

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

EUGENE DIVISION

ELIZABETH HUNTER, et al.,)	
)	
Plaintiffs,)	Case No. 6:21-cv-474-AA
)	
v.)	Monday, October 4, 2021
)	3:00 PM
U.S. DEPARTMENT OF EDUCATION,)	
et al.,)	
)	
Defendants.)	
_____)	

STATUS CONFERENCE

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE ANN L. AIKEN

UNITED STATES DISTRICT COURT JUDGE

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1 THE COURTROOM DEPUTY: Now's the time set for Civil
2 Case No. 21-474, Hunter, et al. v. U.S. Department of
3 Education, et al., for status conference. If you could please
4 introduce yourselves for the record, beginning with plaintiff.

5 MR. SOUTHWICK: Paul Southwick for Plaintiffs.

6 MS. BRENNER: Alletta Brenner of Perkins Coie for
7 Plaintiff.

8 MR. BAXTER: Joe Baxter, legal fellow for Plaintiffs.

9 MR. ROBINSON: Josiah Robinson, (indiscernible)
10 fellow for Plaintiff.

11 MR. GREY: Herb Grey for Intervenor CCCU.

12 MR. SCHAERR: And Gene Schaerr for Proposed
13 Intervenor CCCU.

14 MR. MILLER: Nick Miller for --

15 MR. LIPPELMANN: Mark Lippelmann for --

16 MR. PRINCE: Joshua --

17 MR. LIPPELMANN: -- Proposed Intervenors Corban
18 University, William Jessup University, and Phoenix Seminary.

19 THE COURT: All right. Let's start over again.
20 After the CCCU -- the second CCCU individual -- who's next?

21 MR. MILLER: Yeah. This is Nick Miller also on
22 behalf of CCCU.

23 MR. PRINCE: And Joshua Prince also on behalf of
24 CCCU.

25 MS. SNYDER: My name a Hilarie Snyder, Your Honor. I

1 represent the Defendants in the case. Cocounsel Carol
2 Federighi and Elliott Davis are also on the line today as well
3 as Carlotta Wells, the Assistant Director of DOJ.

4 THE COURT: Are we expecting anyone else?

5 MR. LINDSAY: Yeah. This is Shawn Lindsay, local
6 counsel for the amicus curiae. And I'll let lead counsel
7 introduce himself.

8 MR. CORRIGAN: And, Your Honor, this is Christian
9 Corrigan, Assistant Attorney General for the State of Montana
10 on behalf of amicus as well.

11 THE COURTROOM DEPUTY: I believe that is everyone,
12 Judge. Thank you.

13 THE COURT: All right. We have apparently what I --
14 I'm sorry -- I'm going to ask this question, because I just had
15 a conference call. And if you're not speaking, please put your
16 phone on mute. Because I can hear heavy breathing, and that's
17 not helpful.

18 So I'm going to ask this preliminary question, and I'm
19 going to assume that -- I assume the answer, but I'm going to
20 ask it anyway. Have you had a chance to confer and come in
21 with an agenda for today's status conference?

22 MR. SOUTHWICK: This is Paul Southwick. Yes, Your
23 Honor, we have -- Plaintiffs have conferred with counsel for
24 DOJ.

25 THE COURT: Okay. So tell me the agenda items that

1 we need to take up today.

2 MR. SOUTHWICK: Again, this is Paul Southwick. Our
3 two agenda items are, one, whether the discovery and pretrial
4 deadlines that were set when the case was first filed should be
5 modified, and then second --

6 THE COURT: Well, the answer to that would be yes,
7 since you've blown by them. Yes, we'll modify those.

8 MR. SOUTHWICK: Okay.

9 THE COURT: So what's the second question?

10 MR. SOUTHWICK: The second question is whether
11 limited discovery should be permitted prior to the preliminary
12 injunction hearing, and, if so, whether the proposed
13 deponents -- Plaintiffs' proposed deponents -- whether
14 subpoenas and notices should be allowed to issue to those
15 potential deponents.

16 THE COURT: All right. So does -- do we have to deal
17 with the second one first before we can deal with the new
18 discovery deadlines?

19 MR. SOUTHWICK: This is Paul Southwick again. The
20 DOJ's position is that discovery and pretrial deadlines are
21 closed. And so we can't discuss anything until those have been
22 modified. And so I think that that might be the primary issue,
23 is whether or not those will be reopened, and then, in the
24 event that they are, what discovery should be permitted now.

