

P R O C E E D I N G S

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2 **THE CLERK:** The matter now pending before the Court
3 is Civil Docket No. SAG-19-cv-1853, Bethel Ministries, Inc. v.
4 Karen Salmon, et al. This matter now comes before the Court
5 for the purpose of a preliminary injunction. Counsel, for the
6 record if you would please state your name.

7 **MR. SCHMITT:** Good morning, Your Honor. I'm Paul
8 Schmitt.

9 **MR. CORTMAN:** David Cortman.

10 **MR. TUCKER:** I'm Ryan Tucker.

11 **MR. GARZA:** John Garza.

12 **MR TREENE:** Eric Treene for the United States of
13 America.

14 **THE COURT:** Good morning.

15 **MS. RICE:** Sarah Rice, Assistant Attorney General.
16 With me is Jody Malmstrom, Assistant Attorney General.

17 **THE COURT:** Good morning to everyone. All right, we
18 are here for argument on Bethel's Motion for Preliminary
19 Injunction. My general plan for the morning is to allow each
20 side roughly 40 minutes of argument time. I will have some
21 questions that I'll probably be interrupting with during the
22 course of the argument. Then I will allow the United States a
23 brief period of time to the extent that it would like to weigh
24 in. And that will leave us a little bit of wiggle room if we
25 go over or have anything to do. I do not intend to make a

1 ruling from the bench today. I intend to submit something in
2 writing following the hearing. But with that, I will allow
3 Bethel to go first.

4 **MR. SCHMITT:** Good morning, Your Honor. And may it
5 please the Court -- and I'm sorry, I would like to reserve
6 about 10 minutes for rebuttal, if I may.

7 **THE COURT:** Okay, that's fine.

8 **MR. SCHMITT:** Bethel participated in Maryland's
9 BOOST program for two years when the BOOST statute provided
10 that participating schools could not discriminate in student
11 admissions. Bethel never violated this provision because it
12 welcomes every child who meets the school's academic
13 standards. And Bethel's policies don't violate the updated
14 policy either.

15 **THE COURT:** Let me -- I know I promised to interrupt
16 with questions and I'll start already. One of the primary
17 questions I have in this matter is it does not appear that
18 Bethel has applied, reapplied under the new updated policy and
19 it appears to me from the record that Bethel is now eligible
20 to reapply even under the suspension that had been imposed?

21 **MR. SCHMITT:** Your Honor, the suspension was for
22 two years, so that would have been the '18/'19 and '19/'20
23 school years.

24 **THE COURT:** Correct.

25 **MR. SCHMITT:** The 2020 to 2021 application process I

1 don't believe has started yet and I think that's part of the
2 State's argument that the program may not even be funded in
3 the future. So we haven't done that yet. But more
4 importantly, Bethel probably wouldn't have gone through the
5 application process anyway because it would be futile.

6 **THE COURT:** But if it doesn't go through the
7 process, how can the Court -- it seems to me that because
8 Bethel has not gone through the process, the Court would be
9 unable to adjudicate an as-applied challenge to the
10 application of the new standard to Bethel. Understanding your
11 concerns about how it would be applied to Bethel, it seems to
12 me that without going through that process, I'm not sure that
13 issue is squarely presented here.

14 **MR. SCHMITT:** Well no, Your Honor, because the fact
15 that we're here today and the Government hasn't -- or is
16 continuing to argue that Bethel is not eligible I think is
17 proof of the fact of the way the board would vote on this. So
18 it seems to me that, you know, Bethel's position is the same
19 as it always was. The board continues to maintain that Bethel
20 was ineligible and that's why we're asking for this relief.
21 Bethel continues to every day suffer a continuing irreparable
22 harm. We continue to lose students. When we lose those
23 students, we lose ministry opportunities which to a religious
24 school, is incredibly significant. We lose educational
25 opportunities. We're covering costs because we're no longer

1 participating in the programs that we were participating in.
2 So textbooks and technology in addition to BOOST, as well as
3 the aging public school program. And so, you know, resources
4 have to be shifted around. We're looking at teachers being
5 laid off, staff being laid off. And so this harm continues
6 because the Government maintains its position.

7 **THE COURT:** But when you say the Government
8 maintains its position, I want to make sure I understand. You
9 mean through its arguments in this lawsuit or has there been
10 any conversation between Bethel and the State about
11 reconsideration or reinstating eligibility?

12 **MR. SCHMITT:** Through its arguments in this lawsuit,
13 Your Honor. Bethel has not changed any of its beliefs and it
14 hasn't changed its admissions policy.

15 **THE COURT:** It has changed its handbook.

16 **MR. SCHMITT:** Its handbook has -- well, every year
17 the handbook gets updated as needed, and it's rearranged the
18 same policies that it's always had into different portions of
19 the handbook as it does. But Bethel's position is still the
20 same. And if the Government wishes to concede that Bethel is
21 now eligible, well that would be -- we would accept that for
22 the upcoming school year.

23 **THE COURT:** But I guess the issue doesn't seem to be
24 conceding whether they're eligible, the issue to the Court
25 seems to be whether they've been considered, whether the

1 updated policy has been applied to the updated handbook.

2 Understanding your position that the changes to the handbook
3 are not in substance, they may be in format, there still have
4 been changes that may or may not be material to someone's
5 review of what the handbook says.

6 **MR. SCHMITT:** Again, Your Honor, because nothing has
7 changed from our policy standpoint, we think that that's the
8 reason that the Government wouldn't come out any other way on
9 this.

10 **THE COURT:** The other important issue that I see the
11 distinctions between the old policy that was applied to Bethel
12 under which Bethel was disqualified and the current policy, is
13 that there has been an introduction of gender identity as one
14 of the categories. I understand Bethel's position that de
15 facto it believes the State was applying the gender identity
16 provision back when it was adjudicated in 2017.

17 **MR. SCHMITT:** Right.

18 **THE COURT:** But formally the entirety of the new
19 2019 version of the policy has never been applied to Bethel.
20 Is that accurate?

21 **MR. SCHMITT:** Well, Your Honor, not exactly for the
22 reason that you stated because they effectively expanded the
23 policy before the statute provided for it and applied it as if
24 it included gender identity and as if it included things
25 beyond admissions.

1 **THE COURT:** But isn't there a distinction between
2 saying their application of the 2017 policy was overbroad and
3 saying they applied this 2019 policy that was not yet in
4 existence to us back in 2017?

5 **MR. SCHMITT:** I think it shows how they would apply
6 the statute as it currently stands. I mean, they effectively
7 did it then and this is, I assume, how they would do it now.
8 I would give the Government the benefit of consistency at
9 least.

10 So after the board launched its inquisition into the
11 --

12 **THE COURT:** Let me stop you one more moment, then I
13 promise I will let you talk. So the injunctive relief that
14 Bethel is seeking, you're seeking to enjoin which version of
15 the nondiscrimination requirement?

16 **MR. SCHMITT:** Sure. So Your Honor, we ask for two
17 things. So enjoin the Government from enforcing the penalty
18 against Bethel, so \$102,000 clawback penalty. That of course
19 goes back to the old policy. We wish for Bethel to be placed
20 back into BOOST so an injunction against the policy as it
21 stands now is appropriate.

22 **THE COURT:** And when you say -- you are only seeking
23 to enjoin the penalty as it stands now as to Bethel or you're
24 seeking to enjoin it as to everyone?

25 **MR. SCHMITT:** As to us, Your Honor.

1 **THE COURT:** Okay. Go ahead.

2 **MR. SCHMITT:** Okay, thank you. So this all came
3 about, Your Honor, because the BOOST board conflated Bethel's
4 religious beliefs with discriminatory behavior and that was an
5 unjust conflation. The board was provided by Bethel written
6 assurances and repeated assurances that we comply with the
7 statutes's requirements. And in this case, after giving these
8 assurances, after we put statements under oath that show that
9 we don't discriminate and that we welcome all students, we
10 were kicked out of the program anyway despite a total lack of
11 evidence of any discrimination or wrongdoing on Bethel's part.
12 So we note that this is about Bethel's beliefs.

13 You know, as I just mentioned moments ago, we face
14 an ongoing and irreparable harm, despite the fact that we
15 never violated the law. We continue to lose those educational
16 opportunities and there will be effects that I just mentioned.
17 And we're entitled to this relief because we are going to
18 prevail on our claims for three main reasons.

19 First, we never violated the law in the first place
20 because we welcome all students and we won't discriminate
21 against any students. Anybody who is academically qualified
22 can come to Bethel.

23 Second, Maryland law explicitly does not require
24 that Bethel change its policies or its beliefs, but that's
25 exactly what the BOOST board demanded that Bethel should do.

