

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES
WEST MICHIGAN,

Plaintiff,

2:19-CV-11661-DPH-DRG

v.

Hon. Denise Page Hood

Hon. 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,

**CATHOLIC CHARITIES
WEST MICHIGAN'S
RESPONSE TO
DEFENDANTS' MOTION
FOR EXPEDITED
CONSIDERATION OF
PRELIMINARY
INJUNCTION MOTION AND
TO CERTIFY THE
QUESTION OF STATUTORY
INTERPRETATION TO THE
MICHIGAN SUPREME
COURT**

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**CATHOLIC CHARITIES WEST MICHIGAN'S RESPONSE TO
DEFENDANTS' MOTION FOR EXPEDITED CONSIDERATION
OF PRELIMINARY INJUNCTION MOTION AND TO CERTIFY
THE QUESTION OF STATUTORY INTERPRETATION TO THE
MICHIGAN SUPREME COURT**

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether expedited review of Catholic Charities West Michigan's pending motion for preliminary injunction is warranted because Proposed-Intervenors (the Dumonts) have invoked a separate settlement agreement between the State and the Dumonts to force the State to take adverse action against Catholic Charities?

2. Whether the delay and expense caused by the certification process are warranted when both the meaning and purpose of the relevant state laws are clear, the Sixth Circuit has expressed that Catholic Charities is likely to succeed on the merits of its federal constitutional claims, and Defendants voluntarily removed this case to federal court over eight months ago?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

City of Columbus v. Hotels.com, L.P.,
693 F.3d 642 (6th Cir. 2012)

Glover v. Nationwide Mutual Fire Insurance Co.,
676 F. Supp. 2d 602 (W.D. Mich. 2009)

*Local 219 Plumbing & Pipefitting Industry Pension Fund v.
Buck Consultants, LLC*,
311 F. App'x 827 (6th Cir. 2009)

Pennington v. State Farm Mutual Automobile Insurance Co.,
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876 F.3d 182 (6th Cir. 2017)

State Auto Property & Casualty Insurance Co. v. Hargis,
785 F.3d 189 (6th Cir. 2015)

INTRODUCTION

Catholic Charities West Michigan has been serving Michigan’s foster children for over 70 years. But in April 2019, Defendants demanded that Catholic Charities recommend same-sex couples as foster and adoptive parents and halt its practice of referring such couples to nearby child-placing agencies. Only if Catholic Charities agreed to violate its religious beliefs would Defendants refrain from terminating Catholic Charities’ foster-care and adoption contracts—an action that would destroy its decades-long ministry to foster children.

Catholic Charities sought protection in the Michigan Court of Claims, asserting both state and federal claims and moving for a preliminary injunction. Defendants removed the case from state court in June 2019.¹ Over eight months later, Defendants wish to go back to state court, asking this Court to certify to the Michigan Supreme Court the interpretation of the state’s statutory protections for faith-based foster care and adoption providers. They also ask for expedited consideration of Catholic Charities’ pending preliminary injunction motion, given that Proposed-Intervenors Kristy and Dana Dumont have since moved to reopen *Dumont v. Gordon*, No. 2:17-cv-13080 (E.D. Mich.), for the express purpose of forcing the State to take adverse action against Catholic Charities.

¹ Defendants improperly removed the case to this Court instead of the Western District. *See* Mot. to Change Venue, ECF No. 9.

The request for expedited consideration should be granted, but the request for certification should be denied.

Put simply, the Dumonts' recent actions require a quick ruling on the preliminary injunction motion. And a preliminary injunction no longer appears to be seriously contested because it would eliminate the State's exposure to competing legal obligations while preserving the status quo as it has been for over 70 years. What is more, the Sixth Circuit last week issued an order stating that First Amendment claims like Catholic Charities' claims here have "a likelihood of success on appeal." Order at 3, *Buck v. Gordon*, No. 19-2185 (6th Cir. Feb. 27, 2020), attached as Ex. 1. And the U.S. Supreme Court recently granted certiorari in *Fulton v. City of Philadelphia*, a case involving similar legal issues.² These recent events strongly support a preliminary injunction.

Certification, on the other hand, is improper for at least three reasons. First, the meaning and purpose of the state's statutory protections for faith-based providers—i.e., Public Acts 53, 54, and 55 (codified as Mich. Comp. Laws §§ 722.124e, 722.124f, 710.23g, and 400.5a)—are plain and can be determined by this Court. Next, Catholic Charities also asserts federal constitutional claims, meaning this Court could enjoin the challenged policy without referencing state law.