25 THE COURT: Well -- all right. Make your position

1 known to me about why you want additional discovery when the
2 discovery deadline was July 28th. We're long past that. Tell
3 me what you think you need that would be helpful for this next
4 part of the case and why we need to extend it.

5 MR. SOUTHWICK: Thank you, Your Honor. This is Paul
6 Southwick again speaking. We were working fairly cooperatively
7 with the DOJ in terms of extensions to respond to our initial
8 complaint. And then we filed an amended complaint in June and
9 gave them additional extensions.

10 The parties were in the middle of proposing a 26(f)
11 report, which we have now actually filed -- I believe it was
12 last Thursday or Friday -- with the Court. So that kind of got
13 put by the wayside while the parties were briefing the motion
14 for TRO. And so now that the TRO is denied, and we're moving
15 forward with the PI hearing, the discovery issues are pertinent
16 again.

17 And the Plaintiffs are proposing three phases for
18 discovery, essentially. The first phase to allow some limited
19 discovery now before the PI hearing on November 4th and 5th,
20 and then a second phase of class discovery, and a final phase
21 of merits discovery. So those are the general discovery
22 modifications.

23 You know, we believe that we -- the Plaintiffs -- were
24 moving the case forward diligently. It's in its early stages.
25 The DOJ didn't file its motion to dismiss until after all the

1 deadlines had passed in any event. And so we believe that we
2 were working cooperatively and would have to come to the Court,
3 though, to resolve some of these discovery and pretrial
4 deadline issues. But we believe that we have good cause.

5 We have some testimony that we would like to get on the
6 record in advance of the PI hearing, particularly because the
7 issue of whether or not there's an imminent threat of
8 irreparable harm is something that there's conflicting evidence
9 about.

10 We attempted -- the Plaintiffs attempted to work with the
11 attorneys for Defendant in terms of any stipulated facts that
12 could be agreed to. We have discussed a few more of the minor
13 facts that we could stipulate to. But in terms of the meat of
14 the discovery Plaintiffs are seeking, it doesn't seem like
15 we're going to be able to agree on any stipulations.

16 And so Plaintiffs essentially want to know what is the
17 status of all of the administrative complaints that we filed
18 back in June and July of this year? There was essentially a
19 freeze that happened, and all of the interviews were canceled
20 and things were frozen. We don't know why. We don't know what
21 happened. We don't know when they anticipate making decisions
22 on religious exemptions. So we need to find that out.

23 And we want to preserve -- essentially what we want is to
24 preserve the administrative Title IX complaints that are on
25 file. We want them to remain open during the litigation. We

1 believe that will provide some protection for the students.
2 And we're particularly concerned about retaliation and
3 harassment. Because retaliation and harassment are prohibited
4 by Title IX; however, the religious exemption can also be used
5 as a defense to a claim of retaliation and also as a defense to
6 a claim of harassment.

7 We'd like the Department of Education to state that they
8 will not allow one of the underlying religious colleges to
9 retaliate against any of our Plaintiffs. Because of the filing
10 of the Title IX administrative complaint, the Department of
11 Education is unwilling to do so.

12 So we want to get some of this on the record so that the
13 Court knows that there is a very real threat of retaliation --
14 actual retaliation -- going on, and that the religious
15 exemption -- because of the religious exemption, Defendants are
16 not going to be protecting these students.

17 THE COURT: Defendants?

18 MR. SOUTHWICK: Those are just some of the issues
19 that we're seeking.

20 THE COURT: Ms. Snyder?

21 MS. SNYDER: Yes, Your Honor. Thank you. You of
22 course have before you a scheduling dispute. It's the
23 Government's position that the discovery period remains closed
24 until the Court decides the motion to dismiss. Of course,
25 motions to dismiss per se do not stay discovery. But courts

1 can and do grant them when -- and here there's threshold issues
2 that go to subject matter jurisdiction and venue.

3 Moreover, when the motion to dismiss is not frivolous and
4 has merit -- some merit -- courts can and do exercise
5 discretion to stay discovery in order to preserve the parties'
6 and Court's resources and effectuate the mandate in Rule 1 to
7 secure the speedy and inexpensive determination of their
8 reaction and to ensure that the proportionality requirements in
9 Rule 26 are met.

10 These mandates and requirements are even more at risk in
11 this case because the potential Intervenors could, if they're
12 subsequently authorized to intervene in the case, ask for
13 repetitive discovery.

