UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; HERMAN MCCALL, 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; ALEX AZAR, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.
_____/

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

STATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TRANSFER OR, ALTERNATIVELY, TO DISMISS

ORAL ARGUMENT REQUESTED

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CONCISE STATEMENT OF REASONS SUPPORTING STATE DEFENDANTS' POSITION

Although framed as a constitutional challenge to protect the rights of religious agencies, church volunteers, foster care children, prospective foster and adoptive parents, this case at its core is about whether the defendant state officials should be allowed to comply with the terms of a settlement agreement that was entered as a consent decree in another case, *Dumont, et al. v. Gordon, et al.*, 2:17-cv-13080 (E.D. Mich., March 22, 2019). Plaintiffs were parties to that case and did not challenge the consent decree. Instead, they filed this new case essentially asking this Court to enjoin the defendant from performing under the consent decree. Plaintiffs' cloaked challenge to the consent decree should be transferred to the *Dumont* court, which retained jurisdiction to enforce its terms.

Alternatively, if this Court chooses to retain the case, Plaintiffs' claims must be dismissed as barred by res judicata because Plaintiffs' claims could have been brought in *Dumont*. The added claims against the attorney general must be dismissed because she is immune from suit and her alleged statements and actions do not amount to a viable claim. Moreover, the church volunteer and foster parent plaintiffs lack standing to bring claims against the defendants, and none of the Plaintiffs have standing to assert the constitutional rights of foster care children. Finally, Plaintiffs' Religious Freedom Restoration Act claims cannot be asserted against the state defendants and these same defendants are immune from the nominal damages Plaintiffs seek.

INTRODUCTION

This case does not belong in this Court. Plaintiffs Melissa Buck, Chad Buck and Shamber Flore (the "Individual Plaintiffs") and St. Vincent Catholic Charities ("SVCC" and collectively, "Plaintiffs") filed this lawsuit to re-litigate claims that were resolved by settlement in another case, in another court. In *Dumont v. Gordon*, No. 17-cv-13080 (E.D. Mich. Sept. 20, 2017) ("*Dumont*"), Plaintiffs were intervenor-defendants who came into the case in order to, among other things, "immediately appeal and protect their interest" in the event of a settlement between the *Dumont* plaintiffs and defendants. (*Dumont* Doc. 18, Motion to Intervene and Mem. In Support, attached as Ex. 1, PageID.439.) Just as Plaintiffs predicted, *Dumont* was settled, and the court entered a consent decree. However, despite their assertions to the contrary, Plaintiffs opted not to challenge the consent decree in that forum. Instead, they came to this Court and filed a new suit seeking a declaration that the terms of the settlement agreement underlying the consent decree should not be enforced against SVCC. This they cannot do.

For this Court to grant Plaintiffs the relief they are seeking, this Court must require Defendants Robert Gordon and JooYuen Chang (the "Dumont defendants")[1] to violate the consent decree they only recently entered in *Dumont*. Because the

[1] The defendants in *Dumont* were Nick Lyon, in his official capacity as Director of the Michigan Department of Health and Human Services (the "Department"), and Herman McCall, in his official capacity as Executive Director of the Department's Children's Services Agency ("CSA"). Both state officials have been succeeded in their respective offices. Pursuant to Fed. R. Civ. P. 25(d), the officer's successor is automatically substituted as a party. Therefore, this motion reflects the current state officials, Robert Gordon and JooYuen Chang.

Dumont court retained jurisdiction over the enforcement of the consent decree, the best forum for raising this challenge and deciding this issue – i.e., whether the *Dumont* defendants should be enjoined from fulfilling the obligations as set forth in the consent decree – is in that court. Accordingly, this Court should exercise its discretion to transfer this matter to the Eastern District of Michigan, pursuant to 28 U.S.C. § 1404(a).

Alternatively, if this Court retains this case, it should be dismissed for multiple other reasons. First, Plaintiffs' Religious Freedom Restoration Act ("RFRA") claim should be dismissed as to Defendants Robert Gordon, JooYuen Chang, and Dana Nessel (collectively the "State Defendants") because it can only be asserted against the federal government. Second, no viable claims are asserted against Attorney General Dana Nessel, and as the advocate for the state, she is immune from suit. Third, because the claims Plaintiffs now raise were the subject of the *Dumont* action, res judicata bars subsequent litigation of those claims, or any claims that could have been brought in *Dumont*. Fourth, this court lacks subject matter jurisdiction because the Individual Plaintiffs – as foster parents and volunteers – are neither parties to, nor third-party beneficiaries, of the state's contracts with SVCC; therefore they lack standing to challenge the contractual provisions. Finally, Plaintiff SVCC lacks standing to represent foster care children and no plaintiff can seek damages, nominal or otherwise, against State Defendants.

For these reasons, this matter should be transferred, pursuant to 28 U.S.C. § 1404(a), to the district court that approved the consent decree and retained

jurisdiction to enforce it, or in the alternative, be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1).