1 And third, the defendant's discrimination against
2 Bethel's religious beliefs violates our free exercise and free
3 speech rights. So I'll address each one of these in turn.

4 First of all, we never violated the policy, ever, or
5 the State's statute ever. You know, the statutory language at
6 the time in question, Your Honor, specifically covered -- just
7 one second. -- oh, that there should be no discrimination in
8 student admissions on the basis of among other things, sexual
9 orientation. Bethel doesn't inquire into orientation, it
10 doesn't look into that with respect to student admissions. If
11 you're academically qualified, you can come. That position
12 has been made clear to the State. It was made clear in Ms.
13 Dant's March 13, 2018, letter. It was made clear in her
14 statement that was provided to the board for their May 3rd
15 meeting in 2018. And it was clear in the May 29, 2018 letter
16 that Ms. Dant provided with follow-up answers to the board's
17 questions. And in particular, in particular Bethel doesn't
18 even violate the concerns that the board had with respect to
19 things beyond the admission's decision in the first place.

20 And I think it's important to point out here, Your
21 Honor, that the defendants have conceded that Bethel was
22 compliant and was -- excuse me, that Bethel in the answer to
23 their complaint they conceded that Bethel was BOOST eligible.
24 This would be paragraph 4. And they met the qualifications
25 for BOOST. So if you take away the defendant's discrimination

1 against Bethel's religious beliefs, there's nothing holding us
2 back from being back in the BOOST program.

3 **THE COURT:** Did Bethel prior to the suspension have
4 to reapply every year or once a school applies and is
5 qualified, does it automatically remain in the program?

6 **MR. SCHMITT:** The schools reapply every year, Your
7 Honor.

8 **THE COURT:** So when the injunctive relief you're
9 talking about, are you talking about permitting Bethel to
10 reapply? Because presumably because you have not reapplied,
11 even if the Court were inclined to grant your relief, it would
12 not bypass the application process.

13 **MR. SCHMITT:** Well, it should, Your Honor, because a
14 reapplication would be futile in the first place. But there's
15 two things too. Bethel could still potentially benefit from
16 Boost this academic school year with injunctive relief from
17 the Court. So specifically, BOOST funds belong to the
18 students and their parents. The awards go to the students.
19 They can choose among 200 or so eligible BOOST schools. And
20 so those students and their parents often times will transfer
21 schools or do other things throughout the course of the
22 academic year and those funds will follow the student. So
23 injunctive relief can be granted right now and then injunctive
24 relief can be granted going forward for 2020 to 2021.

25 **THE COURT:** So just to make sure I understand what

1 you're saying, there may be some students who were at Bethel
2 who had BOOST funding who have left Bethel to go to a BOOST
3 eligible school to retain their funds, but could potentially
4 transfer back if relief were granted?

5 **MR. SCHMITT:** Correct, or there may be students who
6 were not at Bethel in the first place or who wanted to be who
7 were BOOST eligible.

8 So yeah, and I think another thing to keep in mind
9 in this particular case with the fact that there's no evidence
10 of discrimination here and that Bethel didn't violate the
11 policy is that the defendants inappropriately put the onus on
12 Bethel to prove a negative. So Bethel gave all the evidence
13 needed to prove nondiscrimination and the board assumed that
14 well, we don't believe your answers anyway. You probably
15 discriminate because of these pragmatic religious beliefs.
16 And so you have to prove to us. And particularly, the
17 chairman of the board's comment that the burden of proof
18 shouldn't be on the board, that also demonstrates this
19 principle.

20 So if you look at the BOOST statute too, Your Honor,
21 the Maryland statute specifically provides that schools don't
22 need to change their religious beliefs. Nothing in the
23 statute says after giving the categories that you don't
24 discriminate against it, it says, nothing herein shall require
25 any school or institution to adopt any rule, regulation or

1 policy that conflicts with its religious or moral teachings.
2 That's precisely what the BOOST board asked Bethel to do in
3 this case. The defendants never asked Bethel to actually
4 change their admissions practices because Bethel welcomes
5 everybody. But it was their policies specifically with
6 respect to their teaching on marriage and all people being
7 created in the image and likeness of God that drew the ire of
8 the board.

9 **THE COURT:** Did the board propose to Bethel specific
10 changes to the language? I know in some of the exhibits that
11 were submitted there were examples of what other schools had
12 done, but was there any discussion between the board and
13 Bethel about particular changes that would satisfy the board?

14 **MR. SCHMITT:** Yes, so that's exactly right, Your
15 Honor. Exhibit 8 demonstrates the type of material provided
16 to Bethel by the board saying hey -- and actually, there are
17 letters from the board that say, you know, let us know if you
18 want to update the policy. And here's what we find
19 acceptable. These are the beliefs that we like. And, you
20 know, on two things, as a free exercise matter you can't do
21 that. You can't tell a church that they have to have certain
22 orthodox beliefs and on a free speech matter you can't control
23 someone's speech and the way they preach the gospel. So I
24 think that that's exactly a problematic situation. And the
25 record here is that there are some orthodox beliefs that are

1 okay, and some that are not.

2 **THE COURT:** I guess my question was a little more
3 specific. Was there ever a more specific discussion about the
4 language currently contained in Bethel's handbook, you need to
5 add sexual orientation to the list of categories in which you
6 do not discriminate? Or you need to remove this portion from
7 the admissions page and put it somewhere else? Were
8 discussions like that had or was it more, let us provide you
9 with a list of what other schools have done so that you can
10 look at that as a model?

11 **MR. SCHMITT:** I think it was both and, Your Honor,
12 so where you look for that sort of thing is, you know, for
13 example, Exhibit 6, it shows you here that here's the language
14 we find problematic, you know, we're not going to let you in
15 the program if you continue to use this language. Exhibit 8
16 or excuse me, 7 goes back and forth with Bethel on that. You
17 know, 8 is the language that the state provided that they
18 thought was orthodox enough. Exhibit 10 shows how this all
19 started and talking about the general types of language that
20 we don't like. Look at your religious language, look at your
21 religious and moral language. If you've got something
22 problematic, you're going to be kicked out of the program.
23 Exhibit 11 highlights exactly and came with a highlight too,
24 exactly of what the state found problematic in this case and
25 showed what the qualifications for eligibility were. So I

1 think the record is very clear.

2 And then on another part of that, Your Honor, if you
3 look through the transcripts and actually the video at length
4 provided of the board meetings is very helpful because it
5 shows the board members parsing through all these particular
6 beliefs. And I'll get a little more into that when we get to
7 our hostility claim. But yeah, we can -- actually, we'll just
8 go there right now.

9 You know, under Church of Lukumi and Trinity and
10 Masterpiece, effectively you can't go after religious
11 institutions because you don't like their religious beliefs
12 and you can't target certain religious bodies or particular
13 religious denominations because you find their beliefs
14 objectionable or you're suspicious of their practices. And
15 this is what is happening in this case. The board was
16 suspicious that if the school has these traditional beliefs
17 about marriage, then certainly they can't also not
18 discriminate. By default they have to discriminate if they
19 believe something like this. And, you know, that violates
20 their free exercise rights, Your Honor. So there's all kinds
21 of examples --

22 **THE COURT:** And in that are you talking specifically
23 about Bethel or are you talking -- because we know from the
24 record that they were reviewing handbooks from a number of
25 schools, some of which frankly had more specific language than

1 Bethel about this particular issue.

2 **MR. SCHMITT:** Correct, Your Honor. I think what's
3 -- there's two things happening here. First of all, the BOOST
4 board doesn't like these types of religious beliefs, anything
5 that touches on human sexuality to begin with. So any schools
6 who have statements like that got more scrutiny and were
7 treated differently than all other religious schools. But
8 then even beyond that, the schools who refused to remove their
9 language were subject to particularly aggressive behavior and
10 overzealous enforcement of the law. And that's our problem
11 here today. You know, Lukumi and Masterpiece emphasized that
12 even upon slight suspicion that an animosity towards a
13 religious body or just distrust of its practices is there,
14 then the Court has to look into the record and that's evidence
15 of targeting, that's the problematic evidence of targeting
16 that's happening here. And that targeting is based on
17 hostility. Here we have comments that --

18 **THE COURT:** I just want to hone in on this a little
19 bit. Some of the other schools that did agree to change their
20 language as I understand it have religious beliefs very close
21 to Bethel's, is that accurate? But they did agree to change
22 their language and then were permitted to remain in the
23 program?

