have submitted evidence that it's not. We have

an affidavit, I believe it's Ms. Bladen's affidavit, but we submitted four different ones and I may be mistaken on that exact point, but we have submitted evidence that states exactly what that is for. That's for something like a natural disaster. That's for a child-placing agency that shuts its doors. That's for a child-placing agency that experiences an exodus of staff and can no longer cope with the number of placements that it has. We have to have something like that in place so if an emergency does happen we can find placements for those children. Otherwise we wouldn't be able to serve those children in their best interests. But there's no evidence in the record to even suggest that this is somehow used as an exemption to target faith-based providers.

And in terms of plaintiffs' reliance on Ward v. Polite, that case has a lot more nuances to it. First of all, it's procedurally very different. Although our motion to dismiss is up, Ward v. Polite was not on a preliminary injunction. What the Sixth Circuit held was that there was enough evidence in that case to at least allow a reasonable jury to conclude that Ward had been discriminated -- or excuse me -- that the plaintiff had been discriminated against. And that's a different standard.

Moreover, the situation in Ward was very different. The plaintiff in that case was an Eastern Michigan University counseling graduate student. She counseled many students, and

she had, I believe, gay and lesbian clients, and she was required to affirm their sexual orientation. She stated that she couldn't do that due to her sincerely held religious beliefs. She referred them to another provider. And then the university punished her for that. The problem with that was the university had no prior policy on that. There was absolutely nothing in the course materials. There was no evidence that any administrator or professor had told her she couldn't do that. Instead what the university did is it claimed to be relying on I believe it was the American Counseling Association standards. I might be wrong on that, but it was a counseling association's standards, Your Honor.

The problem with that, not only was it after the fact, but the counseling standards expressly allowed conscience referrals. So even in that case the university wasn't even following the counseling association standards.

Now, under those circumstances what the Sixth Circuit said was when we add it all up, we don't know whether this person was singled out because of her free exercise of religion. What we do know is that there's enough for a reasonable jury to draw that inference and that's all we need to worry about for now. So that was a very, very different case.

In terms of whether we have -- whether rational basis or strict scrutiny applies, we've briefed this, but we do

believe that rational basis review applies here. If you look at courts that have addressed very similar issues, we're talking of Fulton from the Eastern District of Pennsylvania and later affirmed by the Third Circuit, and New Hope which was a case from the Northern District of New York. I believe that has recently been appealed to the Second Circuit. Very analogous situations. They were dealing with foster care agencies in their respective jurisdictions. Those -- due to changes in the law, those foster-care agencies were required to not discriminate against gay and lesbian foster and adoptive parents.

They sued. They alleged that it violated their free exercise rights. In both cases, policies very similar to the ones at issue here, the courts that reviewed that found that they were neutral, they did not target religion, and because they were facially neutral and generally applicable that rational basis applies. And the courts found that there was indeed a rational basis.

In the first instance the state has a rational basis in trying to end a discrimination. And that's not just Fulton and New Hope, but that's something that many courts over the years have held.

In addition, there's other rational basis as well. For instance, the state should reasonably be able to expect that when it contracts for a public service like adoption or

foster care services that the providers are indeed going to follow the contract. That is that the state, its taxpayers, they are all going to get the benefit of the bargain. What we contracted for. That's a pretty rational basis.

In addition, there's also the rational basis of the best interests of the children. As I stated in my opening statement, Your Honor --

THE COURT: Sorry. Go ahead. Go ahead.

MR. SMITH: Oh. Sorry. As I stated in my opening statement, it may very well be the case that for any particular child the best placement is with a same-sex couple. It's rational to require child-placing agencies to indeed work with same-sex couples who want to be foster or adoptive parents in the best interests of the children.

In addition, the citizens of the state have -- it's a rational basis for the citizens of the state to know that they can be served on an equal basis regardless of their sexual orientation or relationship status when they go to a child-placing agency, because even if that child-placing agency is a private agency, it's still by contract fulfilling a basic governmental function. They are providing a public service. Absent that, citizens of the state, the very people who fund through their taxes these foster care and adoptive services, essentially are treated like second-class citizens, and that's in violation of the Santa Fe case from the U.S. Supreme Court.

Every citizen can reasonably expect that they are not going to be treated in a derogatory manner.

Even if strict scrutiny applies, however, we do believe that that's been satisfied. If you look at the Roberts case from the U.S. Supreme Court and the more recent RG & GR Harris Funeral Home case from the Sixth Circuit, those cases have held that ending -- not only ending invidious discrimination is a compelling state interest, but in the case of RG & GR Harris, ending discrimination against gays and lesbians and transgendered persons are also compelling state interests.

Moreover, the state's policy is narrowly tailored. Now, in the Fulton case the courts, both the district court and the Third Circuit, held that the least-restrictive means of achieving that state interest is to require compliance with a religiously neutral and generally applicable regulation that requires the agencies in Philadelphia to not discriminate against potential foster care and adoptive parents.