BACKGROUND

I. *Dumont v. Gordon* is filed in the Eastern District of Michigan.

On September 20, 2017, two same-sex couples (the "*Dumont* plaintiffs") filed a complaint in the United States District Court for the Eastern District of Michigan, Case No. 2:17-cv-13080 (Borman, J.), styled *Dumont v. Gordon* ("*Dumont*"), challenging the Michigan Department of Health and Human Services' (the "Department") contracts with taxpayer-funded, state-contracted foster care and adoption agencies ("Child Placing Agencies" or "CPAs")[2] that refuse to provide contracted services involving same-sex couples. As alleged in the *Dumont* complaint, the *Dumont* plaintiffs approached SVCC and another CPA for the purpose of adopting through the State's foster care system. (*Dumont* Complaint, Doc. 1, attached as Ex. 2, ¶¶ 61-62, PageID.16-17.) The *Dumont* plaintiffs claimed that, because of their sexual orientation, SVCC refused to work with them when providing state-contracted services for children accepted by the agencies through a

[2] CPAs are licensed and regulated by the Department. *See generally* Mich. Comp. Laws § 722.111 *et seq*.; Mich. Admin. Code R. 400.12201 *et seq*. As alleged in the Complaint, funding is provided to CPAs after an agency accepts a referral from the Department of a child. (Doc. 1, PageID.22.) A CPA accepts a referral by submitting to the Department a written agreement to perform services related to the particular child or particular individuals referred by the Department, or by engaging in any other activity that results in the Department being obligated to pay the agency for the services related to the particular child or particular individuals referred by the Department. Mich. Comp. Laws § 722.124f(1)(a), (b). A CPA may decline to accept a Department referral if it will result in a conflict with the CPA's sincerely held religious beliefs. Mich. Comp. Laws §§ 722.124e(2), 722.124f(1). However, once a Department referral is accepted by a CPA, the CPA must perform the services as specified in the state contracts.

Department referral, in violation of the federally mandated non-discrimination provisions in the agency's contracts with the Department. (*Id.*) The *Dumont* plaintiffs asserted two counts: violation of the First Amendment (Count I) and violation of the Fourteenth Amendment (Count II). (Ex. 2, ¶¶ 75-89, PageID.20-21.)

On December 15, 2017, *Dumont* defendants moved to dismiss the *Dumont* complaint, alleging lack of standing and failure to state a claim under the Establishment Clause of the First Amendment and under the Equal Protection Clause of the Fourteenth Amendment.

II. Plaintiffs move to intervene in *Dumont* and to dismiss the complaint.

While that motion was pending, the identical Plaintiffs in this case – SVCC, Melissa and Chad Buck, and Shamber Flore – moved to intervene by right in *Dumont*, alleging they had "a substantial legal interest that may be impaired because [the *Dumont*] Plaintiffs' complaint could force St. Vincent to close its foster and adoption programs, and also harm the Buck Family and Shamber Flore through the resulting loss of services." (Ex. 1, PageID.418.) As proposed intervenors, Plaintiffs argued they had "'a significantly protectable interest' in the outcome of the [*Dumont*] lawsuit" because "[SVCC's] foster and adoption services are directly implicated," and because its contract with the Department was "directly challenged" by the *Dumont* plaintiffs, and SVCC was "directly targeted" in the *Dumont* complaint and would be "directly impacted by the constitutional arguments" the *Dumont* plaintiffs raised. (Ex. 1, PageID.433-434.)

Plaintiffs further claimed that the *Dumont* defendants' arguments "could mean that [the court] will interpret [SVCC's] contractual obligations or consider [SVCC's] Free Exercise rights[,]" and because "the resolution of [*Dumont*] 'may as a practical matter impair or impede [their] ability to protect [their] interest[s].'" (*Id.* at PageID.435.) As proposed intervenors, Plaintiffs further argued that the court should allow them to intervene as of right "to immediately appeal and protect their interest" in the event of a settlement between the *Dumont* plaintiffs and the State defendants because the burden of that settlement "would fall on Proposed Intervenors." (*Id.* at PageID.439.)

The *Dumont* court granted SVCC's unopposed motion to intervene, but had some hesitation regarding the request for intervention of the Individual Plaintiffs. After oral argument, the court granted their motion as well, finding they met their "minimal burden" to show that there was "a potential for inadequate representation" by the other parties. (*Dumont* Doc. 34, Order Granting Motion to Intervene, attached as Ex. 3, PageID.23.)

Along with their motion to intervene, SVCC, the Bucks and Flore moved to dismiss the *Dumont* complaint, arguing that the relief sought in *Dumont* would violate the First Amendment's Free Exercise Clause, including targeting, selective enforcement, and exclusion from a public benefit. (*Dumont* Doc. 19, Defendant-Intervenors' Mtn. to Dismiss, attached as Ex. 4, PageID.511-516.) They also argued that the relief sought would violate the First Amendment's Free Speech Clause by compelling content-based speech. (Ex. 4, PageID.518-521.) These claims sound

familiar because, after Judge Borman soundly rejected their defenses early on in *Dumont*, they are virtually identical to the claims that Plaintiffs now bring to this Court. (Doc. 1, ¶¶ 122-162, PageID.42-49.)

