

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

AMERICAN FREEDOM LAW CENTER, INC.,
Plaintiff,

v.

DANA NESSEL, in her official capacity as
Attorney General of Michigan; AGUSTIN V.
ARBULU, in his official capacity as Director,
Michigan Department of Civil Rights,
Defendants.

No. 1:19-cv-153

Hon. Paul L. Maloney

**PLAINTIFF'S RESPONSE TO DEFENDANT ATTORNEY GENERAL'S MOTION TO
STRIKE PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY**

AMERICAN FREEDOM LAW CENTER
Robert J. Muise, Esq. (P62849)
P.O. Box 131098
Ann Arbor, Michigan 48113
(734) 635-3756
rmuise@americanfreedomlawcenter.org

Attorneys for Plaintiff

Christina M. Grossi (P67482)
Ann M. Sherman (P67762)
Kyla L. Ragatzki (P81082)
Michigan Department of Attorney General
P.O. Box 30754
Lansing, Michigan 48909
(517) 335-7573

*Attorneys for Defendant Attorney General
Dana Nessel*

Ron D. Robinson (P35927)
Michigan Department of Attorney General
Civil Rights Division
3030 W. Grand Boulevard, Suite 10-200
Detroit, Michigan 48202
(313) 456-0200

*Attorneys for Defendant MDCR Director
Agustin V. Arbulu*

ISSUE PRESENTED

Whether the Court should strike Plaintiff's notice of supplemental authority (Doc. No. 29), which brings to the Court's attention the recent decision in *Buck v. Gordon*, No. 1:19-CV-286, 2019 U.S. Dist. LEXIS 165196, (W.D. Mich. Sep. 26, 2019), in which the court highlighted Defendant Nessel's improper use of her authority as the Michigan Attorney General to target groups for adverse treatment because she objects to their religious views, describing them as "the product of hate."

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

Bell Atlantic v. Twombly, 550 U.S. 544 (2007)

Fed. R. App. P. 28(j)

ARGUMENT

This Court should deny Defendant Nessel’s request to strike (Doc. No. 30) Plaintiff’s notice of supplemental authority (Doc. No. 29) for at least two reasons. First, providing supplemental authority to a court after the briefing has closed is a common and important practice. As Defendant Nessel acknowledges, in the federal appellate courts there is a specific rule that sets forth the procedure for doing so. (Def. Nessel Br. at 3 [quoting Fed. R. App. P. 28(j)] [Doc. No. 31]). This rule makes sense. If there is subsequent authority that may assist the court with rendering its decision, it is entirely appropriate to bring this authority to the court’s attention and to briefly explain why the party believes this authority is relevant, as Plaintiff has done here.

Consequently, what exactly is it that Defendant Nessel seeks to accomplish with her request *to strike* Plaintiff’s notice? Leaving aside the question of whether a motion to strike is appropriate in the first instance,¹ does Defendant Nessel *not* want the Court to be informed of this subsequent decision? Is this subsequent decision now off limits for the Court’s consideration? Practically, Defendant Nessel’s request makes little sense. And more important, since the role of the Court is to pursue justice, Defendant Nessel’s request to strike—which is, in essence, an argument that the Court should not be informed of this subsequent authority—plainly undermines that goal. In short, Defendant Nessel’s motion is improper and should be denied.

We turn now to the second and more substantive reason why the Court should deny the motion.

At issue in this case is whether Defendant Nessel is using her authority as the Michigan Attorney General to target and pejoratively label as “hate groups” organizations whose political

¹ See Fed. R. Civ. P. 12(f) (setting forth the bases for a “motion to strike”).

views she opposes in violation of the United States Constitution. *Buck v. Gordon*, No. 1:19-CV-286, 2019 U.S. Dist. LEXIS 165196, (W.D. Mich. Sep. 26, 2019), is relevant to this inquiry. *See, e.g.*, Fed. R. Evid. 401 (describing the test for relevancy as whether (a) it “has *any* tendency to make a fact more or less *probable* than it would be without” it . . . and (b) “the fact is of consequence in determining the action”) (emphasis added).