In the present case Michigan has a statutory scheme that goes a little further than that. It's even, if you will, more narrowly tailored. Because under that -- and we can see Catholic Charities of West Michigan exercised that in one of their corrective action plans -- prior to accepting the referral the child-placing agency can reject a referral for any reason. And that's embodied in the Michigan statutes. So if

there is a reason they can't accept that child, perhaps they know ahead of time, as Ms. Windham alluded to, that there could be a relative placement with a same-sex couple that would be most appropriate, they can refuse that placement off the bat. That way they refuse that placement before they have a contract with the state to provide services for that child, and they are not required to follow the nondiscrimination clause for that child because there's simply no contract in place for the child. And that's what I think the Michigan statutes effectively go towards.

But free exercise, in fact your -- another judge on this court a couple years ago in the Country Mill Farms case held that free exercise does not require the government to conduct its own affairs in order to conform to the religious convictions of particular citizens. You have to allow people to exercise their faith, to believe in their faith, to practice their faith, but when you contract for government services, the organizations or even individuals with whom you contract don't get to dictate government policy based on their sincerely held religious beliefs.

And that sort of leads into the plaintiffs' First Amendment case. In this case the most analogous case would be the Teen Ranch case. In Teen Ranch the district court and later the Sixth Circuit affirming held that when the government contracts for the provision of public or

governmental services, that any speech -- first of all, it does not create a forum for private speech. The intent of that contract is not to create a forum for private speech. Rather the intent of the contract is to provide the services to the people who need them.

So any speech that results from that contract isn't the private speech of the agency with whom the government has contracted but rather it becomes the government's speech.

Now, any --

THE COURT: You have about 10 minutes left, just so you know.

MR. SMITH: Thank you, Your Honor.

And the Teen Ranch case was followed by Fulton in the Third Circuit. It was followed by I believe New Hope in the Northern District of New York. And really it puts this case more in the Velazquez v. Legal Services Corporation case. It was a Supreme Court case from I believe around 2000 or 2001 in which the court held that when the government contracts for services, that's government speech.

Now, in this case the plaintiffs have tried to distinguish this and say that a home study really isn't government speech because it's not a contracted-for service. Well, it is a contracted-for service. The money flows from the state when they accept a referral. But our affidavits all say the same thing, that that money that flows from the state is

intended to provide all of the services, including the home study.

Now, the home study does ask a lot of questions. Some of those questions are deeply personal. That does not transform it into speech. And this really goes back to the best interests of the children. There are a wide variety of things that the Department of Health and Human Services and its staff have to look at when they are considering the best possible placement for a child. Marital status might be part of that, but certainly the marital stability. The religious faith comes into it too because, remember, very few kids that enter the foster care system actually leave the foster care system with an adoptive family. The goal when a child enters the foster care system is not to adopt that kid out. Rather the goal is to provide the family with services so that they can eventually be reunited. And most children are reunited with their birth families.

Their birth families might have sincerely held religious beliefs too, and their birth families have an absolute right to have a voice in the religious upbringing of their kids, even if the state has temporary custody and control over those kids. So the religious background of the foster family can in fact come into play.

Again, so the stability of the relationship is key because these are children that have experienced typically

pretty heavy forms of trauma. They have been taken away from their birth families. The stability of the relationship, whether it's in the context of a marriage or not, is of paramount importance when we're determining (A) whether that couple should be licensed as a foster family; and (B) if they are licensed, what's the most appropriate placement for a child. So those factors are not speech. They are factors that are set forth in state -- the state administrative regulations, and they are set forth in a particular form that I believe we attached to one of the affidavits.

This is not something that St. Vincent has drafted on their own. It's not something that has ever been intended as a means or a method or a forum for private speech. These are state requirements so that we can determine whether this family should be licensed, and if they are licensed what children should be placed with them and what would be the best fit for a particular child.

Unlike the AOSI case --

THE COURT: I just want to make sure --

MR. SMITH: Yes.

THE COURT: -- you don't have to cede any time, but you're down to about seven minutes, so . . .

MR. SMITH: And I do intend on ceding the time, so I appreciate that.

THE COURT: Well, I mean, you're already into the

10 minutes. There's seven minutes left for the other party.

MR. SMITH: I will -- I'm sorry, I will quickly wrap up, because it was not my intent to go into the amicus party's time.

THE COURT: Go ahead.

MR. SMITH: I think if you look very closely at this case, I think if you look at the case law, the leading cases on this are all in alignment. These contracts do not create a forum for private speech and they are religiously neutral and generally applicable and do not violate the free exercise rights of the plaintiffs.

And I do want to say one final thing in parting. My understanding is that the St. Vincent adoption contract expires on September 30th of 2019. That is in approximately six weeks. I believe the foster care contract runs through September 30th of 2020 or 2021. And my client would be happy to renew both of those contracts. We would like to continue to work with St. Vincent and all of our providers, but we do insist that they follow the contractual terms, including the nondiscrimination clause. Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Smith.