24 **MR. SCHMITT:** Some schools who hid their beliefs or
25 changed their language, the BOOST board stopped persecuting

1 them in a particular instance, but schools who wanted to stand
2 by their beliefs unfortunately could no longer participate in
3 the program. So here we have all kinds of examples of
4 hostility. You know, those schools that have those kind of
5 beliefs, certainly they cite their assurances illegally,
6 that's Bate stamp 0176 in Exhibit 12. Comments that the
7 schools are either not discriminating or were being opened to
8 discrimination, again this bias that unless you say the things
9 we want you to say, you're clearly going to be discriminatory.
10 You know, descriptions of these types of religious beliefs as
11 very problematic and extraordinary problematic. The promise
12 that schools with these problematic religious beliefs are
13 going to face for at least the chairman of the board, an
14 extraordinarily high bar when it comes to being admitted into
15 the program. That just shows that anyone that has those
16 beliefs is going to be treated differently than someone else.

17 **THE COURT:** Is there a cite for that?

18 **MR. SCHMITT:** Yes, Your Honor. That's at Bates
19 stamp No. 0210 in Exhibit 12. And also the related comment
20 that the board had to, quote, "scrutinize more closely," end
21 quote certain schools and that's at Exhibit 12, Bates stamp
22 0195.

23 And then there's comments that the burden shouldn't
24 be on the board to prove that these schools don't
25 discriminate. They need to prove a negative. And that's at

1 02117. And then, you know, the other thing is just the
2 actions of the board. So they expanded the nondiscrimination
3 policy broader than the law allowed. They ignored the written
4 assurances and effectively said to Bethel, we don't believe
5 you. You say you don't discriminate. We don't believe you
6 because of your beliefs. This had to betrays as prejudice
7 that you can't have these religious beliefs and also not
8 discriminate. And the irregularity of the way this decision
9 was made also indicates that there was an improper motive and
10 that Jesus Christ is the Answer Ministries case out of the
11 Fourth Circuit has that proposition. When you violate
12 Maryland's open meetings laws and you don't follow the right
13 process, something is afoot, and especially in the context of
14 a board that never went into closed session before.

15 **THE COURT:** And when you say "never went into closed
16 session," they did say on the record here that they were going
17 into closed session to receive legal advice, and then they
18 came back out and voted on the open record. Even that has not
19 happened before?

20 **MR. SCHMITT:** So to my knowledge no, Your Honor.
21 They've never done that. And because the chairman of the
22 board said in three years we've never had to go into -- and
23 the program has only been around that long. So that's how I
24 deduced that. And let's see here, yeah.

25 And the other thing is if you look at Exhibit 12,

1 Bates stamp 0164, the board was advised that the clawback
2 specifically was discretionary. They didn't have to clawback
3 this money. The State of Maryland already received the
4 benefit of the bargain in this case. Bethel educated these
5 schools. There was never any issue with the program and then
6 the board didn't like their language. Now they're going after
7 the clawback and that's a choice. They made that
8 discretionary choice.

9 **THE COURT:** This may be a better question for the
10 State than you, but do you know, has clawback been applied to
11 other schools and has it been contingent on whether the
12 schools came into compliance and remained in the program or
13 not?

14 **MR. SCHMITT:** I can't answer that definitively, Your
15 Honor.

16 **THE COURT:** Okay, that's fine.

17 **MR. SCHMITT:** And then because of these things, Your
18 Honor, because of the free exercise violations, you know,
19 strict scrutiny applies. The defendants don't have any
20 compelling interest as it plays out in these types of cases.
21 They need to have a compelling interest in the enforcement
22 that they're doing against Bethel. Because there's no
23 discrimination here, they don't. There's no compelling
24 interest for them to go in and change Bethel's religious
25 beliefs and even if they had some kind of interest, they

1 haven't pursued this in the least restrictive means because
2 they could have relied on the assurances. They could have
3 accepted Bethel's word after they couldn't come up with any
4 evidence of discrimination, after Bethel has said under oath
5 that they don't discriminate. So that fails under strict
6 scrutiny.

7 **THE COURT:** Understanding your argument that it
8 fails under strict scrutiny, if the Court were not to find
9 strict scrutiny to apply, what is Bethel's position if
10 rational basis review would apply?

11 **MR. SCHMITT:** I think it's irrational that in a case
12 where there's no discrimination and the policy is welcome all
13 students, there's no rational basis to go into a church-run
14 school's handbook and change all the theological language. If
15 you look at the handbook as a whole, Your Honor, the
16 theological language is sprinkled in everywhere. It informs
17 the conduct policies, it informs the dress code, it informs
18 the student goals, the goals for the school, student behavior,
19 how to resolve conflicts among one another. Scripture
20 references are abundant throughout the course of the handbook.
21 So, you know, the State has no business coming in and finding
22 particular provisions that it doesn't like and saying oh, we
23 don't like the way you said this. Come in and say it a
24 different way. Say it our way.

25 And Bethel is also likely to prevail on its free

1 speech claims. This is pretty self-explanatory, but the
2 discrimination here is viewpoint based and content based. We
3 have a letter from -- we know that this censorship because the
4 BOOST board itself indicated that all Bethel needs to do to be
5 restored to the program is change its language. Well, it
6 doesn't actually have to change its practices because those
7 aren't problematic, but if you come back and change your
8 language then you can come back in. And that is if you look
9 at Exhibit 15, that's where you'll find an example of that,
10 specifically the BOOST program executive director's letter of
11 February 28, 2019.

12 **THE COURT:** It seems to me that the question here
13 looking at the free speech claim is really the issue of
14 whether this is a regulation of conduct or a regulation of
15 speech. If it's a regulation of conduct rather than speech,
16 how does that effect the free speech claim?

17 **MR. SCHMITT:** Well, certainly we don't believe it's
18 a regulation of conduct at all, Your Honor, just as a preface.
19 But that being the case, you know, obviously the free exercise
20 claim still stands and we suspect that when you target based
21 on communicative intent, then you've got to meet the strict
22 scrutiny and the Government can't do that.

23 And the problem here, Your Honor, is that they are
24 conditioning the receipt of the state benefit particularly on
25 an unconstitutional condition which is that you have to have

1 orthodox language, according to them.

2 **THE COURT:** And how much information do you have now
3 understanding the stage of the case that we're at, as to what
4 happened with respect to these other schools? Again, some of
5 the schools that had more problematic language arguably in
6 their handbooks originally and made changes to them? I don't
7 have other than I think it's Exhibit 8 that has the sort of
8 changed language, I don't appear to have much information in
9 the record about the interaction between the BOOST board and
10 the other schools.

11 **MR. SCHMITT:** Well, what we do know, Your Honor, you
12 can look at Exhibit 15 that says hey -- I'm paraphrasing, but
13 hey, by the way the board has reconsidered other schools who
14 got rid of the things we don't like.

15 **THE COURT:** Okay.

16 **MR. SCHMITT:** It seems that if you capitulate, you
17 can participate in the program.

18 **THE COURT:** But besides those things, we don't have
19 at this point a particularly robust record as to what happened
20 with those schools?

21 **MR. SCHMITT:** Especially not with respect to us,
22 Your Honor, so we don't know how this would play out in our
23 case.

24 And then I would just want to emphasize one more
25 thing before I wrap up which is that the harm here is

1 continuing, ongoing and really irreparable. The whole point
2 of the school is to transmit the religious beliefs and help
3 billed up their church. It's a religious school and so every
4 student you lose, and we've lost students that we've had,
5 we're barely hanging on to a couple students, we've lost a lot
6 of prospective students. I think in the record we've got over
7 20-something inquiries and those are the ones we know about
8 who would want to go to Bethel, but then Bethel is not BOOST
9 eligible so they had to go elsewhere. So each one of those is
10 a lost ministry opportunity. And that's a particular type of
11 harm for Bethel, in addition to all the other things.

12 **THE COURT:** I want to focus on the imminent and
13 irreparable harm for a minute. First of all, with respect to
14 the clawback which is part of the injunctive relief you're
15 seeking, understanding that the State has sent you a letter
16 saying we intend to clawback these funds, is there any ongoing
17 collection effort or is there any immediate effect of the
18 letter saying we're going to clawback the funds that are
19 occurring to the school right now?

20 **MR. SCHMITT:** Your Honor, we have the letter saying
21 this is going to happen and you need to pay it back and, you
22 know, contact us to arrange payment.

23 **THE COURT:** Right.

24 **MR. SCHMITT:** I don't believe this has been referred
25 to collections yet, but I think that that's coming given the

1 timeline of how this has all happened. And so it's impending,
2 but the other shoe hasn't dropped yet.