Defendant Nessel seeks to dismiss Plaintiff’s lawsuit, claiming, *inter alia*, that she, as the Michigan Attorney General, would never abuse her authority by engaging in any adverse action against a political opponent because of the opponent’s political views. In support of this assertion, Defendant Nessel asked this Court to consider unsworn statements she made to a State Senate oversight committee—statements made after the filing of this lawsuit. (*See* Def. Nessel Supplemental Br. [Doc. No. 25]). In contrast to her comments to the oversight committee, *Buck v. Gordon* tells a very different story—one that comports with the (similar) allegations leveled against Defendant Nessel in this case. In *Buck v. Gordon*, Chief Judge Jonker makes clear that Defendant Nessel is improperly using her authority as the Michigan Attorney General to target groups based on their religious beliefs—beliefs which she opposes. Per the Court:

What this case is about is whether St. Vincent may continue to do this work and still profess and promote the traditional Catholic belief that marriage as ordained by God is for one man and one woman. In 2015, Michigan’s state legislature passed a law designed to ensure it could do just that. And when the State was first sued on the issue, the State defended the right of St. Vincent to maintain its religious belief while it placed children on a non-discriminatory basis in any home approved by the State.

But that changed in the wake of the 2018 general election. While a candidate for Michigan Attorney General, Dana Nessel called the law indefensible. She indicated that she would not defend the State’s position in the litigation challenging the law, because she “could not justify using the state’s money” to defend “a law whose only purpose is discriminatory animus.” *Leading up to the campaign, she described proponents of the law as “hate-mongers” who disliked gay people more than they cared about children.* Candidate Nessel won the election, and shortly after taking office, she changed the State’s position toward

St. Vincent. Under the Attorney General's current interpretation of Michigan law and the parties' contracts, St. Vincent must choose between its traditional religious belief, and the privilege of continuing to place children with foster and adoptive parents of all types.

Because the record demonstrates that the State's new position targets St. Vincent's religious beliefs, strict scrutiny applies, and St. Vincent has established a basis for preliminary injunctive relief to preserve the status quo while the validity of the State's new position is tested in plenary litigation.

Id. at *2-3 (emphasis added). Chief Judge Jonker proceeded to find the following:

The exception applies here because the historical background, specific series of events, *and statements of Defendant Nessel all point toward religious targeting.*

The history of this case, the *Dumont* litigation, the Michigan Legislature's enactment of 2015 PA53, the 2018 campaign for Michigan Attorney General and General Nessel's statements *create a strong inference that the State's real target is the religious beliefs and confessions of St. Vincent, and not discriminatory conduct.*

Id. at *31-32 (emphasis added). The same is true here. The allegations in the First Amended Complaint create a strong inference that Defendant Nessel's real target is Plaintiff's political beliefs. The creation of the "hate" incident database by the Michigan Department of Civil Rights clearly illustrates the point.² And Defendant Nessel's official reliance upon and endorsement of SPLC's "hate group" labeling and her Facebook post responding to this lawsuit prove it. (First Amended Compl. ¶¶ 22-32, 50-53, Exs. 1 [press release] & 4 [Facebook post] [Doc. No. 7]).

Chief Judge Jonker continues:

The State Defendants seek dismissal of Defendant Nessel from the case. They contend that she is simply the State's chief legal counsel, is not responsible for Michigan's change in policy, and does not belong in the case. The record undercuts the claim. Based on the record to date, Defendant Nessel is at the very heart of the case. She referred to proponents of the 2015 law as "*hate-mongers*"

² The official announcement of this database was made in a joint press release with the Michigan Attorney General in which both Defendant Nessel and Defendant Arbulu officially endorsed and gave the government's imprimatur to SPLC's "hate group" designation, providing, *inter alia*, a hyperlink to SPLC's Hate Map which lists Plaintiff as one of the "hate groups" operating in Michigan. (First Amended Compl. ¶¶ 22-25, Exs. 1 [press release] & 2 ["Hate Map"]).

and said the only purpose of the 2015 law was “discriminatory animus.” She described the 2015 law as “indefensible” during her campaign. *These statements raise a strong inference of a hostility toward a religious viewpoint.* Based on the present record, she was also a pivotal player in the State’s total reversal of position in the *Dumont* litigation. It was her assessment of risk that led the State to move from defending St. Vincent’s position to abandoning it in the first month of her term - and this despite the 2015 law, the language of the contracts, and well-established practice. *All of this supports a strong inference that St. Vincent was targeted based on its religious belief, and that it was Defendant Nessel who targeted it.*