14 The pending hearing on the motion for preliminary
15 injunction doesn't change the analysis or mitigate in favor of
16 discovery for three reasons. The first is that of course
17 Plaintiffs have to establish the Winter factors, the likelihood
18 of success on the merits, the irreparable harm absent the
19 preliminary relief, that the balance of the equity is tipped in
20 their favor, and that the injunction is in the public interest.
21 In this case, the analysis of those factors raise disputed
22 legal but not factual issues.

23 As this Court noted in its opinion on the TRO with respect
24 to the merits, the parties dispute standing, ripeness, and
25 whether their non-APA claims state a claim. Those arguments

1 are all legal disputes based on facial challenges to the four
2 corners of the complaint. And no amount of discovery is going
3 to assist this Court in, for instance, considering the impact
4 of the Lemon factors.

5 Similarly, the consideration of irreparable harm and the
6 balancing of the equity in the public's interest here raise
7 legal disputes and not factual ones. By way of example, among
8 other things, Plaintiffs absolutely here have an adequate
9 alternative recourse for the private discrimination they allege
10 they suffered by filing a direct suit against their educational
11 institution. The ability to file those lawsuits counts as
12 against the need for injunctive relief.

13 The second reason, Your Honor, is that although Plaintiffs
14 seek what they label as only limited discovery relevant to the
15 issues in the PI motion, their (indiscernible) is actually much
16 broader than they even admit is relevant. So they claim that
17 they seek discovery only regarding the status of the
18 Plaintiffs' Title IX complaints; the process and timeline for
19 religious exemption determinations on those specific
20 complaints; and what protections, if any, defendants will
21 provide to plaintiffs who experience retaliation as a result of
22 the filing of those complaints.

23 Discovery regarding just those topics would be a narrow
24 30(b)(6) deposition or perhaps could be eliminated entirely by
25 a stipulation identifying just the status of the complaints and

1 the process the agency uses, including the process that it
2 would use to review any retaliation claims that are filed.

3 But that's not what Plaintiffs have asked for here.
4 Instead, they want to take eight depositions, and their list of
5 potential deponents belies the notion that they seek
6 information only about themselves and their administrative
7 complaints.

8 By way of example, Plaintiffs have identified Ms. Lhamon,
9 who is the current nominee for the position of Assistant
10 Secretary for Civil Rights, as a potential deponent.

11 Ms. Lhamon does not currently work at the Department of
12 Education and hasn't for at least the last four years. It's
13 entirely unclear why Plaintiffs think she might have
14 information about their administrative claims that they have
15 filed all within the last few months.

16 Plaintiffs are saying they want limited discovery, but
17 their list of deponents show that what they want is to spend
18 the next month conducting a time-consuming, costly, and
19 inefficient fishing expedition that's unrelated to the upcoming
20 hearing.

21 You know, the last reason that the preliminary injunction
22 motion doesn't change the analysis and mitigate in favor of
23 discovery is that Plaintiffs have controlled the timing and
24 scope of their preliminary injunction motion. They requested
25 the November hearing date. And although they could have sought

1 depositions before filing their PI motion or before the close
2 of discovery, they instead chose to raise this issue about a
3 month and a half before the hearing, and only after the
4 presumptive discovery period closed.

5 They haven't really offered an explanation why they didn't
6 at least preserve the discovery issue before the close of the
7 time. Moreover, they seemingly misstate Defendants' position
8 when they say that Defendants were kind of unwilling to agree
9 to facts regarding the issues that Plaintiffs contend impact
10 the analysis here.

11 During our telephone call, we discussed a potential
12 stipulation and -- that maybe would eliminate or at least
13 decrease Plaintiffs' stated need for discovery. But to our
14 understanding at least, Plaintiffs were unwilling to pause
15 raising these issues with the Court while the parties
16 negotiated a relevant resolution.

17 So from the Defendants' perspective at least, we've never
18 really -- they never really meaningfully tried to have -- to do
19 a stipulation or to narrow their broad requests. And we've
20 attached as an exhibit to the letter that was sent a
21 description of their -- Plaintiffs' description of their own
22 requests they seek.

23 For those reasons, Your Honor, we'd respectfully request
24 that the motion to dismiss and the motion for preliminary
25 injunction show legal instead of factual disputes and,

1 therefore, mitigates in favor of staying the discovery pending
2 the outcome of the motion to dismiss. Thank you.

3 THE COURT: Mr. Southwick, a response?

4 MR. SOUTHWICK: Thank you. This is Paul Southwick.
5 I just have a few responses. First, on whether there are only
6 legal issues or whether there are also factual issues that will
7 be presented to the Court, Plaintiffs' position is that there
8 are factual issues both in terms of the standards for the
9 preliminary injunction as well as the substantive issues.