3 **THE COURT:** Okay. And then the other issue with
4 respect to imminent and irreparable harm it seems to me in
5 this case is the timing of all of this arising. Bethel was
6 obviously informed of its removal from the program
7 significantly before it even filed suit in this case and then
8 there was some period of time between the filing of the suit
9 and the filing of the preliminary injunction motion. Doesn't
10 that undermine the arguments that this is imminent and
11 irreparable harm at this point?

12 **MR. SCHMITT:** No, Your Honor, for two reasons.
13 Because the harm is ongoing, so even the fact that the harm is
14 ongoing, we still need this remedied. But second, you know, I
15 think that's a misconstrual of the way this has happened. If
16 you look at the timeline of events and I understand that
17 that's the Government's position, but if you look at the
18 timeline of events, Bethel tried to work with the State of
19 Maryland for a year-and-a-half. We were going back and forth
20 with letters. You know, the board made its final decision in
21 the month of June and Bethel didn't find out about it until
22 August of 2018 right before school started. And then there
23 was a question of well, maybe is it better to, you know,
24 continue without the program and then the clawback comes in
25 and that doesn't happen until December. And then there's

1 correspondence from the State all the way in the end of
2 February, almost March saying oh, and by the way here are all
3 the policies we like and we'll reconsider schools who
4 capitulate. And so really, there's no delay on Bethel's part
5 because by the time all of this finally sorted out, Bethel is
6 trying to avoid litigation and avoid having to go through the
7 Court process to resolve this. They've bent over backwards to
8 try to accommodate the State, but they also don't want to
9 abandon their religious beliefs and so that's how we get here.

10 **THE COURT:** It does create something of a legal
11 predicament though because typically a preliminary injunction
12 is used to preserve the status quo. The status quo at some
13 point in time would have been Bethel has all these BOOST
14 students and they want to be able to continue as students, et
15 cetera. Now we're sort of two years down the road, what
16 Bethel really is asking it seems to me is more of a mandatory
17 injunction to be reinstated into the program which is not
18 preserving the status quo, it's taking action and changing the
19 status quo for the pendency of the litigation.

20 **MR. SCHMITT:** No, Your Honor. And because what
21 Bethel is asking is send us back to the way things were before
22 the illegal action happened. Put things back to the way they
23 were before the State engaged in religious discrimination.
24 The State has conceded in their answer to the complaint that
25 Bethel was BOOST eligible. You know, and without the State

1 meddling with Bethel's religious beliefs, they'd still be
2 BOOST eligible. They'd still be participating and parents and
3 students who wanted to go to Bethel could choose to send their
4 kids there.

5 So that's what we're trying to reestablish is to go
6 back to what the State has already admitted which is that, you
7 know, if we didn't have this issue, you'd be in the program
8 participating just fine. And I know that the student deadline
9 typically is at the end of April, so any relief that this
10 Court would give, that should probably be in mind that
11 students are going to have their application deadline coming
12 up at the end of April for the coming school year. And so we
13 would hope to get some sort of relief before that.

14 **THE COURT:** You said earlier though that the
15 deadlines as far as you knew for schools to apply have not
16 happened. Are there no deadlines in place for schools but
17 there are deadlines in place for students?

18 **MR. SCHMITT:** I'm sorry, Your Honor, I'm talking
19 about historically how this happened. It's always been late
20 April, maybe early May that student applications are due. I
21 checked the BOOST website last night and 2020 to 2021 had not
22 been firmly established yet.

23 **THE COURT:** Either for schools or for students?

24 **MR. SCHMITT:** For -- yes, yes.

25 **THE COURT:** Okay.

1 **MR. SCHMITT:** As far as I could tell from the
2 website.

3 And just in conclusion, Your Honor, Bethel has just
4 been upfront about what its values are. Its students handbook
5 provided that for parents and students to know that these are
6 our beliefs and all are welcome here and so we don't think
7 Bethel should be punished for that, thank you.

8 **THE COURT:** All right, thank you. Ms. Rice?

9 **MS. RICE:** Thank you, Your Honor. I wanted to start
10 off discussing a little bit the role of the board and what it
11 means to be a board and what it means to enforce a
12 nondiscrimination requirement in this circumstance. The board
13 is a number of appointees, meets periodically. It has no
14 staff and it can only take action by vote. And I think that
15 that's really important here in addressing some of Your
16 Honor's preliminary questions to the plaintiffs. Because the
17 board has not considered and has not had the opportunity to
18 consider the new revised handbook for the 2019, 2020 school
19 year or any application of the new BOOST nondiscrimination
20 requirement with respect to Bethel.

21 **THE COURT:** Is the State currently or the board
22 currently accepting applications for 2020, 2021?

23 **MS. RICE:** No, the program in 2020, 2021 does not
24 yet exist. This program is a program that requires
25 reauthorization in the budget bill every year. And it has no

1 codified existence.

2 **THE COURT:** But historically isn't it true that
3 applications have been accepted before the formal
4 reauthorization of the funding? It appeared from the track
5 record that schools have been asked to submit applications
6 before there has been a formal reauthorization.

7 **MS. RICE:** Sure, it's my understanding that that has
8 been historical practice that around this time of year would
9 be the time that the schools would be asked to reapply. There
10 are a few things going on this year in the general assembly,
11 external to this case that may well be affecting that. And
12 also a few things going on just-staff wise at MSDE that may be
13 affecting that. But importantly the general assembly has been
14 widely reported there has been statements from the new speaker
15 and the new president is going to be focused on education
16 reform this year. There are proposals from the governor about
17 education reform. There is the consideration of what has been
18 colloquially called the Kirwan Commission Report. And there's
19 a consideration of a huge increased investment in public
20 schooling. So historically in the past when that's happened,
21 under Thorton, smaller programs were eliminated in an effort
22 to find the funds for the reinvestment formulas. I do not
23 know and in fact, it is unknowable whether the BOOST program
24 will be looked at, but it has certainly been a topic of
25 contention in past sessions. It came into being in 2016.

1 That was simultaneous with a large funding measure that was
2 passed to what is called close the gap for public education.
3 And it appeared to be -- it came later in session and it
4 appeared to be part of a compromise with the administration.
5 Maryland Government's budget is different from many other
6 states. In Maryland, the governor proposes the budget and the
7 general assembly can only make cuts. So there often have to
8 be these compromises in order to get programs instituted. So
9 we don't know how that balance is going to come out this year
10 in particular.

11 **THE COURT:** So just to be clear, no schools have had
12 the opportunity yet to apply for the 2020, 2021 school year?

13 **MS. RICE:** Yes, I share that understanding.

14 **THE COURT:** If applications are opened at some point
15 for that process, the State would be willing to consider
16 Bethel under the same guidelines it considers all the other
17 schools?

18 **MS. RICE:** Yes. In fact, Exhibit 15 made clear to
19 Bethel that even though this statute provided for sort of this
20 prospective suspension, that they would still consider their
21 application for the 2019, 2020 school year if they chose to
22 reapply with recognition that something would need to change
23 about the admissions policy at that time. So yes, the State
24 would reconsider Bethel at any time as it has made clear from
25 the beginning of this case -- or actually of this matter,

1 before this case began.

2 The BOOST board was given again, this language in
3 the budget bill which was not codified and was charged with
4 enforcing it. And when it began, it did what was a reasonable
5 thing to do for boards of this size. It asked for
6 self-certification about the nondiscrimination clause and a
7 number of other requirements. It was not until it was brought
8 to the board's attention by a citizen group complainant that
9 there were schools out there that had admissions policies that
10 were in direct conflict with these certifications, that the
11 board sent out a letter to all of the participant schools
12 asking for the handbooks to look to see if those policies were
13 in compliance with the nondiscrimination. And that is, again,
14 very key to considering what the board did here because the
15 board was only concerned with ascertaining the policy. And
16 one of the pieces of evidence about the policy, the conduct
17 policy and the admissions policy is what it does in the
18 student handbook. And that is, in fact, the way that any
19 school communicates to the public who and who is not eligible
20 for admission. And counsel for Bethel just said it themselves
21 that there are statements of belief throughout their handbook
22 and there are statements of belief throughout many of these
23 schools' handbooks because many of the schools that
24 participate in the program are religious, about their
25 religious beliefs and their expectations for student conduct.

1 And when those statements of religious beliefs and
2 expectations for student conduct were not directly tied to the
3 possibility of denial of admission or of expulsion, the board
4 did not consider them. So you can look back in the
5 communications with the board and you can see very clearly
6 that the only language that was identified as problematic was
7 the language appearing in the statement of nondiscrimination
8 and the admissions policy of the handbook page.