III. *Dumont* court denies the motions to dismiss and all parties engage in substantial written discovery.

On September 14, 2018, Judge Borman issued a 92-page Opinion and Order that, except for dismissing an individual plaintiff for lack of standing, otherwise denied in the entirety of the motion to dismiss filed by Plaintiffs SVCC, Chad and Melissa Buck, and Shamber Flore, as well as the *Dumont* defendants' motion to dismiss. *Dumont v. Lyon*, 341 F.Supp.3d 706 (E.D. Mich., Sept. 14, 2018). Judge Borman noted that "nothing in [the *Dumont*] Plaintiffs' Complaint suggests or requires the conclusion that St. Vincent would be required to disseminate any kind of scripted statement as a condition of partnering with the State to provide child welfare services." *Id.* at 751. Judge Borman also relied heavily on *Teen Ranch, Inc. v. Udow*, 389 F.Supp.2d 827 (W.D. Mich. 2005), *aff'd Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 410 (6th Cir. 2017), because it made "some of the same Free Exercise and Free Speech claims that [SVCC] assert[ed in *Dumont*]." *Dumont*, 341 F.Supp.3d at 751. Judge Borman emphasized that SVCC "has not distinguished *Teen Ranch* and has not explained how these same principles do not defeat [SVCC's] First Amendment arguments[.]" *Id.* at 752. Judge Borman also found that the *Dumont* plaintiffs asserted a viable Equal Protection claim, and, as such, were entitled to "an opportunity to conduct discovery to support their claim[.]" *Id.* at 743.

Discovery began in earnest and lasted several months. (Doc. 1, ¶ 89, PageID.32.) Prior to taking depositions and just as Plaintiffs had predicted in their motion to intervene, the case entered settlement discussions. (Doc. 1, ¶¶ 89-90, PageID.32.) The *Dumont* plaintiffs and *Dumont* defendants notified the court that they were engaging in settlement discussions and requested a stay on January 23, 2019. (Doc. 1, ¶¶ 89-90, PageID.32.) Plaintiffs did not participate in the settlement discussions, and a settlement agreement was reached two months later. (Doc. 1, ¶ 89, PageID.32.)

IV. The *Dumont* Consent Decree requires compliance with the non-discrimination provision in agency contracts.

On March 22, 2019, the *Dumont* plaintiffs and *Dumont* State Defendants filed a Stipulation of Voluntary Dismissal with Prejudice. (*Dumont* Doc. 82, Stip. of Voluntary Dismissal with Prejudice, attached as Ex. 5, PageID.1437.) The terms of a settlement agreement were incorporated into the Stipulation. (Ex. 5, PageID.1439, 1444-1450.)

In the settlement agreement, the *Dumont* plaintiffs and *Dumont* defendants acknowledged that the Department contracts with licensed CPAs (such as SVCC) to provide foster care case management-related services and adoption-related services for children placed with the Department for care, supervision, and foster care or adoption. (Ex. 5, PageID.1444.) They further acknowledged that those contracts include a non-discrimination provision which mandates that child placing agencies comply with the Department's non-discrimination statement prohibiting

discrimination "against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability." (Ex. 5, PageID.1444.) Under the terms of the settlement agreement, the Department agreed to maintain non-discrimination provisions in its CPA contracts, as required by 45 CFR 75.300(c). (Ex. 5, PageID.1445.) The Department also agreed to enforce these provisions when a state-contracted agency discriminated against same-sex couples or LGBTQ individuals that may otherwise be qualified foster care or adoptive parents for any child accepted by the agency through a referral for services under contract with the Department. (Ex. 5, PageID.1445-1446; *see also* Doc. 1, ¶ 101, PageID.36.)

The settlement agreement provided examples of prohibited practices under the non-discrimination provision:

> i. turning away or referring to another contracted CPA an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract;
>
> ii. refusing to provide orientation or training to an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract;
>
> iii. refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract; and
>
> iv. refusing to place a child accepted by the CPA for services under a Contract or a Subcontract with an otherwise qualified LGBTQ individual or same-sex couple suitable as a foster or adoptive family for the child;

(Ex. 5, PageID.1445.). The settlement agreement was also specific about what the Department must do once it finds that a CPA refuses to comply with the non-discrimination provision: "In the event a CPA refuses to comply with the Non-Discrimination Provision or Similar Provision within a reasonable time after notification by the Department of a Contract Violation, the Department will terminate the CPA's Contracts." (Ex. 5, PageID.1446.)

On March 22, 2019, Judge Borman of the United States District Court for the Eastern District of Michigan entered an order dismissing the case based on the settlement agreement ("Consent Decree").[3] (*Dumont* Doc. 83, Order on Stipulation of Dismissal, attached as Ex. 6, PageID.1468-1469.) Judge Borman indicated that after considering the *Dumont* plaintiffs' and *Dumont* defendants' stipulation and voluntary dismissal, as well as the settlement agreement, he was dismissing the case with prejudice. (*Id*. at PageID.1468-1469.) Judge Borman, however, "retain[ed] jurisdiction over the enforcement of the Settlement Agreement[.]" (*Id*. at PageID.1469.) Although Plaintiffs, as proposed intervenors, vigorously asserted they would immediately appeal any settlement that was not in their interest (Ex. 1, PageID.439), they did not do so. Instead, they filed the instant action.