We'll go for the rest of the time to is it Ms. Siddiky?

MS. SIDDIKY: That's correct. Thank you to the state for ceding time.

In addition to the reasons that the state has set forth for why the preliminary injunction should be denied, I would like to discuss two additional reasons. The first is that an injunction requiring the state to permit contracted agencies providing public child welfare services to use religious criteria to exclude prospective foster and adoptive families headed by same-sex couples like my client, the Dumonts, would violate both the Establishment and Equal Protection Clause.

In addition, the balance of the equities and the public interest weigh heavily against granting a preliminary injunction. The nondiscrimination clause in the state's contracts advances the public interests because nondiscrimination is mandated by best practices in the child welfare field. The provision is not targeted at religion or religious beliefs, it is targeted at discriminatory conduct.

Returning to a system that tolerates discrimination would harm not only same-sex couples like my client but also children in the child welfare system who might otherwise be adopted by same-sex couples like the Dumonts.

More specifically, there would be fewer available families for children, and the parties agree that there is a dire need for families. And as well, the LBGTQ population would be subject to further stigma and discrimination.

On the Establishment Clause. Plaintiffs' claims

cannot succeed because the relief requested, an injunction, requiring the state to permit contracted agencies providing public child welfare services on behalf of itself to use religious criteria to exclude prospective foster and adoptive families would violate the Establishment Clause.

Plaintiffs' requested relief would lead to excessive entanglement between the state and the religion by delegating government functions to religious institutions. The Establishment Clause bars the fusing of government and religious functions as plaintiffs seek to advance here.

Specifically the U.S. Supreme Court case, Larkin, dealt with the Massachusetts statute that delegated to churches and schools the power to effectively veto applications for liquor licenses within a 500 radius [sic] of a church or a school.

The Supreme Court held that that statute violated the Establishment Clause because there were no guarantees that the delegated power would be used exclusively for secular neutral and nonideological purposes and it could instead be used -- employed explicitly for religious goals.

Civil power must be exercised in a manner neutral to religion. The state delegating public child welfare services to private CPAs with permission to use religious eligibility criteria would not be in compliance with the Establishment Clause.

Further, by allowing religious agencies performing a state function to turn families away on the basis of their religious beliefs, the state gives the appearance that those agencies' religious beliefs are favored, sending to those who do not share those religious beliefs the message that they are outsiders or not full members of the political community.

Plaintiffs are asking for the right to sign up for government contracts, take taxpayer dollars, but then refuse to perform those public services in a nondiscriminatory manner as required by the terms of their contract. An objective observer would view this to be an endorsement of religion.

Plaintiffs' response that some agencies will work with same-sex couples does not resolve the Establishment Clause violation. The state is not permitted to allow some agencies, even if others do not, to use religious exclusion criteria.

As to the Equal Protection Clause. The Equal Protection Clause prohibits the government from making distinctions between individuals based solely on differences that are irrelevant to a legitimate government objective. The state may not distinguish between equally qualified people without a legitimate state interest. Categorically denying same-sex couples the ability to foster or adopt children out of a Michigan child welfare service does not serve a legitimate government purpose. In fact, the legitimate government purpose would be to increase the number of available families so that

all children could have access to a home. Here, permitting discrimination would not even pass rational basis because such a policy limits the number of families available for wards of the state, both by directly turning away families like the Dumonts and also by deterring others from participation.

As to the balance of the equities, in response -- in denying the preliminary injunction I'd like to highlight three other considerations in addition to what the state said. First --

THE COURT: You have about two minutes, just so you know. Go ahead.

MS. SIDDIKY: Yeah. I would like to specifically focus on the report of Dr. Brodzinsky which we submitted with our opposition. Dr. Brodzinsky is an expert in child welfare, and he in his report describes what he views to be the impact and the harm associated with permitting discrimination. He states that if the state permits agencies to exclude any group of qualified applicants, it will reduce the chances that these children find permanent life-long homes. It will lead to -- potentially to separation from children, longer time in foster care, and a greater likelihood of being in group homes.

Another harm described by Dr. Brodzinsky is the deterrent effect that discrimination places on same-sex couples. There is an example. The declaration of Katie Page Sander describes an instance where a family did call

and tried to inquire about foster and adoption services and because they were a same-sex couple they were turned away and that they did not come back and pursue with another agency. That discrimination was enough of a deterrent.

For those reasons and those set forth by the state, we would urge the Court to deny the preliminary injunction.

THE COURT: All right. Thank you, Ms. Siddiky.

Let's just go to a rebuttal round for any wrap-up that you have, and I'll go to Mr. Bates first for five minutes.

MR. BATES: Thank you, Your Honor.

