

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES
WEST MICHIGAN,

Plaintiff,

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

v.

MAG. DAVID R. GRAND

MICHIGAN DEPARTMENT
OF HEALTH AND HUMAN
SERVICES; ROBERT GORDON, in
his official capacity as Director
of the Michigan Department of
Health and Human Services;
MICHIGAN CHILDREN'S
SERVICES AGENCY; JENNIFER
WRAYNO, in her official capacity as
Acting Executive Director of
Michigan Children's Services
Agency; DANA NESSEL, in her
official capacity as Attorney General
of Michigan.

NOTICE OF FILING

Defendants.

NOTICE OF FILING

Defendants submits this notice to further alert the Court that, in
addition to its motion to voluntarily dismiss its appeal of the

preliminary injunction in *Buck v. Gordon*, No. 19-2185 (6th Cir.) (ECF 36-1), the State also filed a Reply Brief in the Sixth Circuit on January 16, 2020, attached as Exhibit 1 to this Notice.

Respectfully submitted,

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Dated: January 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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EXHIBIT 1

No.19-2185

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MELISSA BUCK; CHAD BUCK; SHAMBER FLORE, ST. VINCENT
CATHOLIC CHARITIES,

Plaintiffs-Appellees,

v.

ROBERT GORDON, in his official capacity as Director of the Michigan
Department of Health and Human Services; JOO YEUN CHANG, in
her official capacity as the Executive Director of the Michigan
Children's Service Agency; DANA NESSEL, in her official capacity as
Attorney General of Michigan,

Defendants-Appellants.

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Appeal from the United States District Court
Western District of Michigan, Southern Division
Honorable Robert J. Jonker

STATE DEFENDANTS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

This Court normally grants an appellant's motion to dismiss an appeal. This case presents no reason to depart from that general rule. State Defendants are willing to forgo their remedy here and to proceed more quickly to the merits of the case and a final decision based on the proper interpretation of state law. This is not maneuvering or gamesmanship and will not prejudice St. Vincent. Rather, it furthers judicial economy and saves time and resources for all involved.

On September 26, 2019, the district court granted St. Vincent's motion for preliminary injunction, which the State appealed to this Court. This interlocutory appeal is in its early stages and is about whether the injunction remains in effect during plenary litigation. St. Vincent could have stipulated to a voluntary dismissal of the appeal with the *preliminary* relief it requested fully intact, i.e., proceeding on the merits of the case in the district court under the protection of a preliminary injunction. That is exactly the situation St. Vincent will be in if this Court grants dismissal of this appeal. St. Vincent has failed to show how they (or any other individual or entity, including the courts below) will suffer ill effects from dismissal of this appeal now.

Contrary to St. Vincent's assertions that the State is engaged in "gamesmanship" and "forum-shopping," this is not cynical maneuvering on the State's part. By requesting dismissal, the State is hoping to facilitate the litigation and push the case to a merits decision based on the correct application of state law. It is not trying to avoid a panel (either the panel that ruled on the stay motion or a new one that may be assigned), an intervening party (the Dumonts did not oppose the State's request to dismiss the appeal), or the anticipated result of briefing or oral argument (the appeal has not yet developed that far).

Additionally, asking the district court to certify the question of state law interpretation to the Michigan Supreme Court has no bearing on whether this appeal should continue. In fact, St. Vincent advised the district court that certification would be beneficial. And although true that the State could also ask this Court to certify, it makes more sense to lodge that request with the district court and allow that decision to shape how the case proceeds on the merits, including the further discovery that is necessary and inevitable in this case.

This appeal should be dismissed without costs assigned to either party.

ARGUMENT

- I. State Defendants are forgoing their opportunity to set aside the preliminary injunction to seek a quicker decision on the merits based on the correct application of Michigan law, and St. Vincent will suffer no harm as a result.**

An appellant's motion to dismiss an appeal is normally granted.

Tw. of Benton v. City of Berrien, 570 F.2d 114, 118 (6th Cir. 1978).

And no exception to this general rule applies here. The district court's order granting a preliminary injunction is precisely that—preliminary, and not based on the merits of St. Vincent's claims. The sole issue in this *interlocutory* appeal is whether the preliminary injunction remains in place while “plenary litigation” proceeds. (Opinion, R. 69, Page ID # 2499.) The State will forgo its opportunity to set aside the injunction because it is looking forward to getting to the merits of this case and a final decision on the correct application of Michigan law. Plain and simple, the State is giving up its remedy on appeal to hasten these next steps and conserve judicial resources as well as the State's time and resources.

Despite the unwarranted hyperbole woven throughout St. Vincent's brief, there is no maneuvering or gamesmanship in this approach—which is patently obvious because St. Vincent will suffer no

harm by dismissal. To the contrary, St. Vincent can rest assured that the preliminary relief it requested will remain in effect when the case resumes in the district court.