² 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 2020 WL 871694 (U.S. Feb. 24, 2020) (No. 19-123)

Finally, if Defendants wanted to litigate the state law issue in state court, they should have refrained from removal. The certification process is not a tool for forum-shopping, and it is all too convenient that Defendants' certification request follows federal court rulings holding that their new policy likely violates the First Amendment.

ARGUMENT

I. This Court should grant the motion for expedited consideration and quickly issue a preliminary injunction.

To be clear, Catholic Charities and Defendants were willing and able to maintain the status quo while this Court considered the many motions pending before it. But nonparties to this case—Proposed-Intervenors Kristy and Dana Dumont—want conflict, not cooperation. On the same day the Supreme Court granted certiorari in *Fulton*, a case involving the exclusion of a faith-based provider from Philadelphia's foster care system, the Dumonts moved to reopen *Dumont v. Gordon*, No. 2:17-cv-13080 (E.D. Mich.). Invoking that case's settlement agreement, the Dumonts are demanding that Judge Borman force the State to take adverse action against Catholic Charities—not for any alleged violation of Defendants' policy, but for expressing its religious beliefs during this litigation. *See, e.g.*, ECF No. 40-5 at 2 (PageID.1832) (arguing that the State must take adverse action against Catholic Charities based on statements made “in its litigation against the State”).

Fortunately, this Court can defuse the impending conflict. A preliminary injunction will not only protect Catholic Charities from adverse action, allowing it to continue its ministry to Michigan's foster children while this litigation proceeds, but it will also ensure the State faces no competing obligation under the *Dumont* settlement agreement. Indeed, that agreement clarifies that its requirements apply “[u]nless prohibited by law or court order.” Settlement Agreement at 2, ECF No. 1-2 (PageID.193) (emphasis added).

Two other developments support a preliminary injunction.

First, the Western District temporarily enjoined the State from enforcing its new policy against St. Vincent Catholic Charities. *Buck v. Gordon*, No. 1:19-CV-286, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019). The Sixth Circuit denied the State's request to stay that injunction pending appeal, *see Order, Buck v. Gordon*, No. 19-2185 (6th Cir. Nov. 19, 2019), attached as Ex. 2, and then granted the State's later request to dismiss its appeal. In so doing, the Sixth Circuit noted that the preliminary injunction would “remain in effect” throughout the litigation and thus guarantee that “St. Vincent will remain protected.” Ex. 1, Order at 2. Moreover, in evaluating whether dismissal would be improper because “lower courts” might “benefit from [its] immediate consideration of the issue,” the Sixth Circuit declared that its order “denying a stay” was a “signal to other courts that St. Vincent's position has a likelihood of success on appeal.” Ex. 1, Order at 2, 3.

Second, the cases that Defendants mainly relied on in opposing a preliminary injunction have been called into serious doubt on appeal. For instance, in *New Hope Family Services, Inc. v. Poole*, the Second Circuit issued a temporary injunction pending appeal of the lower court's ruling, concluding that the faith-based adoption provider there "may succeed on the merits of its appeal" and that "the equities warrant" a preliminary injunction. *See* Order at 4–5, *New Hope Family Servs.*, No. 19-1715 (2d Cir. Nov. 4, 2019), attached as Ex. 3.

And in *Fulton v. City of Philadelphia*, the U.S. Supreme Court agreed to review the Third Circuit's decision that a city could legally exclude a faith-based provider from its foster care system for adhering to its religious beliefs about marriage. *See Fulton*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 2020 WL 871694 (U.S. Feb. 24, 2020) (No. 19-123). The Supreme Court will thus soon decide similar constitutional issues to those presented here; this too supports a preliminary injunction.

II. This Court should deny the motion to certify.

More than eight months after voluntarily removing this case to federal court, Defendants ask this Court to certify to the Michigan Supreme Court the question whether state law allows a child-placing agency "under contract with the State . . . to refuse to provide state-supervised children with contracted services that conflict with the [agency's] sincerely held religious beliefs." ECF No. 38 at 3 (PageID.1579). But that question does not even describe the parties'

disagreement. The parties disagree about whether state law allows Defendants to force Catholic Charities to violate its religious beliefs when performing pre-referral activities—such as recruiting, training, studying, and recommending prospective parents—for which Catholic Charities is *not* reimbursed under the contracts. *Compare, e.g.,* Reply in Supp. of MPI at 2, ECF No. 25 (PageID.1366), *with* Defs’ Resp. to MPI at 9–10, ECF No. 22 (PageID.935–936).

