

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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

No. 1:19-cv-00286

Plaintiffs,

HON. ROBERT J. JONKER

v.

MAG. PHILLIP J. GREEN

ELIZABETH HERTEL, in her official capacity  
as the Director of the Michigan Department of  
Health and Human Services; DEMETRIUS  
STARLING, in his official capacity as the  
Executive Director of the Michigan Children's  
Services Agency; DANA NESSEL, in her  
official capacity as Michigan Attorney General;  
XAVIER BECERRA, in his official capacity as  
Secretary of Health and Human Services;  
UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

**PLAINTIFFS' RESPONSE TO  
ORDER TO SHOW CAUSE**

Defendants.

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Mark Rienzi  
William Haun  
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The Becket Fund for Religious Liberty  
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The Court directed the parties to respond to its Order to Show Cause on September 23. The parties conferred as directed, but did not come to agreement on the terms of a dismissal order, so Plaintiffs submit this response.

St. Vincent agrees with the Court that dismissal is appropriate, if such an order permits St. Vincent to promptly return to the current status quo should the Federal Defendants change their position and begin enforcing 45 C.F.R. § 75.300. Plaintiffs therefore submit the attached proposed order for the Court's consideration.

As noted in the attached proposed order, this Court should retain jurisdiction to enforce the terms of that order. *See Midwest Realty Mgmt. Co. v. City of Beavercreek*, 93 F. App'x 782, 784-785 (6th Cir. 2004) (approving "conditional dismissal order," which was "subject to a condition subsequent" and recognizing that "dismissal would be undone" if that condition were triggered); *see also Re/Max Int'l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 641 (6th Cir. 2001) ("[A] district court does have the authority to dismiss pending claims while retaining jurisdiction over the future enforcement of a settlement agreement."). Should reinstatement of this action be necessary, Plaintiffs do not believe that full briefing on their renewed preliminary injunction would be necessary given that this Court has already granted a preliminary injunction against the challenged regulation and this Court is already familiar with the factual record. Moreover, any application of the regulation against the State of Michigan would have to take into account the fact that Michigan has conceded a Constitutional violation and is subject to a permanent injunction in this case.

For the reasons stated in prior briefing and in the joint proposed scheduling order, ECF 116 at PageID.3144, Plaintiffs do not believe that dismissal is appropriate without some path to promptly resume protection under the preliminary injunction.

October 7, 2022

Respectfully submitted,

/s/ Lori H. Windham

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Secretary of Health and Human Services;  
UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES,

**ORDER OF CONDITIONAL  
DISMISSAL**

Defendants.

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## ORDER OF CONDITIONAL DISMISSAL

On September 26, 2019, this Court granted a preliminary injunction to Plaintiffs, enjoining United States Defendants<sup>1</sup> from “tak[ing] any enforcement action against the State [of Michigan] under 45 C.F.R. § 75.300(c) based upon St. Vincent’s protected religious exercise.” (ECF No. 70). The case was then stayed on May 5, 2022, in anticipation of the Supreme Court’s decision in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). *See* ECF No. 98.

In light of the Supreme Court’s decision in *Fulton*, Plaintiffs<sup>2</sup> and State Defendants<sup>3</sup> entered into a stipulated judgment. “Because [State Defendants] exercise[ ]” certain discretion in their foster care contracts, “and as a result of the Supreme Court’s decision in *Fulton*,” State Defendants “agree[d] that [St. Vincent] would likely prevail on Count III (Individualized Exemptions) of the Complaint.” ECF No. 113 at PageID.3124. The Parties agreed to the entry of judgment in favor of Plaintiff on Count III of the Complaint. *Id.* State Defendants also stipulated that they “shall not take any action against St. Vincent’s CPA license or terminate or not renew

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<sup>1</sup> Xavier Becerra, in his official capacity as Secretary of the United States Department of Health and Human Services, and the United States Department of Health and Human Services.

<sup>2</sup> The current and former plaintiffs in this litigation.

<sup>3</sup> Elizabeth Hertel, in her official capacity as the Director of the Michigan Department of Health and Human Services; Demetrius Starling, in his official capacity as the Executive Director of the Michigan Children’s Services Agency; and Dana Nessel, in her official capacity as Attorney General of Michigan.

the Contracts because St. Vincent does not ... certify or approve a same-sex or unmarried couple as a foster parent or adoptive parent.” *Id.*

After approving and entering this stipulated judgment, the Court directed Plaintiffs and United States Defendants to file a joint status report. ECF No. 114. In this report, United States Defendants stated that HHS was in the process of repromulgating the Regulation and confirmed that no enforcement action will be taken under the Regulation pending its repromulgation, a position consistent with HHS’s Notice of Nonenforcement, 84 Fed. Reg. 63,809, 63,811 (U.S. Dep’t of HHS Nov. 19, 2019). *See* ECF No. 116. That Regulation is still pending repromulgation, and has been remanded to the agency by a different federal court. Order, ECF No. 44, *Facing Foster Care in Alaska v. Dep’t of Health and Human Servs.*, No. 1:21-cv-308 (D.D.C. June 29, 2022). As of October 7, 2022, United States Defendants still have not repromulgated the Regulation and the Notice of Nonenforcement remains in effect.

If United States Defendants repromulgate the Regulation without representing that they have no plans to enforce this regulation against Plaintiffs or State Defendants, as currently prohibited by preliminary injunction, then the repromulgation may constitute a credible threat of enforcement under this circuit’s precedent. *See, e.g., Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021 (6th Cir. 2022); *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016).

On September 23, 2022, this Court issued an Order to Show Cause directing the parties to state their respective positions on whether it should “dismiss the case

without prejudice but on the condition of immediate reinstatement to the current position of the case, including the order of preliminary injunction, if the Federal Defendants decide to take any action to enforce 45 C.F.R. § 75.300 against Plaintiffs or the State of Michigan.” See ECF No. 117.

**ORDER**

IT IS ORDERED:

Plaintiffs’ remaining claims against the United States Defendants are DISMISSED, conditional on the following:

1. Plaintiffs’ claims against the United States Defendants are dismissed without prejudice.
2. The dismissal is on the condition of immediate reinstatement to the current position of the case, including the order of preliminary injunction, if the United States Defendants decide to take any action to enforce 45 C.F.R. § 75.300 against Plaintiffs or the State of Michigan.

The Court retains jurisdiction to enforce the terms of this order.

SO ORDERED.

Dated: \_\_\_\_\_, 2022

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Robert Jonker  
United States District Court Judge