10 I'd point the Court's attention to its opinion and order
11 on page 9 in which, as justification for denying the TRO, the
12 Court states that "there is little evidence of when OCR might
13 reach a determination on each plaintiff's complaint." And that
14 raises an issue of fact and factual evidence about what is the
15 current status, when will OCR reach determination, who and how
16 will those determinations be made?

17 And then in terms of some of the substantive claims, one
18 of the underlying -- one of the arguments that has been
19 advanced by Plaintiffs is that a religious exemption has been
20 used in different ways and interpreted differently and applied
21 differently from administration to administration. And that
22 the Trump administration, when they passed the final rules in
23 2020, ignored a lot of the reliance interests and ignored the
24 prior application of the previous administration.

25 And we are aware of witnesses who will be able to provide

1 testimony on these matters, but we need to be able to depose
2 them to get that testimony in front of the Court.

3 In terms of whether or not the Plaintiffs could get relief
4 from private lawsuits such that the preliminary injunction is
5 not required, Plaintiffs respond that in a private lawsuit
6 against an educational institution, the Court would lack
7 jurisdiction over the Department of Education such that it
8 couldn't order the Department of Education to do anything with
9 respect to application of Title IX or the processing of
10 complaints.

11 And so what the Plaintiffs have sought from the Court here
12 is not to ask the Court to do anything with respect to their
13 individual educational institutions, but solely to provide the
14 requested declaratory and injunctive relief against the
15 Department itself. And in any private lawsuit that the
16 individual plaintiff would bring, it couldn't cure the
17 constitutional and statutory deficiencies of the Defendants
18 that are at issue in this court.

19 So there is in fact -- there is another avenue to monetary
20 relief, for example, or to be reinstated as a student. But
21 there is no relief for -- for -- over the Government's own
22 conduct when it received the Title IX complaint from an LGBTQ
23 student.

24 In terms of what we were able to discuss stipulation-wise,
25 the Plaintiffs have an understanding that we will likely be

1 able to stipulate on certain pieces of evidence that will
2 remove the need for discovery. For example, it looks like the
3 parties will stipulate on the nature and extent of the federal
4 funding that attaches to these institutions, which is something
5 that will reduce the workload on both sides.

6 However, with respect to the actual functioning of the
7 OCR, complaints, the determination, how the current
8 administration is going to apply the religious exemption, there
9 was little appetite. However, Plaintiffs remain open that in
10 the event they are allowed to pursue discovery, but they are
11 able to reach stipulations with the Defendants prior to taking
12 of any depositions, that, you know, Plaintiffs would work
13 cooperatively to reduce the burden and increase efficiency on
14 all sides.

15 In terms of reaching some of the historical folks,
16 Catherine Lhamon is, yes, a current -- currently awaiting
17 Senate confirmation. But she held the position of the current
18 defendant -- Suzanne Goldberg -- which is acting Assistant
19 Secretary for the Office of Civil Rights within the Department
20 of Education.

21 And it is that person, ultimately, who -- the Department
22 of Education's own documents state it is that person who
23 ultimately makes decisions over religious exemption. And
24 Catherine Lhamon made those decisions, and we have documents of
25 a variety of different decision-making processes by Catherine

1 Lhamon during the Obama years. And it is for those reasons
2 that we want to show the Court.

3 Your Honor, every time a religious -- a complaint from an
4 LGBTQ student has been filed with the Office of Civil Rights,
5 they have always used a religious exemption to close and to
6 deny that plaintiff's complaint, even when there were instances
7 of retaliation or harassment or other forms of prohibited
8 discrimination. And that is the kind of evidence that could
9 inform the Court as to whether or not there is a risk of the
10 current complaint being closed on the basis of the religious
11 exemption.

12 So we are open -- the Plaintiffs are open to agreeing on a
13 limited efficient schedule. We're not seeking to do full-day
14 depositions with everyone. But we do -- we don't want to be
15 going into the PI hearing blind as to what processes are or are
16 not occurring within the Office of Civil Rights with respect to
17 the complaints that are at issue.

18 And then, finally, Your Honor, we have been made aware of
19 numerous additional expulsions and suspensions that are
20 occurring at educational institutions with the start of the new
21 year. We predicted that this would be the case, and it is
22 continuing to be the case. The federally funded educational
23 institutions are continuing to expel and suspend LGBTQ
24 students.