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[3] Judge Borman's Order constitutes a consent decree. He expressly referenced the *Dumont* parties' "voluntary settlement agreement" which "memorializes the bargained for position of the parties," and included a "final judicial order" that "compels" the issuing court to retain jurisdiction to protect the integrity of the decree by governing requests for enforcement or modification. *See Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

V. Plaintiffs file the instant action asserting claims similar to *Dumont* and challenging the *Dumont* Consent Decree.

Now, Plaintiffs bring the instant action to challenge the effect and enforcement of a non-discrimination provision in their foster care and adoption services contracts with the Department. (Doc. 1, ¶¶ 6, 13, 15, 23, 27, 55, 56, 63, 82, 132, 139-140, 152, 165-166, PageID.4, 7-8, 11, 13, 21-22, 24, 30, 44-45, 47, 50.) They do so by seeking to collaterally enjoin the enforcement of the *Dumont* Consent Decree. (Doc. 1, ¶¶ a-d, Page ID.51-52.) In their Complaint, Plaintiffs cite to the *Dumont* matter, and in particular, the *Dumont* Consent Decree Agreement. (Doc. 1, ¶¶ 80-82, 89-90, 99-102, PageID.29-30, 32,35-36.) Plaintiffs claim that under the terms of the Consent Decree, "any private agency which refuses to comply with [the Consent Decree] requirements 'within a reasonable time after notification by the Department of a Contract Violation' will have its contracts 'terminated.'" (Doc. 1, ¶ 100, PageID.35-36.) Plaintiffs also allege that they "reasonably fear[]" that the Department "will refuse to renew the contract on the basis of St. Vincent's religious beliefs and practices," and they further fear that enforcement of the non-discrimination clause will "prohibit St. Vincent from providing adoption services consistent with its religious beliefs." (Doc. 1, ¶ 105, PageID.37.) In support of their claims, they attach portions of the extensive discovery collected in *Dumont* (Doc. 1, Exs. A-G, PageID.53-137.). They seek relief that is in direct contravention of the terms of the Consent Decree, including (1) declaratory relief that their actions in turning away LGTBQ individuals and couples and non-married individuals is protected by the First and Fourteenth Amendments, (2) specific performance by the

state to continue contracting with SVCC, despite their intentional noncompliance with the non-discrimination provision, and (3) enjoining the Department from cancelling SVCC's contracts despite SVCC's intentional nonadherence to the non-discrimination provision. (Doc. 1, ¶¶ a-d, PageID.51-52.)[4]

On the surface, Plaintiffs bring eight counts against State Defendants, alleging violations of the Free Speech (Count IV, V), Free Exercise (Count I, II, III, V, VI) and Establishment Clauses (Count VI) of the First Amendment, and the Equal Protection Clause (Count VII) of the Fourteenth Amendments, and of the Religious freedom Restoration Act, 42 U.S.C. § 2000bb (Count VIII)[5]. (Doc. 1, ¶¶ 122-173, PageID.42-51.) But at its essence, Plaintiffs challenge the enforcement of the *Dumont* Consent Decree. Because of this challenge to the Consent Decree, this Court should transfer this matter to the court that retained jurisdiction to hear such disputes. In the alternative, this Complaint should be dismissed against the State Defendants in its entirety for failure to state a claim and lack of subject matter jurisdiction.

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[4] Plaintiffs also seek nominal damages, costs and attorney's fees. (Doc. 1, ¶¶ e, g, PageID.52.)

[5] Although Plaintiffs' Compliant labels the RFRA claims as "Count VII," it is the eighth count in the Complaint. Therefore, the RFRA claim is referred to as Count VII in this Motion.

LEGAL STANDARD

Courts have discretion, under 28 U.S.C. § 1404(a), to transfer a matter to a different district court "[f]or the convenience of parties and witnesses and in the interest of justice." 28 U.S.C. § 1404(a); *see also Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 59-60 (2013). Section 1404(a) "permits transfer to any district where venue is also proper (i.e. 'where [the case] might have been brought') or to any other district to which the parties have agreed by contract or stipulation." *Id*. at 59. In reaching its decision, a court must balance a number of private and public interest factors, and no one factor is dispositive. *See Moses v. Business Card Express, Inc.,* 929 F.2d 1131, 1137 (6th Cir.1991).

Rule 12(b)(6) provides for dismissal of an action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion should be granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). In deciding a Rule 12(b)(6) motion, courts may consider exhibits attached to the pleadings that are central to the claims without converting the motion to one for summary judgment. *Kaminski v. Coulter*, 865 F.3d 339, 344 (6th Cir. 2016). Such exhibits include "exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n,* 528 F.3d 426, 430 (6th Cir. 2008) (citation omitted). "Courts may also consider public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies." *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir.

1999), abrogated on other grounds, *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002).

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action for "lack of subject matter jurisdiction." Fed. R. Civ. P. 12(b)(1). When Plaintiffs lack standing under U.S. Const., art. III, § 2, the Court does not have subject matter jurisdiction and the complaint must be dismissed under Fed. R. Civ. P. 12(b)(1). *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Carver v. Bunch*, 946 F.2d 451, 452 (6th Cir. 1991). Similarly, the court may dismiss claims pursuant to Fed. R. Civ. P. 12(b)(1) where a party is entitled to Eleventh Amendment immunity. *See CPC Inter., Inc., v. Aerojet-General Corp.*, 764 F.Supp.2d 479, 482 (W.D. Mich. 1991) (dismissing plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(1) because the Michigan Department of Natural Resources was entitled to Eleventh Amendment immunity).