The federal defendants do not belong in this suit. This is a dispute between plaintiffs and the State of Michigan. There has been no action at all in this case by the federal defendants. There has been no warning letter. There has been no threat of enforcement. There's been no hint of enforcement. To the contrary, the most lenient regulatory action in this space by the federal defendants has been to grant an exception to another state. Action that is directly inconsistent with the notion that there is a threat or a credible threat of enforcement by the federal defendants in this case.

To quote again from the plaintiffs' brief in support of their motion for preliminary injunction that Michigan may be attempting to "use the perceived threat of federal enforcement as an excuse to violate plaintiffs' rights" does not give the plaintiffs standing to sue the federal defendants and does not

make their claims against the federal defendants ripe.

Now, the plaintiffs in their argument, they mentioned the Miller case and the Parsons case. I would like to briefly respond to their points there.

First with regard to Miller. Miller is not all on all fours with this case. We acknowledge that. But Miller's relevance is not because it is on all fours with this case. Its relevance is that it sets the standard for this Court to consider in determining whether the plaintiffs' claims against the federal defendants are ripe. And that standard is have the plaintiffs established a credible threat of enforcement by the federal defendants? And for the reasons outlined in our briefs, they have not established a credible threat because there is no credible threat here.

As to the -- as to the Parsons case, as we explained in our reply brief we filed earlier this week, that case is not on point here because that case was not a pre-enforcement challenge. Whatever the test was that the court applied in that case, that test does not apply here, because this case, unlike Parsons, is a pre-enforcement challenge. In Parsons I believe it was the Department of Justice had already issued the report identifying the plaintiffs in that case as potential gang members, and so this wasn't a challenge before a regulatory action had been taken. And as we have explained, the standard and the test that applies in the pre-enforcement

context, which is the context here, is have the plaintiffs established a credible threat of enforcement by the federal defendants?

To the extent that plaintiffs have discussed the harm that they are facing, that harm is being caused by Michigan. It is not being caused by the federal defendants. Again, there's been no action at all in this case vis-a-vis plaintiffs from the federal defendants. And enforcement is not certainly impending. Plaintiffs mention that phrase in their argument. That is a quote, I believe, from the Magaw case.

As I mentioned previously, that case is distinguishable here and does not govern the scenario here for a variety of reasons. But I would again highlight that in that case the court found that enforcement was -- that there was a credible threat of enforcement. In fact that enforcement was inevitable given the actions by the Bureau of Alcohol, Tobacco & Firearms. In that case sending letters indicating that they intended to conduct inventories of firearms dealers in that case.

Again, there has been no warning letter here sent by the federal defendants either to Michigan or to the plaintiffs. There has been no hint, no threat of enforcement by the federal defendants. For that reason the plaintiffs' claims against the federal defendants are not ripe, and as also explained in our briefs, they lack standing to sue the federal defendants.

Thank you.

THE COURT: All right. Thank you, Mr. Bates.

Ms. Windham, I'll give you 15 minutes.

MS. WINDHAM: Thank you, Your Honor. I want to discuss a few things here. Starting off with -- I know Mr. Smith had discussed this question about individualized exemptions and made some sort of burden-shifting argument. We're asking the Court to look at the language of the contracts. Those are in evidence. No one has disputed them. The plain language of the contracts creates a system of individualized exemptions that the state can rely on.

The state has pointed to declarations saying that these are used in rare and unforeseen circumstances, but there's no rare and unforeseen circumstances language in the contract. As a matter of fact, the contract says "for the reasons outlined in the manual or upon written approval." And so the fact that agency officials say, Well, we're going to use it for this reason and this reason and this reason but not to accommodate religious exercise, that's exactly the sort of determination that is subject to strict scrutiny under the Sixth Circuit's decision in Ward.

I also want to discuss the Fulton case for a moment. As I acknowledged last time, I'm counsel in Fulton. I think the Third Circuit got it wrong. We have a pending cert petition. But even if this Court were persuaded by that

decision, there are several reasons it doesn't control here.

Number 1, to the degree that Fulton splits with Ward v. Polite or uses analysis -- or Ward v. Polite uses analysis that's not addressed in Fulton, then Ward and not Fulton is going to control.

With regard to Fulton, it does not take on the issue of what do you do in a system of individualized exemptions. The Third Circuit sidestepped that issue and said, "Well, there was a regulatory disagreement." The Sixth Circuit has told us what we do with a system of individualized exemptions. It says it's the antithesis of a neutral and generally applicable policy.

Also in Fulton the Third Circuit really focused on this idea that Philadelphia didn't know about Catholic Social Services' actions and that Philadelphia was reacting to this news and trying to craft a new policy. And while I disagree with that construction of the facts, that's the idea the Third Circuit's decision was premised on. That they weren't letting anybody else engage in this behavior.

Here the state knew. The state passed a law saying "We are going to protect religious agencies to" -- and I quote -- "to the fullest extent permitted by state and federal law. A child-placing agency shall not be required to provide any services if those services conflict with or provide any services under circumstances that conflict with the

child-placing agency's sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child-placing agency."