In any event, certification “lies within the sound discretion of the district court,” *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 449–50 (6th Cir. 2009) (citation omitted), and is “not obligatory,” *Glover v. Nationwide Mut. Fire Ins. Co.*, 676 F. Supp. 2d 602, 622 (W.D. Mich. 2009). As detailed below, there is no good reason for sending this case back to state court.

A. The state laws are straightforward and can be interpreted by this Court.

Despite removing this case to federal court, Defendants now believe “[t]he Michigan Supreme Court should have the first opportunity to interpret” the state’s statutory protections for faith-based foster care and adoption providers. ECF No. 38 at 29 (PageID.1605). But federal courts “generally will not trouble [their] sister state courts every time an arguably unsettled question of state law comes across [their] desks.” *Pennington*, 553 F.3d at 450 (cleaned up). And courts in this Circuit routinely deny certification requests

when “a reasonably clear and principled course of action exists,” even when “the legal question is one of first impression.” *State Auto Prop. & Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 194 (6th Cir. 2015).

In *Sims Buick-GMC Truck, Inc. v. General Motors LLC*, 876 F.3d 182, 190 (6th Cir. 2017), for example, the Sixth Circuit held that a district court properly declined to certify the interpretation of an Ohio state law even though the Ohio Supreme Court had “never interpreted” that law. It was enough, the Sixth Circuit explained, that “Ohio contract and statutory interpretation precedent guided [the district court’s] reasoned decision.” *Id.*

The same path forward is available here—Michigan statutory interpretation precedent can lead to a reasoned decision from this Court. Like other courts, the Michigan Supreme Court’s “goal in interpreting a statute is to give effect to the Legislature’s intent, focusing first on the statute’s plain language.” *Malpass v. Dep’t of Treasury*, 833 N.W.2d 272, 277 (Mich. 2013) (cleaned up). Michigan courts “examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme.” *Id.*

Applied here, these basic principles of statutory interpretation establish that Catholic Charities’ understanding of Public Acts 53, 54, and 55 is correct. Without reiterating Catholic Charities’ statutory analysis, *see* MPI Br. at 9–11, ECF No. 11 (PageID.608–610); Reply in Supp. of MPI at 1–2, ECF No. 25 (PageID.1365–1366), it suffices to say

that the Michigan Legislature enacted Public Acts 53, 54, and 55 to ensure “as many possible qualified adoption and foster parent agencies in [the] state” and to guarantee that faith-based providers like Catholic Charities remain “free[] to abstain from conduct that conflicts with [their] sincerely held religious beliefs.” Mich. Comp. Laws § 722.124e(1)(c) & (e). Catholic Charities’ interpretation of these laws gives effect to their plain meaning and purpose; the State’s does not.

Indeed, under the State’s view, the laws would be all but meaningless. The State contends that the laws do not protect faith-based agencies providing foster-care services through a government contract and that agencies with a contract may not “turn away an Applicant” for religious reasons. ECF No. 22 at 18 (PageID.932). But that includes *every* foster-care agency, as the *only* way to provide foster-care services in Michigan is through a contract and license with the State. *See* Slater Decl. ¶ 17, ECF No. 11-1 (PageID.633); *see also* Defs.’ Answer ¶ 112, ECF No. 12 (PageID.666). What is more, the laws explicitly instruct an agency declining “any services” to “[p]romptly refer” the “applicant.” Mich. Comp. Laws § 722.124e(4). Given these facts, the State’s proposed interpretation is wrong.

In fact, while the parties currently disagree about whether Public Acts 53, 54, and 55 allow Catholic Charities to follow its religious beliefs when performing pre-referral activities and services such as recruiting, studying, and recommending prospective foster care and adoptive

parents, that was not always true. Until recently, the State interpreted the laws the same way Catholic Charities does. *See* Mot. to Dismiss at 25, *Dumont v. Lyon*, No. 2:17-cv-13080, ECF No. 16 (2:17-cv-13080 PageID.88) (“The people of Michigan chose to maximize child-placing-provider options when they passed legislation to continue Michigan’s longstanding practice of contracting with faith-based [child-placing agencies] while ensuring that every person seeking to adopt has the ability to do so.”). So did Attorney General Nessel—she declared the laws “a victory for the hate mongers,” ECF No. 25-7 at 4 (PageID.1429), and said their “only purpose” was to allow faith-based foster care and adoption providers “to discriminate against people,” ECF No. 25-6 at 3 (PageID.1425).