Because Plaintiffs' claims challenge the consent decree entered in the Eastern District of Michigan, this Court should exercise its discretion to transfer this matter to the appropriate forum. Alternatively, because Plaintiffs have failed to state a claim upon which relief can be granted and are unable to establish this Court's jurisdiction over this case, this Court should dismiss this matter.

ARGUMENT

I. This Court should transfer this case to the Eastern District pursuant to 28 U.S.C. § 1404(a).

Section 1404(a) of Title 28 of the United States Code provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." In making this assessment, a court considers private and public interests. *Moses*, 929 F.2d at 1136–37; *Langley v. Prudential Mortg. Capital Co., LLC*, 546 F.3d 365, 370 (6th Cir. 2008). While a plaintiff's choice of forum is usually given weight as one of the private interest factors, "this factor is not dispositive." *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 413 (6th Cir. 1998).

A. This action could have been brought in the Eastern District of Michigan.

A threshold consideration for granting a motion to transfer is whether the action could have been brought in the Eastern District of Michigan. As an initial matter, not only could this action could have been brought there, it essentially *was* brought there. Plaintiffs intervened in the *Dumont* matter precisely because it raised the same issues that Plaintiffs raise in the instant suit.

Nevertheless, this matter also could have been brought in the Eastern Michigan on other grounds. Plaintiffs allege this Action arises under the Constitution and laws of the United States, so the Eastern District has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1361. (Doc.1, ¶ 18, PageID.9.) Moreover, venue is proper in the Eastern District because this case

brings suit against an officer of a United States agency – Alex Azar, in his official capacity as Secretary of the United States Department of Health and Human Services – and at least one defendant that resides in the district. *See* 28 U.S.C. 1391(e)(1)(A) (explaining that where a United States agency officer is a defendant, an action may be brought in any judicial district in which a defendant resides). Defendant Dana Nessel, Michigan's Attorney General, is a state official, sued in her official capacity. (Doc.1, ¶ 15, PageID.8.) She maintains an office in Detroit, which is in the Eastern District of Michigan, and "resides" there for purposes of 28 U.S.C. § 1391.[6] *See Bay County Democratic Party v. Land*, 340 F.Supp.2d 802, 808 (E.D. Mich. 2004). In *Bay County Democratic Party*, the court held that venue was proper in the Eastern District for a state official because it was "abundantly clear" that the state official, though located in the Lansing, "perform[ed] official duties in [the Eastern District of Michigan] and therefore 'resides' here within the meaning of 28 U.S.C. § 1391(b)(1)." *Id.* (rejecting argument that Michigan's secretary of state performs her official duty only in Lansing considering she has brought cases in the Eastern District, has 173 branch locations, and has a statutory obligation to

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[6] The Attorney General's Detroit office is located at Cadillac Place, 10th Floor 3030 W. Grand Blvd., Ste 10-200, Detroit, MI 48202. This court may take judicial notice of the Attorney General's office locations by referring to the Attorney General website at https://www.michigan.gov/ag/0,4534,7-359-82100---,00.html. *See Gordon v. Caruso*, No. 1:06-cv-71, 2009 WL 1346932, at *1 (W.D. Mich., May 13, 2009), attached as Ex. 7 (noting that the magistrate judge should have taken judicial notice of the plaintiffs location, which was available at the website for the Michigan Department of Corrections).

perform duties throughout the state). Because both subject matter jurisdiction and venue are proper in the Eastern District, this action could have been brought there.

B. The transfer would promote the interest of justice.

Courts must consider various factors when deciding to transfer, several of which, under the circumstances of this case, are neutral. For example, courts consider the convenience of the parties and witnesses; the accessibility of evidence; the availability of process to make reluctant witnesses testify; the costs of obtaining willing witnesses; the practical problems of trying the case most expeditiously and inexpensively; and the interests of justice. *Reese v. CNH America LLC*, 574 F.3d 315, 320 (6th Cir. 2009). Because this case concerns mostly a legal issue and is not witness-intensive, the factors considering reluctant witnesses, the convenience of their travel, and whether they would be reluctant is not at issue. Also, while the accessibility of evidence is also a factor, much of the relevant documentation is in electronic form and easily accessible. Moreover, Plaintiffs have already obtained relevant documents through discovery, a sample of which was attached to their Complaint. (Doc. 1, Exs. A-G, PageID.53-137.).

However, the interest of justice factors leans towards transfer. These factors are referred to as "public interest" factors and include "(i) the enforceability of the judgment; (ii) practical considerations affecting trial management; (iii) docket congestion; (iv) the local interest in having deciding local controversies at home; (v) the public policies of the fora; (vi) the familiarity of the trial judge with the particular state law." *Cincinnati Ins. Co. v. O'Leary Paint Co., Inc.*, 676 F.Supp.2d

623, 637 (W.D. Mich. 2009). Because Plaintiffs are seeking to enjoin the Department from enforcing the non-discrimination provision of the SVCC contracts, and the Consent Decree entered in *Dumont requires* the Department to enforce the non-discrimination provision in *all* its foster care and adoption contracts (including SVCC's), this Court would have to essentially order the Department to breach the Consent Decree approved by Judge Borman in order to effectuate the relief Plaintiffs seek. Judge Borman has a level of familiarity with the issues in this case, because they were briefed before him, presented to him during oral arguments on the motion to intervene and the motions to dismiss, considered by him in his 92-page order on the motions to dismiss, and resolved by him in his dismissal of the case. He further retained jurisdiction to enforce the Consent Decree at the crux of this case. Accordingly, the interests of justice heavily favor transfer.