The State of Michigan was aware, the State of Michigan chose to accommodate and protect religious agencies, and now the State of Michigan wants to end that policy of accommodation and wants to begin penalizing religious agencies. That as soon as you accept one referral for one child, you are no longer protected by the state law and you are going to be penalized, you're going to be investigated, your contracts will be terminated, your contracts will not be renewed. That was not the case in Fulton. At least as the Third Circuit construed the facts. Philadelphia didn't know. Philadelphia was reacting.

Also, in Fulton the Third Circuit dealt with some hostile statements from city officials and said that they were either an attempt to find common ground or that some of the most inflammatory statements that came from the mayor -- they determined that the mayor was not actually involved in the decision to penalize Catholic Social Services.

Here we have a different situation because we have actions targeting Catholics -- we have agencies targeting St. Vincent that are taken by a high-ranking state official, Ms. Bladen, who does acknowledge that she started that investigation. The state has, I believe, disputed the reasons

why she did that but has not disputed the fact that a state official instigated that investigation.

We also have the statements of the Attorney General, who has been quite clear both on her thoughts about accommodating religious agencies and their religious beliefs and has also publicly taken credit for this policy. The Attorney General put out the press release announcing it. We included that in our papers.

Also, if you look into that document, there's a link to a YouTube video where she takes credit for this where she says it's good for Michigan. And so we see that the Attorney General has acknowledged that she had direct involvement and that she recommended to the agencies that they settle the Dumont litigation, that they enter into this new policy. And so her statements are relevant and her involvement here is relevant in a way that is different, according to the Third Circuit, from Mayor Kinney's involvement in the Fulton case.

Finally, on strict scrutiny Fulton differs from this case because if you look at the Fulton strict scrutiny analysis, there's a footnote there saying that this analysis is carried out under Pennsylvania state law, which is different from federal law, and that had the law in question been not neutral or generally applicable the strict scrutiny analysis would have been different.

So if we're going to follow Fulton and take a look at state law, what does state law says? What does state law say? State law says that private child-placing agencies, including faith-based child-placing agencies, have the right of free exercise of religion. State law says that it is a benefit to children in the state. Children and families benefit greatly from the adoption and foster care services provided by faith-based and nonfaith-based child-placing agencies. And so we have acknowledgments and policy here, democratically enacted policies on the part of the state that really give away any argument they have to have a compelling interest. That's something that wasn't present in the Fulton case.

I want to speak for a moment about Teen Ranch as well because I know we've had a lot of discussion about that case. The Teen Ranch case was primarily an Establishment Clause case. In fact, the district court there -- the Sixth Circuit said this case turns on whether the funding is indirect rather than direct because funding is a result of the genuine independent private -- sorry -- result of the genuine independent choices of private individuals. The district court there said, "Although many issues have been raised by the parties, they all boil down to the single issue of whether the ability of youth to opt out of the Teen Ranch program gives the youth true private choice so as to make the funding of the religious programs at Teen Ranch indirect rather than direct."

This was an Establishment Clause analysis that was carried out under prior cases involving school vouchers. And it was an analysis that focused on whether the children who are placed at Teen Ranch via state computer program had a true private choice or whether they were required to go to Teen Ranch and be subjected -- the allegation was there to participation in religious exercise.

We're not dealing with the choices of children here. We are not dealing with the state directing people what agency they go to. In fact, the state has said that they want -- and you can see this in the Cooper declaration -- that they want prospective foster and adoptive families to find the agency that's the best fit for them. In the recruitment materials they encourage families to call at least two agencies before they make a choice. So these are not -- we're not discussing the situation of children who are placed with an agency that -- with a home that is then requiring them to participate in religious exercise. We're talking about the choices of adults who have a wide variety of options available to them. And in fact under state law the rule is that if you're not able to provide services to that particular couple, you refer them elsewhere so that they can continue to make independent private choices. And so the Teen Ranch case shows that this situation is very different.

Also, in Teen Ranch the court already found there was

an Establishment Clause violation. There's no surprise that after they found an Establishment Clause violation they then found no corresponding Free Speech or Free Exercise Clause violation. The free exercise section there is very brief. It relies on Locke v. Davey. The Supreme Court after Teen Ranch was decided in the Trinity Lutheran case actually cut back on Locke v. Davey and invalidated an analysis by the Eighth Circuit that was very similar to the Sixth Circuit's analysis here and affirmed that in fact a religious agency, in that case a church, competing for a government grant program could not be discriminated against because of its religious character. And in doing so under Trinity Lutheran the Supreme Court relied upon the Associated Contractors of Jacksonville case which recognizes that government contractors, even though they might not have a right to a particular contract, have the right not to be discriminated against when they go in and they seek to provide services. And so for those reasons I don't believe that Fulton is applicable here. I don't believe that Teen Ranch is applicable here. The most applicable case is Ward.