Even so, a mere disagreement about the laws’ proper interpretation and scope does not justify certification. Courts reserve certification for complex and challenging legal questions, with the Michigan Supreme Court “rarely accept[ing] certified questions from the federal courts, and almost never accept[ing] them from the district court.” *Glover*, 676 F. Supp. 2d at 621.

Because the laws are not “ambiguous,” the State “may not properly ask a state court if it would care in effect to rewrite a statute.” *City of Houston v. Hill*, 482 U.S. 451, 471 (1987). When, as here, a federal court “can resolve an issue of state law with available research materials already at hand,” “[c]ertification is inappropriate.” *Yates v.*

Ortho-McNeil-Janssen Pharms., Inc., 808 F.3d 281, 293 n.1 (6th Cir. 2015); accord *Fid. Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940) (“[I]t is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State.”).

B. The First Amendment independently bars Defendants’ new policy.

Certification is also improper because this Court could enjoin the challenged policy without referencing state law. Catholic Charities asserts constitutional claims under the First Amendment, and the Sixth Circuit has declared that similar claims have “a likelihood of success on appeal.” Ex. 1, Order at 3.

Nor is Michigan state law “at the heart” of Catholic Charities’ federal constitutional claims, as Defendants contend. ECF No. 38 at 30 (PageID.1606). In *Buck v. Gordon*, No. 1:19-CV-286, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019), for example, the court temporarily enjoined the State from enforcing its new policy against St. Vincent Catholic Charities because the policy likely violated the First Amendment. Although the *Buck* court criticized the State for disregarding Public Acts 53, 54, and 55, it identified other factors “creat[ing] a strong inference” of religious targeting: the State’s sudden change of position in the *Dumont* litigation and Attorney General Nessel’s history of making disparaging statements about the religious beliefs shared by St.

Vincent and Catholic Charities West Michigan. *Id.* at *10–11. Those same factors support Catholic Charities’ First Amendment claims here.

C. Defendants removed this case to federal court and seek a return to state court only after adverse rulings by the Western District and the Sixth Circuit.

This Court should deny Defendants’ certification motion for another reason: they voluntarily removed the case from state court. Although Defendants assert that removal does not weaken their request, *see* ECF No. 38 at 33–35 (PageID.1609–1611), the Sixth Circuit has held that courts “should be slow to honor a request for certification from a party who chose to invoke federal jurisdiction.” *Local 219 Plumbing & Pipefitting Indus. Pension Fund v. Buck Consultants, LLC*, 311 F. App’x 827, 832 (6th Cir. 2009).

Other courts considering the issue have held the same. *See, e.g., Passaro v. Virginia*, 935 F.3d 243, 252 (4th Cir. 2019) (certification inappropriate, in part, because “the [State] removed this case from Virginia state court, choosing to put the issue before the federal courts”); *Seaboard Sur. Co. v. Garrison, Webb & Stanaland, P.A.*, 823 F.2d 434, 438 (11th Cir. 1987) (declining request to certify because moving party could have litigated suit in state court but chose federal forum instead); *Colonial Park Country Club v. Joan of Arc*, 746 F.2d 1425, 1429 (10th Cir. 1984) (“[W]e note that the Country Club chose to file its case in federal court, and hence is in a somewhat awkward

position to now claim that the federal judge misunderstood the New Mexico law.”); *Cantwell v. Univ. of Mass.*, 551 F.2d 879, 880 (1st Cir. 1977) (“[O]ne who chooses the federal courts . . . is in a peculiarly poor position to seek certification.”).

Here, Defendants’ request for certification comes more than eight months after removal and follows unfavorable rulings from the Western District and Sixth Circuit on virtually identical constitutional issues in *Buck v. Gordon*. As the Sixth Circuit has explained, certification is “disfavored” when a party selects “federal court and then, after an unfavorable judgment, ‘seeks refuge’ in a state forum.” *City of Columbus v. Hotels.com, L.P.*, 693 F.3d 642, 654 (6th Cir. 2012).³

D. Certification would be inappropriate without a preliminary injunction.

Finally, this Court’s rules about certification require a written finding that “certification of the issue will not cause undue delay or prejudice.” E.D. Mich. LR 83.40(a)(3). Because the State’s new policy

³ *Accord Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008) (“There is a presumption against certifying a question to a state supreme court after the federal district court has issued a decision.”); *Enfield ex rel. Enfield v. A.B. Chance Co.*, 228 F.3d 1245, 1255 (10th Cir. 2000) (denying certification where party did not seek certification until adverse decision and stating “[t]hat fact alone persuades us that certification is inappropriate”); *Perkins v. Clark Equip. Co., Melrose Div.*, 823 F.2d 207, 209–10 (8th Cir. 1987) (discouraging requests for certification after an unfavorable decision because, “[o]therwise, the initial federal court decision will be nothing but a gamble with certification sought only after an adverse decision”).