9 And that's critical because if you look at the
10 handbook for that year and let me just check to see -- it's
11 Exhibit 1, page 7, that's all on one page in the handbook.
12 The exact next page, page 8 contains a statement of faith
13 where very similar, although not identical language appears
14 and that language was never remarked upon, drawn into question
15 or scrutinized by the board.

16 **THE COURT:** I want to back up to something you said
17 a minute ago which is unless it pertained to admissions or
18 possibility of expulsion. Aren't those two different things
19 in terms of the 2017 policy? I know that the amended policy
20 does contain language about expulsion, but the original policy
21 just talked about admissions.

22 **MS. RICE:** Sure, that was a decision made by the
23 board and you can read for yourself their deliberations about
24 why they made that decision. That when the general assembly
25 said "admissions," they meant the ability of the student to

1 continue to be enrolled. That it would not count under the
2 general assembly's nondiscrimination clause as
3 nondiscrimination in admissions to admit the student who would
4 be immediately or shortly thereafter subject to expulsion or
5 status linked conduct.

6 **THE COURT:** Did they have any concrete examples of
7 this happening or is this purely a hypothetical that the board
8 was considering? I mean, this notion of sort of a sham
9 admission, is there any examples of that?

10 **MS. RICE:** The board had received a complaint from a
11 parent/teacher organization that --

12 **THE COURT:** About handbook language?

13 **MS. RICE:** About handbook language.

14 **THE COURT:** But not about actual conduct such as a
15 sham admission or admissions decision to --

16 **MS. RICE:** In that case it was related to the
17 child's status as defined by their parents' marriage. And so
18 I think that is what brought that hypothetical to the board's
19 mind because that is something that you might not know on
20 admissions, but you may quickly find out.

21 **THE COURT:** But that was, again, not Bethel, the
22 school that was the subject of that letter?

23 **MS. RICE:** Not Bethel, correct. There were many
24 schools and as I think Your Honor pointed out. And that
25 brings me to a point that I wanted to make sure that I

1 addressed. This action was not taken for Bethel alone and I
2 think that's really important when we're looking at a claim of
3 hostility or targeting, that this was a broad-based inquiry.
4 It was made to all schools, regardless of their religious
5 affiliation or belief.

6 **THE COURT:** Secular schools and religious schools,
7 alike?

8 **MS. RICE:** Secular schools and religious schools.
9 The list is included as an exhibit to our response. And the
10 schools that drew attention, some of them as I think you
11 pointed out had very clear language in their handbook. So on
12 Exhibit 8, No. 11, Woodstream Christian Academy had a
13 statement that said, evidence of deviant behavior of a sexual
14 nature -- and then they listed examples, e.g., promiscuity,
15 pregnancy and homosexuality will be grounds for expulsion.

16 And I bring that up because that is the language
17 that Chair Gallagher was considering on this Bates stamp
18 page 212 when he said -- or sorry, 210 where he said, and I
19 will just say I will have an extraordinarily high bar that
20 relates to my vote on this. If you look immediately before
21 that, Chair Gallagher said okay, so I think at this point as
22 it relates to Woodstream, we don't have a consensus other than
23 we need additional information as it relates to Woodstream.
24 So this --

25 **THE COURT:** And what happened with respect to

1 Woodstream? This is where I feel that I don't have a very
2 good handle on the track record. And I understand that we're
3 dealing with them as applied challenge vis-a-vis Bethel, but
4 it does seem like some of what happened to these other schools
5 is particularly relevant to the inquiry.

6 **MS. RICE:** Sure. In the record we just have
7 Exhibit 8. I can proffer to you that for the schools that --
8 for Woodstream, Woodstream declined to participate in the
9 program going forward. And there's also evidence for
10 Broadfording Christian Academy is another especially important
11 example. The board record, Broadfording Christian Academy
12 after at first scrutinizing whether their policy was in
13 compliance because the board recognized that their policy was
14 stated in mutual terms. And so Broadfording Christian Academy
15 was never disallowed from the program.

16 **THE COURT:** What part of Bethel's policy was viewed
17 as not stated in neutral terms with respect to sexual
18 orientation? Because again, gender identity did not become
19 part of the statute until subsequent to this decision.

20 **MS. RICE:** Sure. I think that the best evidence of
21 this is what the board itself said in its deliberations, and
22 what it said in its letter, in particular. Just a second.

23 **THE COURT:** You're talking about Exhibit 6?

24 **MS. RICE:** I'm talking about Exhibit 6, yup. And in
25 this it was the conjunction of student conduct having to align

1 with this view of marriage as between a man and woman combined
2 with the statement on gender identity. And the reason why
3 that is relevant has been explained at length by the Supreme
4 Court and other Courts of Appeals. In Christian Legal Society
5 versus Martinez, the Court stated that it has never been true
6 that when dealing specifically with matters of sexual
7 orientation that the Courts are required to turn a blind eye
8 and make this false distinction between status and conduct.
9 So that is to say if somebody was discriminating based on
10 sexual orientation, because of deviance from gender
11 stereotypes, that is still discrimination on the basis of
12 sexual orientation.

13 **THE COURT:** So in your view, sexual orientation
14 subsumes gender identity?

15 **MS. RICE:** No, they are still separate, but I think
16 what I'm saying here is the board deliberated on this point,
17 considered this relevant background principle and looked at
18 that paragraph as a whole. And the fact that Bethel although
19 it provided many explanations that it would admit people
20 without inquiring into their sexual orientation or identity,
21 they did not explain what they meant by requiring student
22 conduct to align with the view of biblical marriage. They
23 didn't -- they chose not to explain to the board what that
24 meant, how that could be consistent with admitting students.

25 **THE COURT:** Well, we're talking about K through 8

1 students, so presumably marriage is not --

2 **MS. RICE:** And actually, that was part of the thing
3 that bothered the board was what could that mean? Other than
4 a marker of status because K through 8 students are not going
5 to be married.

6 **THE COURT:** Well, it says faculty, staff and student
7 conduct. I mean, faculty and staff one would think had a much
8 greater chance --

9 **MS. RICE:** Faculty staff were not at issue in this
10 case and the board would not have considered that because --
11 there are many reasons, but the law does not require that the
12 board consider nondiscrimination on this issue for faculty and
13 staff. It was just what could that mean, the student conduct
14 has to align with this definition of marriage other than a
15 marker for status discrimination.

16 **THE COURT:** Well, but I guess -- I mean, we're
17 really dealing with a sentence that contains two different
18 things. It has the biblical view of marriage defined as a
19 covenant between one man and one woman, and then you have God
20 immediately bestows gender upon each person at birth as a male
21 or female. So the sentence has components of both sexual
22 orientation at least vis-a-vis marriage, and then gender
23 identity.

24 **MS. RICE:** Correct. And I think that's why it is
25 even more appropriate to take this view that nonconformance

1 with sexual -- with gender identity stereotyping could be
2 evidence of orientation status.

3 **THE COURT:** But aren't they -- I mean, BOOST amended
4 its statute or the legislature amended the BOOST statute to
5 add gender identity as a separate category. Aren't they
6 really two different things?

7 **MS. RICE:** Again, this has been an area of conflict
8 in the law. So there have been views over the decades that
9 sex actually subsumes both sexual orientation and gender
10 identity discrimination and that has been the case in Maryland
11 that there have been arguments and case law arguing that. The
12 general assembly is aware, the Supreme Court and the common
13 law imagine will be a crucible as society evolves and there
14 are more and more instances of status-based discrimination
15 that it is in the State legislatures that people will first
16 debate and recognize the need to protect people based on
17 status. So I think it's been an evolving trend and a dialogue
18 between the courts and the general assembly to get there. So
19 the gender identity nondiscrimination I think was passed in
20 Maryland -- I don't have the statute with me right now, but I
21 think it was as late as 2015, possibly later. It was in 2018
22 that this Court, the District Court of Maryland held that it
23 was improper to discriminate even in public schools based on
24 gender identity. And that that was a prohibited
25 discrimination. And that came under Title 9 which only uses

1 sex. It doesn't specifically call out gender identity. So
2 you can see that there's like an evolving dialogue about this.

3 **THE COURT:** Absolutely, and evolving statute here
4 with respect to the BOOST program that in 2019 was
5 specifically amended to add gender identity as a category.

6 **MS RICE:** Correct. In fact, I don't know the
7 sequencing of the passage of the 2016 law and when the
8 nondiscrimination statute was passed. So I would have to look
9 more carefully at that.

10 **THE COURT:** Okay.

11 **MS. RICE:** It's possible that they were passed in
12 the same session.