We've also heard some discussion from the state -- actually, before I get to that, I do want to respond. I think that the fact that we do have a system of true private choice and that we have actions that are taken by a private actor, as a matter of fact the state has acknowledged that most foster

care -- most adoption services, most adoption services in Michigan are privatized. And you can see that at page ID 967 in the Goad affidavit. And so we have a private actor who is making private decisions and taking private religious actions that's not funded by the government.

We also have a system of true private choice. Within a system of true private choice the government is not considered to be responsible for religious actions because the responsibility lays with the religious actor and individuals who choose to go elsewhere can always go elsewhere.

I do want to -- I do want to end by talking for a moment about the state's arguments. And I think this goes to the balance of the equities and the public interest here. The state has focused on the best interests of the children. The state should be focusing on that. That's their obligation. This is a little bit different than the argument that they made in their briefing. But they have not explained why it would be in the best interests of the children in their care to shut down a religious agency that's been serving those children for over 70 years.

As we demonstrated, and you can see this in our opening brief, St. Vincent has been more effective than the average agency at recruiting families. It's been more effective than other agencies in recruiting families to serve older children and children with disabilities. And so shutting

down St. Vincent is not going to advance the interests of the children in the state's care.

Many of the arguments that we're hearing from the state and hearing from the amici act as if same-sex couples are being shut out of the system, and that's not true. In fact, state law requires that rather than shut a couple out of the system, what happens is that at the outset you refer that couple to another agency or to the state's website where there are two dozen agencies -- I believe it's -- I believe the number is over two dozen just in the Greater Lansing area that are available. And so these couples have a wide variety of options for them.

The argument that is being set up here that these couples are somehow being excluded from the system simply isn't borne out by the facts. They are being given options. St. Vincent would like to continue to be an option for the families in Michigan who are seeking to work with them.

And I would point the Court to the Strachan Report which speaks about the exceptional services that St. Vincent provides. Speaks about the importance of this agency in the system. And Ms. Strachan is someone who has long and deep experience with the foster care system and in fact works as a trainer, and so she can speak to the experiences of families within the system, the expertise of agencies within the system, and the value that St. Vincent brings to the system. In fact,

St. Vincent is the only agency in the area -- and I believe Ms. Buck's affidavit talks about this as well as Ms. Snoeyink's -- that provides a support group for foster and adoptive families. And that's a support group that even LBGTQ families can attend. And so shutting down St. Vincent is going to deprive a resource for all families in the area, including LBGTQ families. It's not going to create more homes for more children. The state's attempt to require agencies to choose between their faith, the faith that motivates them to serve, and their ability to continue serving children is only going to result in agency closures, is only going to mean that families like the Bucks and the Flores lose support, is only going to mean that these agencies are not out there recruiting more families into the system, supporting those families, helping them along their way. The end result is not going to be more homes for children, it's going to be fewer. For all those reasons we believe that the Court should enter a preliminary injunction and allow the status quo to continue while this case continues. Thank you.

THE COURT: All right. Thank you.

Mr. Smith, we'll give you 15 minutes total. And you're planning to cede five minutes?

MR. SMITH: Yes, I'm going to give the amicus party five minutes of my time, so I'll try to talk a little bit faster. But not too fast.

THE COURT: Go ahead.

MR. SMITH: Several points I would like to make. First of all, the plaintiffs are, I think, attempting once again to shift the burden here. They are claiming that Section 1.1 of the foster care contract creates the ability for the state to create individualized exemptions. The affidavits contradict that. They have offered no rebutting evidence whatsoever. And, quite frankly, the burden is on them. They have to prove, by I believe clear and convincing and certainly at least a preponderance of the evidence, that that actually happens. They have no proof whatsoever. And the only proof that we have on that are the affidavits submitted by the state defendants that show that is not what that clause is for. So I think that can safely be put to rest.

And as far as their analysis of Fulton and Ward goes, there really is no tension at all between Fulton and Ward. Fulton dealt with a situation very analogous to the one at issue. Our affidavits show that contrary to what Ms. Windham has said, they did not know what St. Vincent's practices were with regard to same-sex couples who try to become foster and adoptive parents until the Dumont v. Lyon lawsuit was filed. And contrary to what Ms. Windham has said, Ms. Bladen did not take it upon herself to single out St. Vincent or to initiate a complaint. What she did was not a discretionary function. She did a ministerial government duty. That is, her job requires

her when she receives a complaint that somebody might be violating the licensing rules of the contract, a CPA not just somebody, that that has to be investigated. And she initiated the investigations of St. Vincent and two separate Bethany homes. That was ministerial. She did not single them out. And she certainly did not initiate an investigation based on an ACLU press release, Your Honor. There is no evidence to support that in this record.

In terms of Ward v. Polite, I think I gave the Court a pretty good overview of Ward v. Polite. Ward v. Polite wasn't so much about the possibility of a discretionary exemption. What Ward v. Polite was about was the fact that Eastern Michigan University tried to justify its action, disciplinary actions against a student after the fact. And the policies on which they tried to rely didn't actually (A) they didn't exist, there were no university policies on it. And moreover, the counseling association policies on which they tried to rely after the fact expressly allowed conscience-based referrals.