threatens Catholic Charities with cancellation of its foster care and adoption contracts, and thus its ability to keep serving Michigan's foster children, this Court cannot make such a finding in the absence of a preliminary injunction. A preliminary injunction should issue if the Court is inclined to certify the state law issue. *See, e.g., Jones v. Coleman*, 848 F.3d 744, 754 (6th Cir. 2017) (“[W]hen the plaintiff has requested preliminary injunctive relief, a district court ought ordinarily to grant it when it abstains.”).

CONCLUSION

For these reasons, Plaintiff Catholic Charities West Michigan respectfully requests that this Court grant the motion to expedite and issue a preliminary injunction but deny Defendants' motion to certify.

Dated: March 5, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2020, I caused the foregoing to be filed with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record.

/s/ Jeremiah Galus
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES
WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT
OF HEALTH AND HUMAN
SERVICES, *et al.*,

Defendants.

2:19-CV-11661-DPH-DRG

Hon. Denise Page Hood

Hon. David R. Grand

**PLAINTIFF CATHOLIC
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Ex. 1	Order Granting Motion to Voluntarily Dismiss Appeal, <i>Buck v. Gordon</i> , No. 19-2185 (6th Cir. Feb. 27, 2020)
Ex. 2	Order Denying State's Emergency Motion for Stay, <i>Buck v. Gordon</i> , No. 19-2185 (6th Cir. Nov. 19, 2019)
Ex. 3	Order Issuing Temporary Injunction Pending Appeal, <i>New Hope Family Servs., Inc. v. Poole</i> , No. 19-1715 (2d Cir. Nov. 4, 2019)

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: February 27, 2020

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Re: Case No. 19-2185, *Melissa Buck, et al v. Robert Gordon, et al*
Originating Case No. : 1:19-cv-00286

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Robin L. Johnson
Case Manager
Direct Dial No. 513-564-7039

cc: Mr. Thomas Dorwin

Enclosure

No mandate to issue

No. 19-2185

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MELISSA BUCK, et al.,)
)
Plaintiffs-Appellees,)
)
v.)
)
ROBERT GORDON, in his official capacity as)
Director of the Michigan Department of Health and)
Human Services, et al.,)
)
Defendants-Appellants,)
)
ALEX M. AZAR, II, in his official capacity as the)
Secretary of the United States Department of Health)
and Human Services, et al.,)
)
Defendants.)

ORDER

Before: NORRIS, SUTTON, and BUSH, Circuit Judges.

Robert Gordon, Joo Yeun Chang, and Dana Nessel—in their official capacities as Director of the Michigan Department of Health and Human Services, the Executive Director of the Michigan Children’s Services Agency, and the Attorney General of Michigan—(“the State”) appeal an interlocutory order granting a preliminary injunction to Plaintiff St. Vincent Catholic Charities that prohibits the State from terminating, suspending, or failing to renew its contracts for child placement services or otherwise taking any action interfering with its free exercise of its religious beliefs. Non-parties Kristy and Dana Dumont move to intervene. The State did not respond. But St. Vincent, along with plaintiffs Melissa Buck, Chad Buck, and Shamber Flore

(collectively, “St. Vincent”), suggest staying the Dumonts’ request pending the outcome of the Dumonts’ related appeal and, alternatively, oppose intervention. The Dumonts reply. The State moves to voluntarily dismiss the appeal without costs assigned to either party. St. Vincent opposes dismissal. The State replies.

Courts “have broad discretion to grant voluntary motions to dismiss.” *Am. Auto. Mfrs. v. Comm’r, Mass. Dep’t of Env’tl. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994). We generally grant motions to voluntarily dismiss, *see Twp. of Benton v. Cty. of Berrien*, 570 F.2d 114, 118–19 (6th Cir. 1978), provided that circumstances do not dictate otherwise. We will deny voluntary dismissal if it is sought to evade appellate review. *See Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir. 2004). We will deny voluntary dismissal if a party is trying to avoid having a particular panel decide the merits of the appeal. *In re Nexium Antitrust Litig.*, 778 F.3d 1, 2 (1st Cir. 2015). We also eschew dismissal if we have invested substantial time in the case and a decision on the merits is imminent or dismissal will needlessly delay consideration by the court. *See id.* We may deny voluntary dismissal if lower courts would benefit from our immediate consideration of the issue. *Cf. Khouzam*, 361 F.3d at 168 (denying dismissal after the court expressed doubts as to the movant’s position during oral argument and noted that the case involved “an issue of public importance.”).