C. Plaintiffs' choice of forum should not be afforded much weight.

While a plaintiff's choice of forum is usually given weight, "this factor is not dispositive." *Lewis*, 135 F.3d at 413 (6th Cir. 1998). In fact, a plaintiff's choice of forum carries less weight in a declaratory judgment action because the roles and incentives for bringing suit are reversed. *See Cincinnati Ins. Co. v. O'Leary Paint Co., Inc.*, 676 F.Supp.2d 623, 631 (W.D. Mich. 2009). In *O'Leary Paint*, the plaintiff brought an action under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* asking the court to interpret a contract provision in its favor. The defendant sought transfer under 28 U.S.C. § 1404(a). The *O'Leary Paint* court afforded plaintiff's

choice of forum little to no weight because in a declaratory action, "[a] plaintiff brings such an action because it has perceived threat of suit. Therefore, its posture before the court is more akin to a defendant than an ordinary plaintiff seeking relief." *O'Leary Paint*, 676 F.Supp.2d at 631 (quoting *Zimmer Enters., Inc. v. Atlandia Imports, Inc.*, 478 F.Supp.2d 983, 989 (S.D. Ohio 2007) (internal citation and quotation marks omitted)). The court applied the reasoning in a Seventh Circuit case, which reiterated its "wariness at the prospect of a suit for declaratory judgment aimed solely at wresting the choice of forum from the natural plaintiff." *O'Leary Paint*, 676 F.Supp.2d at 631 (quoting *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 718 (7th Cir. 2002)).

Similarly here, Plaintiffs bring an action under 28 U.S.C. § 2201 seeking declaratory relief. (Doc.1, ¶ 20, a, b, PageID.9, 51.) They brought this action only three weeks after the Eastern District of Michigan approved the Consent Decree, presumably to avoid the consequences of the settlement terms that obligated the Department to enforce compliance with the non-discrimination provision in SVCC's contracts. Rather than challenge the Consent Decree in *Dumont*, which, as intervenor-defendants, they had the right to do, Plaintiffs instead rushed to file in this Court. Because Plaintiffs filed this suit in anticipation of breaching the non-discrimination provision in their contracts, with the hopes of enjoining the Department from acting on that breach and forcing it to breach the settlement terms, this Court should not afford much weight to Plaintiffs' choice of forum. *See Zide Sport Shop of Ohio, Inc. v. Ed Tobergte Assoc., Inc.*, 16 Fed. Appx. 433, 437 (6th

Cir. 2001), attached as Ex. 8 (noting that a plaintiff's choice of forum should not be afforded weight where there is evidence of bad faith, anticipatory suits, and forum shopping).

Furthermore, it should be noted that a plaintiff's choice of forum is given less weight when the suit can be construed as a continuation of another suit originally brought in other district. *See Blue Diamond Coal Co. v. Michigan Sugar Co.*, 463 F.Supp. 14, 16 (E.D. Tenn., 1978). In *Blue Diamond Coal*, the court recognized that because the case involved an earlier suit, that ended in settlement, "[r]ealistically, this suit must be viewed as but a later stage of the suit originally brought by [defendants] in the Eastern District of Michigan. Therefore, the weight normally accorded to a plaintiff's choice of forum in this case supports transfer." The same is true here.

For the reasons set forth above, State Defendants respectfully request that this Court grant State Defendants' motion to transfer this Action to the Eastern District of Michigan.

II. In the Alternative, this court should dismiss this matter in its entirety for failure to state a claim under Rule 12(b)(6) and lack of subject matter jurisdiction under Rule 12(b)(1).

A. Plaintiffs fail to state a claim upon which relief may be granted under Rule 12(b)(6).

1. Plaintiffs' Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb claim fails against State Defendants because it can only be asserted against the federal government.

Plaintiffs allege that State Defendants violated the RFRA. (Doc. 1, ¶¶ 169-173, PageID.50-51.) But the RFRA cannot be applied to State Defendants because it is unconstitutional "as applied to the states." *Tree of Life Christian Sch. v. City of Upper Arlington*, 823 F.3d 365, 369 (6th Cir. 2016) (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).) Although the RFRA applies to federal agencies, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 (2014), State Defendant are plainly not federal agencies. Accordingly, Plaintiffs have failed to state an RFRA claim against State Defendants.

2. Plaintiffs fail to state a claim against Defendant Nessel because neither her statements nor her alleged actions as the state's advocate amount to an actionable claim.

Plaintiffs add a new official to the list of defendants in this case: Attorney General Dana Nessel. Plaintiffs claim that Attorney General Nessel, in her official capacity, "directed [the Department] to change its internal policy regarding permitting private child placing agencies to refer couples to other agencies." (Doc. 1, Cplt., ¶ 91, PageID.33.) They further allege that she "has been instrumental in framing [the Department]'s current policy regarding the enforcement of [the Department's] contracts and state law governing religious child welfare providers." (Doc. 1, ¶ 15, PageID.8.) They believe she directed the change in policy because of statements Attorney General Nessel made *before* she was elected, as well as statements she made immediately *after* Judge Borman entered the Consent Decree.