That is not the case here at all. Ward is an entirely -- is entirely consistent with the state's actions. The state has not taken any after-the-fact punishment. The state has initiated investigations. And the state certainly does not want to shut St. Vincent or any other CPA that does its job down. The state is only interested in taking

disciplinary action when CPAs don't follow the rules or don't follow contract policies.

Now, when we're talking about the allegedly hostile statements from Attorney General Nessel, I think I've covered that in my brief, but I'll make a few points. First of all, all of those statements were made when Ms. Nessel was a private citizen. Second, those statements have no bearing on this Court's evaluation of the policy. We look at the Trump v. Hawaii case, and if we look at McCreary case, the policy has to be evaluated on its own terms, not what somebody says about it.

And what's different from this case, unlike Trump v. Hawaii where it's more or less uncontested that the president has authority over foreign policy, the policy in question here, the nondiscrimination clauses, were put into place in 2015 and 2016. Ms. Nessel wasn't even a candidate for Attorney General at that point. So those predate her tenure as Attorney General by at least a few years.

Moreover -- and I think we've briefed this as well -- I believe that the plaintiffs are ascribing powers and abilities to the Attorney General that the Attorney General does not possess under Michigan statutory and Constitutional Law. The Attorney General is an advocate for client agencies and for the State of Michigan, but ultimately those client agencies, in this case Director Gordon and at the time acting director of DCWL Jen Wrayno, they are the ones that

made the call on that settlement. Certainly the Office of Attorney General as legal counsel provided just that, counsel, but we can't make the policy.

When the Attorney General disagrees with a client agency, she has the right to put up a conflict wall, file an amicus brief, and take an opposing point of view. We've seen this happen just this year in another case I have in the Sixth Circuit, Gary B. v. Whitmer. So that's what the Attorney General does. The Attorney General cannot force another state agency to settle something and certainly can't force it to settle on certain terms.

The Teen Ranch case. I believe Ms. Windham did misstate the Teen Ranch case. First of all, I think she took a detour into private religious actions and true private choice. That's not at issue here. They have made no allegations on that in their Complaint. They have made no allegations regarding that in their preliminary injunction. I don't think that that's relevant at all.

The Teen Ranch -- it was involved in the Teen Ranch case, and Ms. Windham is correct, it came out of the voucher cases. And the idea is you can't expressly religious programming funded by the government unless it's through something like a voucher system. In that case if we give say school kids in Cleveland a voucher and say you can attend any school you want, including a religious school, they have the

right to attend a religious school that can include religious activities in the school, because that's the result of truly private choice.

That was a factor in Teen Ranch, but so was the Free Speech Clause. Teen Ranch expressly said that the state's actions violated their right to free speech. The district court said that is not -- that's not private speech, it doesn't create a forum for private speech, and any speech there is government speech.

The Sixth Circuit affirmed and the Sixth Circuit expressly addressed that at page 410 of the opinion. "The purpose of contracting for these services is to provide treatment for troubled youth in a residential setting, not to promote the private speech of the providers."

Contrary to what Ms. Windham said, Teen Ranch said that exact thing and came to the conclusion that it was not private speech. That's the same conclusion I hope this Court comes to.

Now, we certainly acknowledge that St. Vincent has provided good services to the state over the years and good service to the children of the State of Michigan. As I said in my closing last time, we would like to maintain that, but we do insist that they follow the state's contracting rules, including the nondiscrimination clause.

And I think I have a few minutes left, Your Honor, is

that fair to say? Or am I getting close?

THE COURT: By my count you have three minutes before your 10 are up.

MR. SMITH: Thank you. I do want to cover the -- some of the injunctive factors that I didn't cover last time. I'll do this very quickly.

The plaintiffs cannot show an irreparable injury or the lack of a legal remedy. To the extent they are talking about closing their doors, to the extent they are talking about losing staff, the case law is very clear on that that those are not irreparable. They can file a simple contract -- breach of contract action in state court to the extent they believe the state is in breach of its contract. There's ample case law in my brief showing that those don't constitute irreparable injuries. Loss of business, et cetera.

Moreover, to the extent that St. Vincent chooses to no longer provide foster care or adoptive services, that's not because the state is shutting them down. The state does not want to shut them down. Rather that's the result of their voluntary choice to cease providing services because they are unwilling to conform to the state's nondiscrimination clause in its contract. That is not irreparable when a party makes a voluntary choice to engage in a course of action.

Moreover, if you look at Fulton, the district court opinion in Fulton at page 702 directly addressed the prospect

of harm to foster parents and found that there would be no harm to foster parents. What the Fulton court found was that there was no prospect of irreparable harm to the foster parents because there's nothing to show they couldn't easily transfer to another child-placing agency. And that's the case here. There are other foster -- excuse me -- other child-placing agencies in Michigan that would love to have the foster parents that St. Vincent currently licenses -- or doesn't license but currently serves. So to the extent that St. Vincent chooses not to provide those services any longer, there are other agencies that would be happy to work with them. So that's certainly not irreparable harm.