The circumstances here support dismissal. The State appealed the grant of a preliminary injunction; thus, even if we consider the merits of the appeal, it will not end the litigation. *See Am. Auto Mfrs.*, 31 F.3d at 23 (citation omitted) (granting voluntary dismissal of a preliminary injunction appeal because dismissal “w[ould] not shelter the . . . claims from scrutiny,” but instead “w[ould] simply . . . accept[] [appellant’s] decision to let those claims be finally adjudicated before bringing them to this court.”). Religious freedom is indisputably of public importance. But, because a stay of the injunction has been denied by both the district court and our court, it will remain in effect pending disposition of the matter. Thus, St. Vincent will remain protected if the district court grants the State’s request to certify a question to the Michigan Supreme Court,

No. 19-2185

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causing a delay. The appeal has not been briefed, oral argument has not been conducted, and a decision is not imminent. Although neither the district court nor this court's unpublished orders denying a stay are binding, both signal to other courts that St. Vincent's position has a likelihood of success on appeal. There are similar cases pending, but they, too, are all in their infancy. The Dumonts do have an outstanding motion to intervene. But they did not oppose dismissal. If they prevail in their related appeal challenging the denial of intervention below, they will be permitted to intervene below. And, regardless, they are participating below as *amici*.

The State suggests that costs should not be assigned to either party. Although St. Vincent notes that it has already expended costs on appeal and takes issue with the State's litigation practice, it does not suggest alternative terms.

The motion to voluntarily dismiss is **GRANTED**. The motion to intervene is **DENIED AS MOOT**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

EXHIBIT 2

No. 19-2185

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MELISSA BUCK, et al.,)
)
Plaintiffs-Appellees,)
)
v.)
)
ROBERT GORDON, in his official capacity as)
Director of the Michigan Department of Health and)
Human Services, et al.,)
)
Defendants-Appellants,)
)
ALEX M. AZAR, II, in his official capacity as the)
Secretary of the United States Department of Health)
and Human Services, et al.,)
)
Defendants.)

O R D E R

Before: SUHRHEINRICH, COOK, and BUSH, Circuit Judges.

The Michigan State Defendants (“the State”) appeal the district court’s September 26, 2019 order granting a preliminary injunction to plaintiff St. Vincent Catholic Charities (“St. Vincent”). The injunction prohibits the State from terminating, suspending, or failing to renew its contracts for adoption and foster placement services with St. Vincent or taking any other action alleged to interfere with St. Vincent’s free exercise of its religious beliefs. The State moves to stay the order pending resolution of its appeal and asks for an emergency ruling on its motion. The district court has denied a similar motion. Plaintiffs oppose a stay. Non-parties Kristy Dumont and Dana

Dumont have tendered a response in support of a stay, which we accept solely for the purposes of this motion.

We consider four factors in deciding whether to issue a stay: (1) whether the movant “has made a strong showing that [it] is likely to succeed on the merits”; (2) whether it “will be irreparably injured absent a stay”; (3) “whether issuance of the stay will substantially injure the other parties interested in the proceeding”; and (4) “where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). “The first two factors . . . are the most critical.” *Id.* The four factors “are not prerequisites that must be met, but are interrelated considerations that must be balanced together.” *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); see *Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014) (order).

We “begin by considering the likelihood that the district court’s preliminary injunction order will be upheld on appeal.” *Serv. Emps. Int’l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012) (per curiam) (internal quotation marks omitted). The State argues that the district court made numerous factual and legal errors. But the facts are largely uncontested; the State objects to the district court’s interpretation of those facts, which led to its conclusion that plaintiffs had a likelihood of success on the merits. In the absence of a factual or legal error, “the district judge’s weighing and balancing of the equities should be disturbed on appeal only in the rarest of cases.” *Preterm-Cleveland v. Himes*, 940 F.3d 318, 321 (6th Cir. 2019) (quotation omitted). The district court’s findings support the conclusion that a preliminary injunction in this case would merely preserve the status quo and ensure that St. Vincent may continue to operate as it has for the past seventy years. See *id.* at 325. We conclude that the relevant factors weigh in favor of denying a stay.

No. 19-2185

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The State's motion for a stay is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

EXHIBIT 3

N.D.N.Y.
18-cv-1419
D'Agostino, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of November, two thousand nineteen.