13 And if I might just return to Broadfording, I think
14 the plaintiff said at one point that other schools were
15 permitted to continue in the program because they, quote, hid
16 their beliefs, unquote. But Broadfording is a case where
17 that's how their handbook language was from the beginning.
18 And it's also an example that I raise because the plaintiffs
19 identify Broadfording in their complaint, self-identified
20 Broadfording as having beliefs similar to their own. So it
21 demonstrates that this issue of what you adopt as your
22 admissions policy is not inherently tied to your religious
23 beliefs. There are many different ways that schools can and
24 did articulate their admissions policies and their religious
25 beliefs to both comply with the BOOST program, and

1 sufficiently articulate their policy.

2 **THE COURT:** But I want to hone in a little bit on
3 articulation of the policy versus the policy in action.

4 **MS. RICE:** Sure.

5 **THE COURT:** Does the State have either at the time
6 or now, evidence of actual examples of discrimination in
7 admissions by Bethel?

8 **MS. RICE:** Sure. No, that was not the basis of the
9 State's inquiry. And, in fact, it would be fairly impossible
10 for this particular board to enforce its program were that
11 standard required. The board again, was made up of appointees
12 who meet infrequently to administer the program. There is not
13 a full-time staff person dedicated to the program -- to the
14 board. And requiring that evidence when you're only looking
15 at policy language and I think that, again, is the key here.
16 That parts of -- there's no examination of curriculum.
17 There's no examination of the other portions of the handbook.
18 The only thing that is looked at are the schools' own
19 statements and their own words of what their policy is and
20 their explanations as made on further inquiry to the board.
21 Those are the only pieces of evidence.

22 **THE COURT:** But doesn't that then go to speech, not
23 conduct? If all you're looking at is speech and you're not
24 inquiring further into conduct, doesn't that mean it's in
25 relation to speech?

1 **MS. RICE:** No, that's not the way policies are
2 treated by the Supreme Court. You can look at specifically I
3 think very instructive, is Christian Legal Society v.
4 Martinez. In that case, Hastings reviewed the bylaws of each
5 organization to determine whether or not they complied with
6 the requirements for student funding. And at no moment did
7 the Court intonate that that was a source of speech, rather
8 than -- somehow separate from their policy. And I think
9 that's also the case in Rumsfeld v. FAIR where there's a long
10 discussion of this issue where the law schools in that case
11 were protesting because they did not want to have to amend
12 their policies about recruiting or to give out specific
13 messages. And the Court said no, you have to use speech in
14 order to comply with the conduct that is being required of
15 you. So when speech is just a tool and is evidence of
16 conduct, it's not a regulation of speech, it's conduct.

17 **THE COURT:** But the question here with respect to as
18 I understand it what happened with some of these other schools
19 is when they -- we don't know whether they changed anything
20 about their admissions policies other than the language in
21 their handbook. Their consideration of students who applied
22 or students who were actually at the school, we don't know
23 whether they made any changes to that.

24 **MS. RICE:** So if I may, Your Honor, if I rephrase
25 what you just said, it is we don't know that they changed

1 their policies except for the fact that they amended their
2 policies.

3 **THE COURT:** Their practices I guess would be a
4 better word. We don't know in terms of how they operated
5 within their admissions offices or within the schools
6 themselves. All we know is that they changed the language in
7 the handbook with respect to how they described what they were
8 going to do.

9 **MS. RICE:** Sure. And I think that this is just an
10 artifact of the iterative process of enforcement. If you look
11 at it's Bates stamped 209, page 209 starting at line 7. Chair
12 Gallagher was discussing how they were going to enforce this
13 law. And he said, I think the answer is that we evaluate the
14 handbook and eligibility of the school and if they're
15 determined to be eligible, they're in the program. And if at
16 some point in the future we become aware of a complaint or an
17 issue that's inconsistent with the assurances, then we will
18 revisit it.

19 So that's the way that State enforcement agencies
20 with limited purviews generally enforce all requirements.
21 They see if an assurance will work. If they have evidence
22 that an assurance will not work, then they go to the next step
23 and examine some evidence, usually written evidence. If
24 they're satisfied with that, great. But that doesn't mean
25 that they stop. If there's a complaint or other evidence

1 that's brought forward to the board, then they would consider
2 it, as Chair Gallagher said. So I think that this is sort of
3 an artifact of where the board is and the different kinds of
4 evidence that might come before an enforcement agency.

5 **THE COURT:** When all of the participating schools
6 were asked to provide their student handbook, do we know did
7 every school provide a handbook and what percentage of those
8 resulted in further inquiry?

9 **MS. RICE:** Sure. I do not know the answer to that,
10 Your Honor. I can look into it for you.

11 **THE COURT:** Okay. And we don't know then whether
12 any of the schools didn't have a handbook and how the State
13 would evaluate that school?

14 **MS. RICE:** No, I don't know the answer to that
15 question. I do know the answer to a question that you asked
16 earlier about --

17 **THE COURT:** I'll take it.

18 **MS. RICE:** --how many student or schools -- an
19 approximate answer is not in the record, but I believe that
20 about six to seven schools were subject to the clawback, came
21 to agreement, payment plans with the State. And it is my
22 understanding that again, the board allowed for offsets going
23 forward.

24 **THE COURT:** When you say "allowed for offsets," so
25 are you -- just to make sure I understand -- the clawback was

1 imposed upon six to seven schools? Does that include Bethel?

2 **MS. RICE:** I do not know if that includes Bethel.

3 **THE COURT:** Okay. And some of those schools are
4 still participating in the program?

5 **MS. RICE:** Yes.

6 **THE COURT:** But they are still being clawbacked for
7 prior years?

8 **MS. RICE:** Yes, but their clawback is being
9 administered through offset. So they have students that are
10 coming in, are eligible, they're just not affirmatively
11 getting the money, based on whatever agreement the schools
12 worked out with the board. This is in an effort to minimize
13 the impact to the school.

14 **THE COURT:** So were other schools originally told
15 that they would be subject to a clawback and then had the
16 clawback lifted because they amended their handbooks? Or did
17 that not happen?

18 **MS. RICE:** That did not happen.

19 **THE COURT:** So any school that was originally told,
20 you are subject to a clawback, the school may have
21 subsequently been reinstated because they made changes to
22 their language in which case maybe an offset was put in place,
23 some of those six or seven schools are presumably no longer in
24 the program so they are not subject to an offset and are just
25 having the money collected back?

1 **MS. RICE:** That's my understanding. And it's my
2 further understanding that Bethel has not been in contact
3 about the clawback.

4 **THE COURT:** Okay.

5 **MS. RICE:** And it's also my understanding that the
6 State has no immediate intent to send Bethel to collections as
7 it stated in its letter, they were amenable to anywhere up to
8 a three-year payment plan and would not need to get the
9 central collections unit involved until that time.

10 **THE COURT:** Okay.

11 **MS. RICE:** So there's a long time horizon on the
12 clawback. Which brings me back I think really to the crux of
13 the issues that we need to consider today which go beyond the
14 likelihood of success on the merits which I think is what we
15 were talking about before, some of the indications that the
16 board was not hostile to religion, articulated mutual
17 principles, was applying general law of applicability mutually
18 towards religious schools to the best of their ability, showed
19 appropriate deference to religion, in fact the letter that
20 went out to Bethel specifically states that their religious
21 beliefs were not an object of consideration. And that instead
22 that was the part of a broader program and a broader effort to
23 enforce this nondiscrimination law that was applied to secular
24 and religious schools and religious schools of all
25 denominations.

1 But going back to the preliminary injunction factor,
2 it's Bethel's burden to make a clear showing on each of the
3 preliminary injunction factors. And I think that we talked a
4 little bit about this at the beginning of the hearing, but the
5 relief that's been requested is particularly problematic given
6 the claims in this case and also given the nature of the BOOST
7 program. As it relates to future eligibility for the program,
8 and that's the way that it has been framed, this particular
9 injunctive relief claim has been framed, there's no standing.
10 This is a fatal defect to the request for this injunctive
11 relief. And standing is evaluated on a claim-by-claim basis
12 and even on a claim-for-relief by claim-for-relief basis. And
13 here we don't even know if the program will exist. It is up
14 to the general assembly to enact into law, the program.
15 Moreover, every year the program has changed. There have been
16 new administrative requirements, including reporting about
17 expulsions, reporting about special education. There was a
18 large discussion in the general assembly about whether or not
19 schools should be required to serve students with
20 individualized education plans which resulted in the
21 compromise in legislation. And that's reflected in the most
22 recent Burfa. But these are things that the general assembly
23 can turn on and off, but we have no idea what they will do
24 this year.