* * *

Leading up to and during the 2018 general election campaign, she made it clear that she considered beliefs like St. Vincent’s *to be the product of hate.*

Id. at *46-47, 50 (emphasis). In this case, the allegations and the inferences drawn from them, which must be viewed in Plaintiff’s favor, support the conclusion that Plaintiff is being targeted by State officials based on its political beliefs, and that it is Defendant Nessel who (along with her accomplice Defendant Arbulu) is targeting it.

In short, *Buck v. Gordon* demonstrates a pattern of conduct engaged in by Defendant Nessel—conduct which can best be described as weaponizing the Office of the Michigan Attorney General to target political opponents. As noted, Defendant Nessel asked this Court to credit unsworn statements she made to a Senate oversight committee after the filing of this lawsuit in an effort to contradict allegations in the First Amended Complaint. Yet, she wants this Court to discredit the opinion and findings of Chief Judge Jonker—findings which demonstrate, at a minimum, the plausibility of Plaintiff’s allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”).

As Chief Judge Jonker made clear, Defendant Nessel’s pejorative statement attacking St. Vincent’s religious beliefs by labeling them the “product of hate” is exceedingly relevant to support a claim of unlawful targeting by the Michigan Attorney General. Here, we have contemporaneous statements made by Defendant Nessel *while serving as the Michigan Attorney General*³ which demonstrate that she is targeting groups she and SPLC consider “hate groups.” Accordingly, Defendant Nessel has placed the power of the State’s government, with its authority, presumed neutrality, and assumed access to all the facts, behind SPLC’s designation of Plaintiff as a “hate group”—a designation designed to harm Plaintiff. (*See* First Amended Compl. ¶¶ 22-30, Ex. 1 [press release]). And once *this* lawsuit was filed, Defendant Nessel doubled-down on her Facebook page, reaffirming her conviction to target organizations that she and SPLC consider “hate groups.” (*See* First Amended Compl. ¶¶ 50-53, Ex. 4 [Facebook post]).

In sum, there is a reason why Defendant Nessel wants to separate herself from Chief Judge Jonker’s decision in *Buck v. Gordon* and why she argues in her motion to strike that this decision is legally and factually meaningless (and, indeed, why she wants to get back before a more favorable judge in the U.S. District Court for the Eastern District of Michigan) (*see* Def. Nessel Br. at 6 & Ex. 2 [Doc. No. 31]). And the reason is this: Chief Judge Jonker’s decision exposes Defendant Nessel for what she is: a politician willing to use the power and instruments of government to target political opponents. *Buck v. Gordon* is pertinent, it is significant, and it

³ In her brief in support of her motion to strike, Defendant Nessel disagrees with Chief Judge Jonker’s reliance on the “product of hate” statement, asserting that it is not relevant because it “was made by the Attorney General in 2015—four years before she took office and over two years before she announced her campaign.” (Def. Nessel Br. at 4 [Doc. No. 31]). As noted, the statements highlighted by Plaintiff here were made while Defendant Nessel was serving as the Michigan Attorney General, making them even more compelling than the statements Chief Judge Jonker found relevant.

is relevant to the proceedings before this Court. It illustrates, at a minimum, the plausibility of Plaintiff's claims in this case. Defendant Nessel's motion should be denied.

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court consider *Buck v. Gordon* and reject Defendant Nessel's request to strike Plaintiff's notice of this relevant authority.

Respectfully submitted,

/s/ Robert J. Muise
Robert J. Muise, Esq. (P62849)
Counsel for Plaintiff

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I certify that this brief contains 1,987 words, exclusive of the case caption, cover sheets, any table of contents, any table of authorities, the signature block, attachments, exhibits, and affidavits, and is thus within the word limit allowed under Local Civil Rule 7.3(b)(i). The word count was generated by the word processing software used to create this brief: Word for Microsoft Office 365, Version 1904.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2019, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise

Robert J. Muise, Esq. (P62849)