(Doc1, ¶¶ 91-92, PageID.33.) Plaintiffs fail to state a claim against Attorney General Nessel for several reasons.

First, the allegations of the Complaint belie any connection between statements made by Attorney General Nessel and the Department's alleged "change in policy." As an initial matter, statements Defendant Nessel made *as a candidate* are not likely to have had any influence on the Department to "change its internal policy." More importantly, however, the Complaint suggests that the alleged "change in policy" started long before Attorney General Nessel made statements as a candidate or as Attorney General.

The Complaint points to a September 29, 2017 email as evidence of the alleged change in policy. (Doc. 1, ¶ 82, n.16, Ex. C. PageID.30, 82.) Plaintiffs allege that the Department "submitted three official 'contract compliance complaints'" against religious child placing organizations, including SVCC. (Doc. 1, ¶ 82, PageID.30.) Plaintiffs further allege that these September 29, 2017 compliance complaints resulted in investigations that were "inconsistent with [the Department's] prior statements and policies regarding compliance with state law." (Doc. 1, ¶¶ 83-84, PageID.30.) Thus, almost a year prior to Attorney General Nessel's statements as a candidate and nearly 14 months prior to her statements about the settlement in her official capacity as Attorney General, the Department was already, taking action allegedly inconsistent with prior policy, according to Plaintiffs' Complaint. And Plaintiffs do not allege any similar statements made by Attorney General Nessel's predecessor while he was in office. Plaintiffs also do not

state the Attorney General's statements conveyed any anti-religious hostility. Thus, there are no allegations supporting Plaintiffs' claims that Attorney General Nessel, in her official capacity and as evidenced by statements she made as a candidate and as Attorney General, orchestrated the alleged "change in policy."

Second, Plaintiffs' allegations fail to state a claim against Attorney General Nessel because her statements, regardless of when made, have no bearing on this action. Plaintiffs base their claims against Attorney General Nessel on two equally flawed premises: (1) statements allegedly made by Attorney General Nessel as a private citizen, a candidate for office or while Attorney General; and (2) that Attorney General Nessel "directed" the settlement, which Plaintiffs erroneously allege to be a "new" policy. (Doc.1, ¶¶ 91-93, PageID.33.)

In *Trump v. Hawaii*, __ U.S. __, 138 S.Ct. 2392 (2018), the Court confronted a challenge to the President's policy of excluding the nationals of several nations with large Muslim populations from the United States. The plaintiffs claimed that the purpose of the action was to exclude Muslims, in violation of the Establishment Clause. *Id*. at 2416-17. According to the Court, "the heart of plaintiffs' case" hinged on "a series of statements made by the President and his advisors casting doubt on the official objective of the" policy. *Id*. at 2417.

The stated purpose of the policy was to prevent terrorists from entering the country. *Id*. at 2404. But the plaintiffs alleged that the President's statements, such as calling for "a 'complete and total shutdown of Muslims entering the United States" and a plan to "'ban Muslim immigration,'" showed an anti-Muslim animus.

Id. at 2417. The President made these statements both when he was a private citizen and later as President. *Id*.

The Court, however, held that "the issue before us is not whether to denounce the statements." *Id*. at 2418. *See also McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 862 (2005) (Courts should review policy "without any judicial psychoanalysis of a drafter's heart of hearts.") Rather, the Court's duty was to assess a facially neutral policy directive. *Id*. Because the policy directive was within the scope of the President's executive authority, the Court gave no probative value to the President's statements and paid them no further heed in affirming the policy.

In the present case, Attorney General Nessel's statements are even more tenuous. In the first place, unlike the President, Attorney General Nessel does not have the power to initiate or implement the policies at issue. Moreover, her statements have no bearing on her official actions as Attorney General. Some of them are nearly four years old and were made in response to public acts that, as noted above, Plaintiffs misinterpret. Accordingly, her statements are in no way actionable and have no probative value on the issues presented in this case, particularly given the limited scope of her role and the limitations imposed on her by Michigan law.

Moreover, Attorney General Nessel's alleged actions of "directing" the settlement do not amount to an actionable claim. The primary role of the Attorney General is to "prosecute and defend all suits relating to matters connected with" the

State of Michigan and its departments. Mich. Comp. Laws § 14.29. In addition, the Attorney General may "intervene in and appear for the people of [Michigan] in any other court or tribunal, in any case or matter, civil or criminal, in which the people of this sate may be a party or interested." Mich. Comp. Laws § 14.28.

Attorney General Nessel was not a party to the *Dumont* case. Rather, the *Dumont* defendants in that matter were the Department Director and the Executive Director of the Michigan Children's Services Agency. The only role played by Attorney General Nessel (and her predecessor) was serving as legal counsel for those defendants. In that capacity, however, she had no ability to "direct" the Consent Decree. Only Director Gordon and then-Acting Executive Director Wrayno had authority to agree to and implement the settlement terms. Attorney General Nessel, as an attorney, had no power or authority to force them to agree to a settlement or to any settlement terms.