25 There's a pressing need all over the country for these

1 young people who are having their entire education disrupted
2 and at times forced to move given 24 hours' notice to vacate
3 dorms. And this is a pressing issue that is affecting a lot of
4 young people across the country.

5 And so when you're looking at the factors into whether or
6 not the preliminary injunction should issue in terms of
7 weighing the merits and the interest of justice, there are
8 significant interests that are at stake. And we want to be
9 able to let the current plaintiffs know that they will be
10 protected from retaliation. We would like a court order to
11 that effect, and our discovery will be limited to these issues.

12 THE COURT: Well, I actually think what I was able to
13 glean from this is you're looking for three phases of
14 additional discovery that we're going to start with. And I'm
15 only going to limit my comment to the first request, which is
16 you have a request for some limited discovery before the PI
17 hearing.

18 I think the Defendants made a valid point. I don't know
19 why we can't either do a stipulation -- that should be
20 something you all should be able to work out. But, if not, a
21 12(b)(6) -- or a 30(b)(6) motion and deposition is -- seems
22 covers most of the -- you know -- when you're listing -- under
23 No. 5 -- it seems like that covers the process information that
24 you're attempting to get.

25 And then there is the use of documents as well, which you

1 all stipulate to -- documents and interrogatories. Why don't
2 we consider those as a tool for this initial early phase in the
3 litigation?

4 MR. SOUTHWICK: This is Paul Southwick, Your Honor.
5 Just to make sure I understand, I believe what the Court is
6 suggesting is that the parties do a limited 30(b)(6) deposition
7 limited to --

8 THE COURT: Yes.

9 MR. SOUTHWICK: -- the topics that were just
10 discussed and that other depositions not be had at this time.

11 THE COURT: Correct.

12 MR. SOUTHWICK: And then the parties also attempt to
13 resolve some of the discovery issues through interrogatories
14 and documents --

15 THE COURT: I mean, I --

16 MR. SOUTHWICK: -- given the --

17 THE COURT: Certain documents will tell you there are
18 different ways different administrations have handled this.
19 I'm sure you have the historical documents that will be able to
20 show that. I don't know that there's a need for these four
21 listed individuals -- why they're necessary at this stage.
22 Documents should be able to show that. And the 30(b)(6)
23 outlines the process and I think will cover those issues. And
24 then if there's something more, you can ask by way of
25 interrogatories.

1 And keep the costs down at this stage. If there's
2 something more, again, I'll go step by step, and we'll take a
3 look at class discovery issues after this proceeding if we
4 reach that. And if we don't reach that, obviously we don't
5 have to get into all the discovery issues now. But I want to
6 narrow what everybody needs to do so that we don't lose the
7 hearing dates that we've set.

8 MR. SOUTHWICK: Thank you, Your Honor. This is Paul
9 Southwick again. And so I think that we could -- I'm hearing
10 the Court's opinion on this. So we can accept that. In terms
11 of documents and interrogatories, given that we are now about
12 31 days from the hearing -- you know, normal timelines for
13 discovery request and responses wouldn't be due until after the
14 hearing -- could we --

15 THE COURT: Why don't you talk to --

16 MR. SOUTHWICK: Could we shorten --

17 THE COURT: Right. Why don't you talk to Counsel and
18 get an abbreviated schedule. I don't know how you thought you
19 were going to get five -- at least five -- depositions done
20 between now and the hearing date either. So I'm going to
21 assume that you can work out getting some of the discovery that
22 you need for the hearing in a shorter timeline.

23 Am I right, Ms. Snyder? That can be done?

24 MS. SNYDER: I mean, yes, Your Honor. We're
25 certainly happy to try to work with plaintiff to get them what

1 they need. I should, though, you know, kind of be clear. I
2 don't -- I'm not sure what it is. And if they want to go down
3 the road of some huge document production or really complex
4 interrogatory, I'm not sure, in the 30 days that we have, if we
5 can do it.

6 THE COURT: Well, there's two ways to go. If they
7 overreach and ask for too much, when they get to the hearing,
8 and we'll have the hearing, and if I see a need to have the
9 record remain open for additional discovery, I may do that.

10 If it's overreaching and too broad, we're done. I'll just
11 do the hearing and I can sort that out. But I would like to
12 have the information that I need at the hearing so that I'm not
13 waiting for other information afterwards and people have a
14 chance to get what they need before the Court.

15 So, I guess, my message to the Plaintiff is ask for what
16 you need, not necessarily for everything you want at this stage
17 of this litigation.