Present:

José A. Cabranes,
Reena Raggi,
Circuit Judges,
Edward R. Korman,*
District Judge.

New Hope Family Services, Inc.,

Plaintiff-Appellant,

v.

No. 19-1715

Sheila J. Poole, in her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York,

Defendant-Appellee.

FOR PLAINTIFF-APPELLANT: Roger G. Brooks, Alliance Defending Freedom, Scottsdale, AZ.

FOR DEFENDANT-APPELLEE: Laura Etlinger, Assistant Solicitor General, Andrea Oser, Assistant Solicitor General, Barbara D. Underwood, Solicitor General, *for* Letitia James, Attorney General, State of New York, Albany, NY.

Plaintiff New Hope Family Services, Inc. (“New Hope”), is a Christian ministry

* Judge Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

incorporated under the laws of New York and authorized to provide adoption services within that state. It does not provide those services pursuant to any contract with the State, nor does it receive any State funding.

New Hope is before this court on appeal from the dismissal of its action in the United States District Court for the Northern District of New York challenging on First Amendment grounds defendant's decision to condition New Hope's continued adoption authorization on its confirmation of compliance with 18 NYCRR § 421.3(d). That regulation states that "[a]uthorized agencies providing adoption services shall . . . prohibit discrimination and harassment against applicants for adoption services on the basis of," *inter alia*, "sex, sexual orientation, gender identity or expression, [or] marital status." 18 NYCRR § 421.3(d). New Hope asserts that it cannot provide the requested confirmation consistent with its religious beliefs, which do not permit it to certify a same-sex or cohabiting-unmarried couple as adoptive parents. OCFS does not appear to question the sincerity of New Hope's religious beliefs. Nevertheless, it maintains that such beliefs cannot excuse New Hope from complying with laws of general application such as § 421.3(d).

New Hope now moves this court for a preliminary injunction to prevent defendant from enforcing its § 421.3(d) confirmation demand pending appeal. Specifically, it seeks an order that allows it to continue providing various adoption services that have already begun and that are ongoing. At the same time, it agrees not to accept ANY new prospective adoptive parents for its services. It further agrees to provide defendant with various information relative to its adoption services.¹

Four factors are properly considered in deciding whether to grant New Hope a preliminary injunction pending appeal: (1) the likelihood of it succeeding on the merits, (2) the likelihood of it suffering irreparable injury without such an injunction, (3) the likelihood of substantial injury to defendant if an injunction is issued, and (4) the public interest. *See, e.g., Mohammed v. Reno*, 309 F.3d 95, 100–01 (2d Cir. 2002). In considering these factors, "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff[] will

¹ The terms New Hope proposes for the requested injunction were apparently developed during earlier negotiations between the parties, which failed in August 2019. At that point, defendant requested that, within fifteen days, New Hope confirm compliance with § 421.3(d) or begin closing its adoption program – which it describes as a "choice." Defendant has agreed to toll this period pending a ruling on New Hope's motion for a preliminary injunction. Because New Hope does not operate pursuant to a State contract or receive any state funding, the source of defendant's authority to demand closure is not apparent on the motion record. The parties are asked to clarify this point in their submissions to the merits panel.

suffer absent the [injunction].” *Id.* (quoting *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (brackets in *Mohammed*); *see id.* (citing approvingly to *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.3d 841, 843 (D.C. Cir. 1977) (stating that “necessary ‘level’ or ‘degree’ of possibility of success will vary according to the court’s assessment of the other . . . factors”). The last point is significant in this case because, while New Hope has a plausible First Amendment claim on appeal, the likelihood of it succeeding on that claim is difficult to assess in advance of full briefing. On the other hand, the likelihood of it sustaining serious, irreparable injury absent an injunction is evident and the remaining two factors also tilt decidedly in its favor.