25 **THE COURT:** You're saying that the standing inquiry

1 is separate with respect to the two prongs that Mr. Schmitt
2 made reference to which is the clawback, the enforcement of
3 the clawback versus the future admission of Bethel to the
4 program?

5 **MS. RICE:** Yes, yes.

6 **THE COURT:** Okay.

7 **MS. RICE:** So there's no present case for
8 controversy because we cannot even speculate at this point as
9 to what the general assembly will do and whether or not Bethel
10 will be otherwise eligible. So any admission answer that
11 related to Bethel's other eligibility in the 2017 program year
12 has nothing to do with whether or not they might be eligible
13 in 2020, 2021.

14 **THE COURT:** What about Mr. Schmitt's argument today
15 about 2019, 2020?

16 **MS. RICE:** In 2019, 2020 we also do not know whether
17 or not they would be eligible because they did not apply. And
18 here, especially important because they did not bring a facial
19 challenge even to the gender identity requirement. That
20 hasn't been articulated. There has been no proof of standing
21 on that element. They've always brought an as-applied
22 challenge, but that requirement didn't exist and it did exist
23 in 2019, 2020. Moreover, they changed their admission policy
24 language quite significantly. So I as the Government who I'm
25 representing in this legal case have only been authorized to

1 represent this case. This case is an as-applied challenge. I
2 can make no proffer about what would or wouldn't happen if the
3 board were to consider the 2019, 2020 handbook under the 2019,
4 2020 law. It didn't happen. It cannot happen at this point
5 because all of the scholarship money has been disbursed. So,
6 well I guess --

7 **THE COURT:** To students. I mean, his argument was
8 that those students could choose to use their money at Bethel
9 if they wanted to.

10 **MS. RICE:** Yeah, and I would submit that that's a
11 highly attenuated causal chain that you would think that as a
12 student would mid-year switch to Bethel. There's no evidence
13 of that. It certainly does not amount to a clear showing of
14 standing, but more than that there's no controversy because we
15 don't know what Bethel would have done. And even more
16 importantly, as to the hostility claim, there's no evidence as
17 to in what manner would the board have adjudicated that
18 particular question. So to that set of claims I think you can
19 start and stop at standing. You don't need to go any further.
20 Of course all of the things that we had to say about the
21 preliminary injunction standard also apply to that claim.

22 The clawback is not so much a matter of standing as
23 it is of failure to make a clear showing of irreparable harm.
24 And that has two components to it. One is that there has been
25 no record evidence that the clawback is of such a magnitude

1 that even if it were executed pending resolution, final
2 resolution of this case, it would have some sort of
3 catastrophic effect on Bethel's operation. So the claim that
4 the clawback as an injury is just merely a claim for money and
5 that cannot be irreparable harm because it can be remediated
6 by a final decision in this case.

7 And the other way in which it fails is that the
8 board has not made any immediate claim to the money. There's
9 no evidence that it will do so. The only evidence in the
10 record says that the board is amenable to a payment plan any
11 time within the next three years, which would certainly be
12 enough time for this Court to retry resolution in this case.

13 So for those reasons, the preliminary injunction
14 factors are not met. And as for his argument, I think it's
15 worth addressing the argument that a First Amendment harm is
16 always irreparable or ongoing. This is sometimes said, but
17 when it is said it is said in relation to threats of ongoing
18 direct burdens that have demonstrated chilling effects. So in
19 LROD which is one of the patronage cases there was evidence
20 that the mere existence of the provision there was chilling
21 speech ongoing as the trial went on of the state employees.
22 But here what we have is Bethel able to conduct its ministry
23 whatever way it chooses, continuing on this path.

24 The other way that Courts have drawn a distinction,
25 I think we went into this a little bit before but on the

1 timing for the request for preliminary injunction. So even if
2 you look at sort of the last date that they're talking about
3 that conversations were going on to March and February, this
4 twist to wait to file until the end of June and to not
5 immediately file the preliminary injunction motion was a
6 choice that Bethel made. It was entirely within their control
7 and it's evidence that the harm is not immediate and
8 irreparable. And that's how many Courts have treated claims
9 for First Amendment injury that arose out of a singular event.
10 So for example, in one case where the plaintiffs waited
11 four months after -- it might have been three months -- after
12 they were denied the ability to demonstrate, the Court held
13 that that was too long. And that is to show irreparable harm.
14 They of course got full adjudication on the merits. That case
15 is Utah Gospel Mission versus Salt Lake City Corporation. 316
16 F.Supp.2d 1201. And the Supreme Court has recently reminded
17 us in Benisek v. Lamone, that even in First Amendment cases,
18 all of the elements of a preliminary injunction must be
19 satisfied. And so delay can also go to the equity prong where
20 a plaintiff-caused delay that causes problems moving forward
21 -- and that was the case in Benisek was that an election was
22 coming up. And here similarly, the delay has caused this
23 motion to come before the Court at a time where we don't have
24 very much information about the 2020, 2021 program. When that
25 is due to the plaintiff's choice of filing, that that is

1 enough to deny preliminary injunctive relief. You can stop
2 there as well if you would like to do so.

3 So I think that those were the main areas that I
4 wanted to go through, unless you have any other questions.

5 **THE COURT:** No, I think you answered all of my
6 questions, thank you.

7 **MS. RICE:** Okay, thank you.

8 **THE COURT:** I will defer to you as to whether we'll
9 hear from the United States first or hear the rebuttal
10 argument from Bethel.

11 **MR. SCHMITT:** I'll just finish up, Your Honor.

12 **THE COURT:** Okay, that's fine.

13 **MR. SCHMITT:** Well Your Honor, there are a few items
14 I think I need to address here which is first of all, BOOST
15 board did apply the new policy to Bethel. And you can see
16 that they have conceded that, that counsel just conceded that
17 right now and that also in the defendant's motion to dismiss
18 on pages 31 through 32 and in their reply at pages 8 and 9, it
19 says, it was proper to consider gender expression while
20 evaluating sexual orientation. So we know how the BOOST board
21 would apply the new provision in the law because they already
22 had applied it to Bethel and that's been conceded here today.

23 Second, BOOST is here opposing the preliminary
24 injunction. And if they would allow Bethel back in now the
25 circumstance are changed, like they just informed the Court

1 they would do that and not impose the preliminary injunction
2 in the first place.

3 Third, BOOST has all the information that it needs.
4 There's nothing left to find out. We've provided statements
5 under oath and everything else and this preliminary injunction
6 would stop a \$100,000 clawback penalty which is an ongoing
7 injury. Every dollar that goes toward that penalty is a
8 dollar that's taken away from Bethel's students.

9 **THE COURT:** But no dollars have gone to it yet.

10 **MR. SCHMITT:** Well not yet, Your Honor, but it's
11 still money owed. It's still money owed. And the fact that
12 the State doesn't want -- isn't demanding it today, doesn't
13 mean that they still aren't saying that Bethel is going to owe
14 that money. And Counsel just said that even if Bethel were to
15 readmit to the program, they'd still be penalized because the
16 State is enforcing these provisions even against schools that
17 changed their language and went along with the relief that the
18 State wanted in the first place.

19 So fourth, you know, the preliminary injunction
20 would prohibit BOOST from denying Bethel from readmission for
21 this year, but Bethel would be glad to reapply. Injunction
22 would allow students to return to Bethel who had to leave
23 because of what happened and it would allow transfers to come
24 in.

25 With respect to the policy change, the State has

1 conflated the statements about religious beliefs and actual
2 admissions here. I just want to emphasize that. Bethel's
3 beliefs about marriage are just separate from the admissions
4 policy on the whole.

5 **THE COURT:** Although at the time in 2017 it was
6 within the admissions section of the handbook.

7 **MR. SCHMITT:** Well, that's true, Your Honor. It was
8 in that, but we're talking about children here. We're talking
9 about what, K through 8th grade so 5-year-olds to
10 15-year-olds. Marriage doesn't apply to them. And those --
11 Bethel still maintains those beliefs. You know, the ruling
12 we're asking for would prohibit BOOST from denying Bethel
13 based on the current nondiscrimination provision since Bethel
14 doesn't discriminate. And we already know what they would do
15 because they had effectively applied the current provision
16 against Bethel when it didn't apply by statute. And this is
17 appropriate regardless of where the program begins or when the
18 application is. And then BOOST is considering -- the fact
19 that BOOST is willing to reconsider Bethel's application does
20 not provide Bethel with any meaningful relief in this
21 situation because BOOST can turn around and say, well that's a
22 very nice application, but we still don't like your policy and
23 the policy is denied and then we are right back here where we
24 are today, Your Honor. We'd have to come back and litigate
25 this again.