18 MR. SOUTHWICK: This is Paul Southwick. Understood,
19 Your Honor, and we will be judicious in our request.

20 THE COURT: And if there's a problem, you can do a
21 letter and get this on my calendar. And Ms. Kramer will get it
22 on my calendar, and we will manage. Generally, lawyers can
23 work this out. They know what the issues are.

24 I think I can generally take almost judicial notice of
25 when there are changes of administration. Rules change,

1 interpretations change. So, you know, know what you're asking
2 for and know why you're asking for it and how this would affect
3 this litigation, this issue, this PI hearing. Okay?

4 MR. SOUTHWICK: Yes, Your Honor. This is Paul
5 Southwick. Thank you. I think I understand what our marching
6 orders are. I did want just to clean up and clarify one other
7 discovery issue, which was discovery of nonparties. And we
8 were considering discovery relating to three nonparty
9 witnesses, two of whom would be the presidents of colleges who
10 are the people who specifically requested the religious
11 exemptions and how that applied and how that actually worked
12 out in practice on their own campus. It was in terms of
13 closing Title IX complaints. And so I just wanted to clarify
14 whether or not Plaintiffs would be permitted to do any nonparty
15 discovery, whether it's documents or depositions, prior to the
16 hearing.

17 THE COURT: Ms. Snyder?

18 MS. SNYDER: Yes, Your Honor. Again, I'm a little --
19 you know -- if the admonition is to kind of keep it tight and
20 only towards what's needed for the hearing, I'm not sure how
21 that impacts the issues before the Court.

22 THE COURT: Well, if she doesn't know, then I don't
23 know. So you're going to need to spell it out a little more.

24 MR. SOUTHWICK: All right. This is Paul Southwick
25 again. We would like to depose the president of George Fox

1 University and the president of Corban University. George Fox
2 University is the institution attended by one current student
3 who's a current student plaintiff who has a Title IX
4 exemption -- who has a Title IX complaint -- against George Fox
5 University that is pending.

6 George Fox University has an existing religious exemption
7 that it obtained in order to close the Title IX complaint of
8 another plaintiff who is a former student -- transgender
9 student -- who filed a housing complaint against George Fox
10 University.

11 In response, the president of George Fox University
12 followed the old requirement of the regulation, which required
13 the president of the institution to request religious exemption
14 from the Office of Civil Rights and ultimately from Suzanne
15 Goldberg -- previously from Catherine Lhamon -- stating out the
16 control issues, stating out the belief's practices, and then
17 how the compliance would burden or not burden those religious
18 tenets.

19 In that case, Your Honor, the -- George Fox's president
20 sought a retroactive application of a Title IX religious
21 exemption. And the Office of Civil Rights received it and
22 acknowledged it as applying retroactively.

23 So then the Title IX complainant -- the former George Fox
24 student -- appealed that decision. And in the process of the
25 appeal -- and this is where we don't have all the documents,

1 Your Honor, and would like some testimony or documents -- in
2 the process of that appeal, the Office of Civil Rights actually
3 wrote a letter to the denomination itself -- the denomination
4 that claimed to control George Fox University -- and it asked
5 for its religious tenets and its control structure and whether
6 or not that control structure -- whether it truly controlled
7 George Fox and whether its religious tenets of the external
8 religious organization would be burdened by compliance with
9 Title IX.

10 And it went through this entire process. And we believe
11 that that process demonstrates excessive entanglement between
12 the Government and between the religious entities, as well as
13 demonstrates the harm that comes to an unsuspecting transgender
14 or queer student whose institution doesn't even have a
15 religious exemption on file, or hasn't given any indication of
16 and religious exemption, and then retroactively have it apply.

17 So we wanted to depose that college president to get the
18 documents that are relevant to that and the testimony about how
19 that whole process worked.

20 MS. SNYDER: Again, Your Honor, I'm not sure how
21 that's relevant.

22 THE COURT: Well, I also think that information -- I
23 also think that that information could be available through
24 documents from your department -- from the Department of Ed.
25 So I'm going to -- I'm going to decline, at this point, to

1 allow those nonparty depositions for this particular hearing.
2 I'm sure there will be other ways to articulate how this is --
3 somebody please put your phone on mute or quit heavily
4 breathing into the microphone. I can't hear. So I'm going to
5 decline that at this time and keep the issues narrow for the
6 first hearing.