When we look at the balancing of the equities, the public interest weighs very strongly against this injunction, Your Honor. First of all, parties should and must honor the terms of their contract. We expect to get the benefit of our bargain, and I think the citizens of the State of Michigan expect to get the benefit of their bargain.

By having this nondiscrimination clause, I think the plaintiffs -- or excuse me -- the intervening -- the amicus parties referred to Dr. Brodzinky's affidavit or his expert report -- this will harm children if they don't have the best placement. And not opening your doors to all potential foster and adoptive parents undercuts the ability to find the best placement for the child, so it is not in the best interests of

the children.

Moreover, there is a strong public interest in ending invidious discrimination against gays and lesbians. We can see this in the line of cases beginning with Romer. It continues through Obergefell, through Windsor, through RG & GR Harris, Boyd City High School. These are all cases I've cited in my brief, Your Honor, so I won't give you the full cites now.

According to Fulton preventing discrimination is undeniably a legitimate public interest. According to the Supreme Court a court has to consider the impact on gay and lesbian individuals because otherwise it sends the message that they are not full members of the community. And moreover, I think as an equitable factor we have to look at Michigan citizens in general. Effectively what injunctive relief would tell Michigan citizens is that if you're in a same-sex partnership and you want to be a foster parent, even though your taxes go to fund those services, those public services, you cannot and will not be served by every CPA in the state. Effectively some CPAs can and will close their doors.

And I think that very much violates the case law that I just went over. It certainly violates Santa Fe. And we are not asking -- we do not want to compel or require St. Vincent to affirm anything they don't want to. They have their beliefs. They can advocate for their beliefs. They can freely speak on their beliefs on the subject of same-sex marriage.

They have that right. What they don't have the right to do, however, is tell Michigan citizens, to tell Michigan's children, and effectively to tell the state defendants in this case that "We want to contract with you, but we have no intent on actually following a pretty important term of your contract." That is absolutely not in the public interest. Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Smith.

Ms. Siddiky, you have about four or five minutes.

MS. SIDDIKY: Thank you. What plaintiffs want is for the Court to order that they need not abide with a contract whose terms are neutral and generally applicable. Denying the injunction does not mean that faith-based agencies will shut down. For example, Bethany Christian Services, which in fact prior to the Dumont litigation turned away one of our clients on the basis of their same-sex couple status, has actually agreed to comply with the nondiscrimination provision. So denying the injunction does not mean all faith-based agencies will have to shut down.

And what is being asked for runs against, as Mr. Smith describes, significant and compelling state interests in ensuring compliance with the nondiscrimination provision. Acting in accordance with child welfare practices dictates that you serve the best interests of the children. As I referenced earlier, Dr. Brodzinsky describes this in length.

Courts have long recognized another compelling state interest is eradicating discrimination. Specifically to same-sex couples and on the basis of LBGTQ status, as Mr. Smith described, but more generally.

Also maximizing the number of families. If same-sex couples as Mr. Smith described are turned away or understand that certain agencies will not work with them, that does have a chilling effect. It creates stigma. Families are concerned that when they pick up the phone they don't know if an agency will turn them away. They understand if the injunction were entered that the agency is permitted to do so. That is a scary task. That is, you know, discouraging. And it in fact will result in less families for children.

Moreover, the state also has a compelling interest in complying with the state's obligations under the First and Fourteenth Amendment. As the Dumonts asserted in their suit, allowing CPAs to turn away same-sex couples violates both the establishment clause and equal protection, and denying the injunction will ensure that the state is complying with those obligations.

Finally, what the plaintiffs seek boils down to the right to enter into a public state contract paid for by taxpayer dollars for a nonreligious function, which is the provision of child and welfare services, and in determining and identifying prospective foster and adoptive families on terms

that are different than those that apply to other CPAs.

Imagine the implications of such a thing. An agency or a residential company that wants to enter the housing market but they don't want to abide by nondiscrimination provisions. That is not permitted under binding law.

The same is true for a restaurant that does not want to abide by certain health ordinances because they have an objection. That is also not permitted by law, and it should not be permitted here as well. Thank you.

THE COURT: All right. Thank you. Thank you all.

Obviously all parties have been through these issues before in one form or another and have shown that in their briefing and their argument, and we'll wade through the materials once again in light of what you've highlighted for us today and issue a written opinion for you in the near term, because I know both sides want to know what comes next and where to go next. So thank you for all of your work.

MR. SMITH: Thank you, Your Honor.

THE CLERK: Court is adjourned.

(Proceeding concluded at 3:42 PM)

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

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

Date: August 23, 2019

/s/ Glenda Trexler

Glenda Trexler, CSR-1436, RPR, CRR