These proceedings have barely begun and will not consider the merits of the case. Nevertheless, St. Vincent opposes dismissal on grounds that “[t]he district court’s preliminary injunction—and this appeal—address the merits of St. Vincent’s claims and the core question of this case[.]” (Response, R. 34, Page 15.). But, neither the district court’s preliminary decision, nor the outcome of these proceedings, are binding on the parties when they eventually return to the district court for litigation on the merits. In fact, when ordering injunctive relief, the district court considered only St. Vincent’s free exercise claim and confirmed that any “‘findings of facts and conclusions of law made by a district court in granting a preliminary injunction are not binding at a trial on the merits.’” (Opinion, R. 69, Page ID # 2516.) The district court also confirmed it made no findings of fact in its opinion, *id.* at Page ID # 2501, n.1, and St. Vincent has even acknowledged to this Court that the district court’s opinion was only preliminary. (Response to State’s Motion for Injunction Pending Appeal, R. 21-1, Page 15.)

Any interlocutory decision by this Court would be similarly limited in scope. A final decision, *when issued down the road*, will be ripe for appellate review.

The Seventh Circuit reiterated this same distinction between preliminary injunctive relief and a final decision on the merits in *University of Notre Dame v. Sebelius*, 743 F.3d 547, 551-52 (7th Cir. 2014)—a case on which St. Vincent relies.¹ In its opinion, the Seventh Circuit emphasized that the “only issue” before it was whether the appellant was entitled to a preliminary injunction. *Id.* at 553. The district court’s decision on these matters was made with “unavoidable haste,” on an evidentiary record that was “virtually a blank,” and

¹ St. Vincent’s reliance on this case is misplaced. In *University of Notre Dame v. Sebelius*, Notre Dame sought dismissal or a limited remand of an appeal denying a preliminary injunction, so that Notre Dame could depose three witnesses. 743 F.3d 547, 561 (7th Cir. 2014). Notre Dame filed the motion six days after a motion to intervene was granted. The Seventh Circuit took the motion to dismiss under advisement because the appeal had been “scheduled for imminent oral argument with expedited briefing underway.” *Id.* at 561. The court found that it was apparent that the appeal would be refiled or resumed after discovery and, therefore, “dismissal or remand would be an interruption rather than a termination[.]” *Id.* Unlike these facts in *University of Notre Dame*, dismissing State Defendants’ interlocutory appeal terminates rather than interrupts the appeal, and it is not harmful to the parties or disruptive of this Court’s schedule. Nor has intervention been granted.

therefore, everything said in the opinion upholding the district court's decision was "necessarily tentative, and should not be considered a forecast of the ultimate resolution" of the litigation. *Id.* at 552–54.

The same analysis applies here. This Court denied the State's request to stay the injunction pending appeal, holding that the "district court's findings support the conclusion that a preliminary injunction in this case would merely preserve the status quo." (Order, R. 29-2, Page. 2.) The State determined that, instead of drawing out this appeal, through briefing, oral argument, and awaiting a decision—which would at best result in a tentative ruling based on a virtually blank factual record—is not the most efficient use of resources. Rather, the time and resources of the courts and the parties are better directed to returning to the district court for a merits decision after requesting the State's highest court to advise on the proper interpretation of state law—an answer that

St. Vincent acknowledged will be beneficial to the underlying case on the merits.² (Transcript, R. 51, Page ID #1844) This appeal should be dismissed.

II. Dismissing this interlocutory appeal will minimize delay in reaching a decision on the merits and is not tantamount to forum-shopping or gamesmanship.

St. Vincent’s contention that dismissal and certification amount to forum-shopping and will result in unnecessary delay or wasted expense is unavailing.³ State Defendants reached out to St. Vincent’s counsel on

² On January 6, 2020, State Defendants filed in the district court their motion to certify the question. A formal stay of the case was not entered in that case, although the parties agreed at the Rule 16 Scheduling Conference that the district court’s decision on the preliminary injunction motion was likely to be appealed by the losing party, at which time litigation would be stayed.

³ A review of the cases on which St. Vincent relies in its response demonstrate the timeliness—and appropriateness—of State Defendants’ motion for voluntary dismissal at this early stage. For example, this appeal has not advanced to the point of the appeal in *Notre Dame*, as described above, or in *Ford v. Strickland*, where the Eleventh Circuit determined a request for dismissal was premature when filed “after full briefing, extended oral argument, and several months of deliberation[.]” 696 F.2d 804, 807 (11th Cir. 1983). Similarly, in *Albers v. Eli Lilly & Co.*, the Seventh Circuit declined a motion for voluntary dismissal filed two weeks after “a draft of th[e] opinion had been written,” 354 F.3d 644, 646 (7th Cir. 2004), and in *Khouzam v. Ashcroft*, the Second Circuit denied a motion for vacatur two weeks after oral argument. 361 F.3d 161, 168 (2d. Cir 2004).