7 Anything else?

8 MR. GREY: Your Honor, this is Herb Grey. I'm one of
9 the lawyers for the Proposed Intervenors CCCU. And --

10 THE COURT: Right.

11 MR. GREY: -- this whole conversation shows that
12 we've been left on the sidelines. And what is still pending
13 before the Court is a motion to intervene on our part and --

14 THE COURT: I'm well aware of that.

15 MR. GREY: So the reason I'm raising the questions is
16 some of these discussions that are taking place, and even the
17 purposes or the intent of what we're covering at the status
18 conference, is not information that's being shared with us,
19 other than receiving the scheduling orders from the Court.

20 So we're flying a little blind here, and the discussion
21 kind of continues about matters which affect our clients'
22 interests. And even -- there's even been motions to strike any
23 of our submissions where we're trying to keep our foot in the
24 door to be able to preserve our rights to speak up here pending
25 the Court's decision on the motions to intervene.

1 So I'm just alerting you that as a practical matter it's
2 been very difficult for us to receive the scheduling orders but
3 not know what we're talking about or not have a role in the
4 ongoing discussions.

5 THE COURT: I understand.

6 Anything else we need to take up? Is that enough guidance
7 for the PI hearing?

8 MR. SOUTHWICK: This is Paul Southwick --

9 MR. GREY: This is Mr. Grey again --

10 MR. SOUTHWICK: This is Paul Southwick. And nothing
11 further on our end, Your Honor.

12 MR. GREY: This is Mr. Grey. So do I understand that
13 there's still an October 20th status conference set as well as
14 the preliminary injunction hearing in early November?

15 THE COURT: Cathy, are they -- is it still set on the
16 20th?

17 THE COURTROOM DEPUTY: Yes. There is a status on the
18 20th, Judge.

19 THE COURT: Mm-hm.

20 MR. GREY: And is there an agenda for that status
21 conference?

22 THE COURT: No. It will be worked out in advance by
23 the parties and where they are with regard to the status of the
24 issues to be presented at the hearing.

25 MR. LIPPELMANN: And, Your Honor, this is Mark

1 Lippelmann for the religious schools Corban University, William
2 Jessup University, and Phoenix Seminary. To the extent that
3 discovery does proceed or that depositions occur while the
4 motions to intervene are pending, is that something that the
5 Intervenors can be -- Proposed Intervenors -- can be notified
6 of and participate in? Because we don't -- we're not in the
7 position to know if questions will be asked that could affect
8 our interests or to what degree that could happen. So we'd
9 just ask for an opportunity to at least be informed or to be
10 present if such a deposition occurs.

11 THE COURT: There are basic 12(b) -- 30(b)(6)
12 depositions that are geared towards the mechanics of the
13 process that will be done and scheduled. And I don't
14 necessarily know whether you'll even need to be a part of that
15 or not. But, at this point, I haven't ruled on the motion to
16 intervene. And I'm trying to keep these issues simple at this
17 particular point. And so you can talk with the respective
18 lawyers. But I've not granted the motion to intervene at this
19 juncture, so you don't have any rights to be part of this
20 litigation at this juncture.

21 MR. LIPPELMANN: Okay. Thank you, Your Honor.

22 THE COURT: Anything else, Ms. Snyder or
23 Mr. Southwick, that I can address today?

24 MS. SNYDER: Your Honor, this is Hilarie Snyder for
25 the Defendants. I just want to make sure I understand the

1 Court's ruling today if you'll indulge me for just a moment.

2 THE COURT: Sure.

3 MS. SNYDER: So you're allowing a 30(b)(6) deposition
4 that's limited to the mechanics of the process done with
5 respect to the Plaintiffs' pending administrative complaints.
6 And then other than -- no other depositions -- and then the parties
7 are to work together to either have stipulations or perhaps to
8 exchange some documents that would otherwise address potential
9 needs that Plaintiffs have; is that correct?

10 THE COURT: Right. Or come up with a stipulation,
11 you know, as to the process and the procedures and --

12 MS. SNYDER: Okay. So you're saying --

13 THE COURT: -- if things have changed.

14 MS. SNYDER: Okay. So the stipulation could
15 potentially replace the 30(b)(6) -- is that -- did I understand
16 you correctly -- if we're able to do that?

17 THE COURT: If you're that optimistic and the
18 glass-half-full person, you could -- when you haven't been able
19 to do it before now -- if you could do that, that would be
20 great. But if you can do a 30(b)(6) deposition that will cover
21 that territory, I guess that's the way to go. But I actually
22 think there's a stipulation that could be resolved ahead of
23 time.