1 **THE COURT:** But then you have an as-applied
2 challenge to the current statute that's now been applied to
3 you.

4 **MR. SCHMITT:** Correct. And as it had been applied
5 before because they had expanded it. And then, Your Honor, if
6 you grant this relief and the legislature doesn't fund the
7 program, no harm no foul, the program went away. If you don't
8 grant this relief and another year passes by and the
9 legislature does fund the program, Bethel's harm continues.
10 The State has nothing to lose with you granting this relief,
11 but Bethel has everything to lose because it's going to
12 continue to lose these students and it's going to continue to
13 hamper the ministry.

14 And I think I need to emphasize that Bethel has told
15 BOOST over and over that it does not discriminate, period.
16 Counsel just conceded that they have no evidence in the record
17 or anywhere of discrimination, and especially no evidence on
18 Bethel's part and that should be enough. But BOOST is here
19 speculating that the religious belief equals discrimination
20 and they said that they look at the policy language and that
21 the board doesn't -- or said that the BOOST board isn't
22 equipped to handle evidence. Well, I mean, all you're left
23 with then are these religious beliefs. And this is beyond
24 their authority that they're granted in the statute because
25 the statute says nothing in here is going to require you to

1 change your policies, practices as they're religiously
2 informed. And so all the statute required, Your Honor, is
3 that participating schools shall not, quote, discriminate in
4 the student admissions on the basis of race, color, national
5 origin or sexual orientation. Bethel never did any of that.
6 There's no evidence of that. That should be enough. Thank
7 you.

8 **THE COURT:** Thank you. All right, Mr. Treene.

9 **MR. TREENE:** Thank you, Your Honor, for making some
10 time for us to respond. I'd just like to use the time to
11 respond to four items in the response brief that the State
12 filed after we filed our statement of interest.

13 The first, the United States believes defendants
14 violated Bethel's First Amendment rights in two ways. First,
15 we believe they engaged in viewpoint discrimination against
16 expression. There's no evidence that Bethel has discriminated
17 in the past, that it currently discriminates on protected
18 bases in the BOOST statute or that it intends to at any time
19 in the future. There's no requirement in the BOOST law of any
20 specific language to be included in an admission statement
21 such as say with federal workplace rules about what you mean
22 to post in a workplace about rights and so forth.
23 Nonetheless, defendants postulate that Bethel has effectively
24 discriminated because of the statement in its parent student
25 handbook regarding views on marriage and sexuality. This just

1 cannot be squared with early related cases.

2 Second, Bethel under Trinity Lutheran is otherwise
3 eligible and fully qualified, the two terms the Supreme Court
4 uses in that case to provide educational services, but for
5 their statement in their handbook about marriage and
6 sexuality. This is, we contend, a violation of the Free
7 Exercise Clause under Trinity Lutheran. We just have those
8 four points I want to mention though, Your Honor.

9 First, they say that we are focused on something
10 different in the record, that we're focused on the statement
11 of faith. In the original 2017/18 handbook there's a
12 statement of faith on the page opposite the admission
13 provision that talks about marriage and sexuality. We are
14 talking about the very same thing that defendants and
15 plaintiffs are talking about. It's that language that we call
16 a statement of belief or the statement of their beliefs on
17 marriage and so forth. But it's the same thing. We're not
18 talking about a separate statement of faith. I just wanted to
19 clear that up for the record.

20 Second, the defendants say in their response brief
21 that the United States concedes that a sign in the window can
22 be an act of discrimination. And we do so concede. We
23 concede that "blacks need not apply." You know, that yes,
24 that is an act of discrimination. But I think what this case
25 is about is what is the sign? What does the sign say?

1 Plaintiffs contend that and I haven't seen any evidence to
2 contradict that they have a statement of their beliefs. They
3 are not saying "gay students need not apply" or "LGBT students
4 need not apply." It's really a forthright statement, it's a
5 truth in advertising statement. It's no different than a
6 school that had "Jesus is the Messiah is our core belief and
7 our school culture will reflect that in all its ways." That
8 may dissuade some Jewish students from attending. Other
9 Jewish parents and students may choose that on balance they
10 like the education of this school and the moral teachings and
11 they will explain to their kids what that means. Yes, it may
12 dissuade some students, the Muslim students, but it's not a
13 statement that non-Christian students need not apply.

14 I think Rumsfeld v. FAIR is very illustrative. In
15 Rumsfeld, law schools had to allow the military to recruit on
16 campus, but they were free to put up signs in the window. A
17 literal sign in the window of the law school saying "we
18 oppose, don't ask, don't tell." That would be permissible
19 under the Court's decision in Rumsfeld v. FAIR. It would not
20 be a bar on the recruiters recruiting and that's all that the
21 law required and all that the Court decision required.

22 The third point is defendants are critical of our
23 citation of some cases involving the Alpha Iota Omega where a
24 Court endorsed the idea that a group might admit students who
25 are of a certain sexual orientation, but then require,

1 affirming certain beliefs and so forth. Citing to the
2 Martinez decision saying that that disposes of those cases. I
3 think it's important to note that the Martinez decision is
4 actually a very narrow one. The Supreme Court very explicitly
5 honed in on a stipulation in the record in that case that
6 there was an all comers policy at the University of Hastings
7 Law School. It said every group must accept everybody for
8 leadership positions. It said -- this is quoting in the Court
9 decision. It said, the Hastings Democratic Caucus cannot bar
10 students holding Republican political beliefs from backing
11 members or seeking leadership positions in the organization.

12 The Court also went on when it's explaining why it
13 said that such a all comers policy is not viewpoint
14 discrimination, they mention that there is some of this status
15 conduct debate when you get into matters of sexuality. And
16 the Court said that this all comers policy removes that
17 difficulty. So you don't need to deal with the difficulty,
18 what's status, what's conduct because you have an all comers
19 policy. However, where you do not have an all comers policy
20 what you default to is Hurley, the Supreme Court's decision in
21 Hurley and that, in fact, is what the telescope media decision
22 in the 8th Circuit relied on. In Hurley, the Court said the
23 parade must accept people regardless of sexual orientation.
24 So if gay individuals want to march in the parade, the public
25 accommodation law prohibits the parade organizers from barring

1 them. What they cannot do is march under a banner -- really,
2 it's not a political banner saying we support this issue or
3 that issue, it's just saying we're proud of being Irish and
4 gay. Even that the Court said that was expression and was
5 distinct from the status of individuals which had to be
6 protected, but this was expression.

7 Just fourth minor point, we cite Trinity Lutheran.
8 The defendants indicate that Trinity Lutheran did not involve
9 discrimination against a particular religion, it was just
10 saying you can't exclude religious entities as a category
11 where you're allowing nonreligious categories. But we contend
12 that if you look at Masterpiece Cakeshop, Hialeah the Lukumi
13 case involving free exercise or in many of the Supreme Court
14 cases, Supreme Court is just as concerned, if not more
15 concerned with denominational discrimination. So the fact
16 that there's no discrimination against religion as a category
17 here doesn't prohibit the application of the Trinity Lutheran
18 principle. And that principle is that where you're otherwise
19 eligible and fully qualified for a benefit and are excluded
20 just because of your religious character, that is a violation
21 of the Free Exercise Clause.

22 **THE COURT:** But when you say denominational, as I
23 understand it, there are many schools here being looked at
24 under different contexts with somewhat similar, not identical
25 religious beliefs both in terms of what they've expressed in

1 the handbook and otherwise. So I'm a little perplexed as to
2 the notion that this was somehow denominational based.

3 **MR. TREENE:** Well, it's the idea that this
4 particular language that this school expresses and they're
5 basically being able to express it a certain way. Other
6 people may express their particular views that may vary in
7 subtle ways, in different ways. These folks are being singled
8 out and excluded and there's no compelling reason of what they
9 have done that requires them to be so treated and excluded
10 from the program.

11 **THE COURT:** And did you have anything you wanted to
12 say with respect to this issue with imminent and irreparable
13 harm?

14 **MR. TREENE:** No, the United States only takes a
15 position on the likelihood of success. We take no position on
16 the other elements of the PI. Thank you, Your Honor.

17 **THE COURT:** Well, having heard from everyone is
18 there anything else we particularly need to address today?
19 Otherwise, like I said I will take this under advisement and
20 issue a written opinion. All right. Thank you.

21 **(Proceeding concluded at 11:32 a.m.)**
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CERTIFICATE OF OFFICIAL REPORTER

I, Nadine M. Gazic, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 18th day of February,
2020.

Nadine M. Gazic

NADINE M. GAZIC RMR, CRR

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