The likelihood of New Hope succeeding on the merits requires careful review of complex precedent construing the First Amendment’s Free Exercise Clause.² *See* U.S. Const. amend. I. While that Clause undoubtedly prohibits the government from “compel[ing] affirmation of religious belief, punish[ing] the expression of religious doctrines it believes to be false, impos[ing] special disabilities on the basis of religious views or religious status, or lend[ing] its power to one or the other side in controversies over religious authority or dogma,” *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (internal citations omitted), it does not “relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes),” *id.* at 879 (internal quotation marks omitted). Navigating between these two principles often depends on the precise circumstances at issue. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S.Ct. 1719, 1727–29 (2018) (differentiating between clergy member’s refusal to perform gay marriage (“well understood in our constitutional order as an exercise of religion”), baker’s refusal to sell *any* cakes or goods for gay weddings (discriminatory commercial activity going “beyond any protected rights”), and baker’s refusal to use his artistic skills in way that expresses endorsement of gay wedding (warranting “neutral and respectful consideration of his claims” in particular circumstances)). Thus, courts considering Free Exercise Clause claims in the context of religious organizations providing adoption or foster care services have reached different conclusions depending on the circumstances. *Compare Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019) (denying Catholic Social Services (“CSS”), which City funded to provide foster care services pursuant to contract, an injunction requiring City to renew contract even though CSS refused to certify same-sex couples as foster parents), *with Buck v. Gordon*, No. 1:19-CV-286, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019) (granting preliminary injunction to Catholic agency that did not certify same-sex couples as adoptive or foster-care parents, but did

² New Hope also raises compelled-speech and freedom-of-association claims under the First Amendment; they present equally challenging questions of law and fact, and therefore warrant no different analysis to decide this motion.

refer them to agencies that would so certify, upon finding that record as whole admitted strong inference that defendant's "real target" was religious beliefs, not discriminatory conduct). On the motion record here, the court can conclude only that New Hope may succeed on the merits of its appeal; the likelihood of such success cannot confidently be predicted in advance of reviewing the circumstances and law as more fully presented by the parties in their merits briefs.

What can be determined even on the motion record, however, is that New Hope will suffer irreparable injury without the requested preliminary injunction pending appeal. A denial of the injunction would trigger defendant's demand that, within fifteen days, New Hope either (1) compromise its religious beliefs by providing the demanded confirmation of compliance with § 421.3(d) or (2) close its adoption ministry. Both options demonstrate specific, irreparable First Amendment injury resulting from defendant's enforcement of § 421.3(d). *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349–50 (2d Cir. 2003) (collecting cases).

At the same time, the motion record demonstrates that the requested injunction causes defendant no serious injury. This is in no small part due to New Hope's agreement not to accept any new prospective adoptive parents for adoption services, thereby avoiding future disparate treatment of same-sex and unmarried couples relative to other prospective adoptive parents pending appeal. In urging otherwise, defendant submits that, under the proposed injunction, same-sex and unmarried couples who previously refrained from using or were excluded from New Hope's services, will continue to be excluded from the opportunity to adopt children that New Hope is in a position to place. At present, such injury must be viewed as more hypothetical than real because the motion record does not demonstrate the existence of any such couples.³

In any event, the strong public interest pertaining to adoption services, *i.e.*, the welfare of children, both those already adopted and those awaiting adoption, is best served by granting rather than denying the requested injunction. By allowing New Hope to continue supervising placements already made (and with which it is therefore particularly familiar), the injunction ensures continued informed supervision without unnecessary disruption to the families involved. By allowing New Hope to continue its review of already pending adoption applications, the injunction avoids delaying the benefits of adoption to children awaiting placement. To be sure,

³ In its complaint, New Hope alleges that it has never denied a same-sex or unmarried couple's adoption application. Rather, when such couples have approached New Hope about adoption, it has referred them to another provider or the country social services office. Nothing in the motion record indicates whether such couples were or were not able to pursue adoptions by these alternative channels, much less the legal significance of any such post-referral activity.

the public also has an interest in there being equal access to public services, but that concern is significantly reduced here by New Hope's agreement not to accept any new applicants for adoptive services pending this appeal.

The court having thus determined that the equities warrant granting New Hope's motion for a preliminary injunction, it is hereby ORDERED that, pending a decision on this appeal,

1. Defendant shall not require New Hope to confirm its compliance with 18 NYCRR § 421.3(d).
2. New Hope shall not accept any new prospective adoptive parents for adoption services.
3. New Hope may continue the adoption study process for any individuals who completed New Hope's orientation prior to the commencement of this lawsuit.
4. New Hope shall provide the New York State Office of Children and Family Services ("OCFS") with a list naming each applicant to be an adoptive parent and each approved adoptive parent.
5. New Hope may continue to supervise placements of children in its legal custody.
6. New Hope may continue to accept surrenders of children and to place out children with approved adoptive applicants.
7. New Hope will inform OCFS when a child is placed with an approved adoptive parent as well as when an adoption is finalized.

The court having ordered that the appeal be expedited, the matter will remain with this panel, which will hear argument on November 13, 2019 at 1:00 p.m.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court


Catherine O'Hagan Wolfe