24 And I'm not -- I guess, I'm not -- would not be surprised
25 that I would get a stipulation or get information at the

1 hearing that says "during different periods of time, there were
2 different interpretations." So maybe I'm just guessing. But
3 I've had a couple of these cases now. And I'm thinking there
4 might be changes with administrations. And so different --
5 they may be looking at things differently. I don't know. I'm
6 waiting to see when I see a stipulation or I see what a
7 30(b)(6) motion tells me. Okay?

8 MS. SNYDER: Okay. Thank you, Your Honor.

9 THE COURT: Anything else?

10 MR. SOUTHWICK: So this is Paul Southwick. So I just
11 want to confirm that we are authorized to go ahead and issue
12 that 30(b)(6) notice. Is that correct, Your Honor?

13 THE COURT: Yes. But did you just hear what Counsel
14 said? I think she'd like a chance to see if you can't
15 stipulate to working that out. So I would -- you know --
16 communication is important in these kinds of cases when we're
17 trying to get the issues efficiently before the Court.

18 And so everybody's very busy. You're busy. Everybody's
19 busy. So if we can do it in an efficient way, and you can get
20 on the phone and work through these issues in a stipulation --
21 because they're -- really I think that's probably the most
22 efficient way to do this. Otherwise a deposition has to be
23 taken, which is really the more arduous way to get the
24 information before the Court.

25 I mean, these are facts. I mean, these are things that

1 are not really subject to much interpretation, would be my
2 guess. But if there's something more than that, I'll hear
3 about it.

4 MR. SOUTHWICK: All right.

5 THE COURT: Okay? And I'm opening the discovery
6 because everybody worked really hard to deal with the first
7 issues before this Court. I think that each of these cases is
8 different. And I'm going to work the discovery. I'm going to
9 work the process in a manner that's the most efficient and
10 doesn't waste and squander a lot of resources on everybody's
11 account so we can get to what we need to make a legal
12 determination -- what we -- what we might need to make as a
13 legal, factual determination. Okay?

14 MR. SOUTHWICK: Understood, Your Honor. And this is
15 Paul Southwick. We will work cooperatively to get
16 stipulations. In my experience though, sending out a notice
17 and then getting a time and a date set does help the parties
18 move that along. Because if we don't send the notice, then we
19 might not get anywhere or be stuck at the last minute.

20 THE COURT: I've been doing this a long time.
21 Deadlines matter. So I understand that. All right.

22 MR. SOUTHWICK: Okay.

23 THE COURT: So I will see you on the 20th.

24 MR. SOUTHWICK: Thank you.

25 THE COURT: I will talk with you further on the 20th.

1 But, you know, again, just think about your audience. Your
2 audience is this Court. Get the information you think that I
3 need to make the decision. It's a legal determination. Get
4 the information you think I need to make a determination in
5 your favor or how to take a look at the information.

6 And narrow -- don't just throw spaghetti against the wall.
7 Make your issues clear and concise for this Court. I mean, I
8 try to say that all the time to my students that work with us.
9 People come in here and just throw things up sometimes and we
10 have to sort it out. Come in and tell me what you really want
11 and why and factually what is -- what you've been able to
12 document the problems are so we have a clear shot of
13 understanding, you know, where we need to start and not have to
14 guess where we need to start. Okay?

15 MR. SOUTHWICK: Thank you, Your Honor.

16 THE COURT: All right? All right. Anything else?

17 MS. SNYDER: Thank you, Your Honor.

18 MR. SOUTHWICK: Not from Plaintiff.

19 THE COURT: All right. Thank you. We're in recess.
20

21 (The proceedings adjourned at 3:44 PM.)
22
23
24
25

C E R T I F I C A T E

ELIZABETH HUNTER, et al. v. U.S. DEPARTMENT OF EDUCATION, et al.

6:21-cv-474-AA

STATUS CONFERENCE

October 4th, 2021

I certify, by signing below, that the foregoing is a true and correct transcript, to the best of my ability, of the telephonic proceedings heard via conference call, taken by stenographic means. Due to the telephonic connection, parties appearing via speakerphone or cell phone or wearing masks due to coronavirus, speakers overlapping when speaking, speakers not identifying themselves before they speak, fast speakers, the speaker's failure to enunciate, and/or other technical difficulties that occur during telephonic proceedings, this certification is limited by the above-mentioned reasons and any technological difficulties of such proceedings occurring over the speakerphone at the United States District Court of Oregon in the above-entitled cause.

A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Kendra A. Stepler, RPR

Official Court Reporter

Signature Date: 10/5/2021

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