December 30, 2019, seeking its concurrence in the motion for voluntary dismissal, waited until January 3, 2020 before receiving a negative response, and then filed a timely motion. Neither party filed an appellate brief, nor has oral argument been scheduled—much less heard. St. Vincent’s claim that this appeal must move forward to avoid wasted expense on behalf of this Court or either party is without merit.

Furthermore, dismissing the appeal at this early stage will hasten rather than delay a final decision on the merits by the district court, which will then be ripe for appellate review. Upon dismissal, the case will return to the forum that St. Vincent chose when it filed its claims. Dismissing this appeal can hardly be gamesmanship and forum-shopping when the result is to return to a court that has already ruled against the State.

As for the question of statutory interpretation, it is a critical issue that will shape the merits case in district court and focus the parties’ discovery efforts. Although State Defendants could ask this Court to certify the question to the Michigan Supreme Court, nothing prevents this Court from taking such action *sua sponte*. However, the question of whether to certify requires a detailed review of the issues. The district

court has already undertaken this time-consuming task and asked the parties whether certification may be helpful. (Opinion, R. 69.) Notably, St. Vincent agreed that certification *would* be beneficial. (Transcript, R. 51, Page ID # 1844.)

If the district court decides that certification is appropriate, St. Vincent will have the benefit of the preliminary injunction in effect while certification proceeds and during any period of time that the Michigan Supreme Court considers the question. The state court's decision could resolve the case or, at a minimum, narrow the issues in dispute and streamline the litigation on the merits in the district court. Because of the district court's familiarity with the case, and its consideration of the importance of state law interpretation to the issues at hand, the most efficient approach is to rely on the district court to decide whether certification is appropriate.

Once a final decision issues from the district court, any appeal that may follow will consider the court's findings, conclusions, and legal analysis of all claims based on a fully developed factual record. Dismissal of this appeal now will expedite that final decision, not delay it. After dismissal, plenary litigation will proceed in the forum that St.

Vincent chose, so, again, there is no risk of forum-shopping by State Defendants. And all the while, St. Vincent will have the protection of the preliminary injunction.

Accordingly, the State's motion for voluntary dismissal should be granted.

III. The Dumonts' efforts to intervene will be addressed separately and enforced in the district court.

Despite their pending motion to intervene in this appeal, the Dumonts took no position on State Defendants' motion for voluntary dismissal. St. Vincent's supposition as to what the Dumonts may do if they are permitted to intervene in the underlying case (R. 34), is just that— supposition. And St. Vincent fails to explain or support its assertion that dismissing State Defendants' interlocutory appeal may “undercut” the future merits panel on the Dumonts' appeal.

St. Vincent's reliance on *Township of Benton*, 570 F.2d at 118, to support an exception to the general rule that “motions to dismiss an appeal by an appellant are normally granted,” is misplaced. Following briefing and oral argument by the parties, including both appellants, the Sixth Circuit held that *Benton* was an exception to the rule because

only one of the two appellants moved to dismiss the appeal and their respective positions on the merits were the same. Dismissal would have been a “meaningless gesture” since the court was still required to review the merits of the case. *Id.* at 119.

The facts here are not even remotely close to those in *Benton*. The Dumonts are only proposed intervenors in this appeal. Their appeal on intervention in the district court proceedings remains pending in this Court. They were not parties to the preliminary injunction order, nor were their interests considered in connection with it. Unlike in *Benton*, State Defendants’ interests and position on the merits of the case are not identical to the Dumonts’, as explained in their motions to intervene filed here and in the district court. Notably, State Defendants are not involved in the Dumonts’ pending appeal.

What the Dumonts may do as intervenors in the district court case if their appeal is granted has no bearing on State Defendants’ current appeal and whether it should be dismissed at this early stage. The Dumonts’ neutral position on dismissal of this interlocutory appeal speaks for itself. Whatever position the Dumonts may stake out if their intervention in the underlying case is granted is not at issue here, nor

should it be factored into State Defendants' motion for voluntary dismissal of their appeal of the preliminary injunction directed to State Defendants' conduct, not the Dumonts.

Consequently, this appeal should be dismissed without costs to any party.

CONCLUSION AND RELIEF REQUESTED

The timing and circumstances of the State's request to dismiss this appeal do not provide any reason to depart from this Court's general rule that it grants an appellant's request to withdraw an appeal. In the end, St. Vincent's claims will be decided on the merits in the forum that it chose, in accordance with the process and schedule determined by the district court. And in the meantime, St. Vincent is protected by the preliminary injunction currently in effect.

Accordingly, this Court should grant State Defendants' motion and, as requested, order dismissal without costs assigned to either party.

Respectfully submitted,

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Dated: January 16, 2020

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This reply brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this reply brief contains no more than 6,500 words. This document contains 2130 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on January 16, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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