In sum, Plaintiffs' allegations fail to state a claim against Attorney General Nessel because her statements are not actionable and have no bearing on policy issues, and her alleged actions of forcing a settlement fall outside the scope of her powers as Attorney General.

3. Plaintiffs' claims were litigated or could have been litigated in *Dumont* and are therefore barred by the doctrine of res judicata.

This matter is barred by res judicata. "The doctrine of res judicata, or claim preclusion, provides that a final judgment on the merits of an action precludes the 'parties or their privies from relitigating issues that were or could have been raised'

in a prior action." *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, (1981)); *see also Taylor v. Sturgell*, 553 U.S. 880, 891–93 (2008) (explaining that "claim preclusion" is also referred to as "true res judicata" and operates to foreclose "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit."). "The purpose of res judicata is to promote the finality of judgments and thereby increase certainty, discourage multiple litigation, and conserve judicial resources." *Westwood Chemical Co. v. Kulick*, 656 F.2d 1224, 1227 (6th Cir. 1981). Res judicata applies where there is: "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Kane*, 71 F.3d at 560.

a. The Consent Decree was a final decision on the merits of the *Dumont* matter.

The first element requires a final judgment on the merits in the prior action. *Kane*, 71 F.3d at 560. This element is met. On March 22, 2019, Judge Borman issued an order dismissing the Dumont Plaintiffs' claims with prejudice in the *Dumont* matter, after reviewing the terms of the settlement and the stipulation of dismissal filed by the *Dumont* Plaintiffs and *Dumont* State Defendants. (Ex. 6, PageID.1469.) Courts have held that an agreed order of dismissal in settlement of an action operates as a final judgment on the merits. *See, e.g.*, *Rafferty v. City of*

Youngstown, 54 F.3d 278, 282 (6th Cir., 1995); *see also Tu Nguyen v. Bank of America, N.A.*, 516 Fed. Appx. 332, 335 (5th Cir. 2013), attached as Ex. 9 (finding a final judgment on the merits where the parties stipulated to dismiss with prejudice, the district court entered an order dismissing with prejudice, and the plaintiff neither challenged the judgment nor tried to reopen the case).

In *Rafferty*, six plaintiffs filed suit for race discrimination based on actions taken pursuant to a settlement agreement that was entered in a prior action. In the prior action, the Fraternal Order of Police ("FOP") intervened, claiming to represent the interests of all its members, including the six plaintiffs. The Sixth Circuit held that the six plaintiffs' claims in the new suit were barred by res judicata because their interests were adequately represented in that prior action. *Rafferty*, 54 F.3d at 282. In reaching its decision that the prior settlement agreement was a final decision on the merits with respect to the intervenors, the court noted that the FOP defendant-intervenors *fully participated* in the prior action by filing its answer in intervention, contesting the manner in which the consent decree was being implemented, and later deciding "not to exercise" its right to appeal the terms of the consent decree. *Rafferty*, 54 F.3d at 281-82.

As in *Rafferty*, the Plaintiffs here fully participated as a party in the *Dumont* action. Plaintiffs, as intervenors, filed and argued a motion to dismiss and engaged in substantial discovery in the *Dumont* case. Although Plaintiffs did not participate the settlement negotiations, this in no way impaired their ability to challenge the approval of the settlement. Plaintiffs were apprised of settlement negotiations

through the Motion to Stay and had the opportunity *and the right* – as any normal party would – to object to the Settlement Agreement or challenge the entry of the Settlement Agreement, either by seeking a relief from judgment or by filing a notice of appeal. In fact, one reason Plaintiffs sought intervention in *Dumont* was "to immediately appeal and protect their interest" in the event of a settlement between the *Dumont* plaintiffs and the State Defendants because the burden of that settlement "would fall on Proposed Intervenors." (Ex. 1, PageID.439.) And it was clear from the settlement terms that those terms would apply to all CPAs, including SVCC. (Doc. 1, ¶¶ 99-101, PageID.36-36.) As in *Rafferty*, when Plaintiffs decided not to pursue their appeal rights or seek reconsideration of the settlement approval, the settlement agreement became "a final decision on the merits." *Rafferty*, 54 F.3d at 282. Thus, the first element of res judicata is satisfied.

b. The parties in *Dumont* are identical or in privity with the parties in the instant action.

The second element is also satisfied. The parties to both the *Dumont* matter and this instant Action are identical: Plaintiffs here were intervening defendants in *Dumont*; Proposed Intervenors[7] here were plaintiffs in *Dumont*; and State Defendants here were defendants in *Dumont*. While Plaintiffs add an additional party, Attorney General Nessel, to this Action, assuming she is a proper party, she

[7] On May 21, 2019, Kristy Dumont and Dana Dumont filed a Motion to Intervene in this Action. (Doc. 18.) This Motion refers to them as either the "*Dumont* plaintiffs" or as "Proposed Intervenors."

would have privity with Defendants for purposes of res judicata. As this Court noted,

> A government official sued in his or her official capacity is considered to be in privity with the government. Therefore, a judgment for or against an official will preclude a subsequent action on the same claim by or against another official or agency of the same government. Similarly, a prior judgment involving the government will bar an action against individual officials of the government in their official capacity for the same claim.

Crawford v. Chabot, 202 F.R.D. 223, 227 (W.D. Mich., 1998) (quoting Moore's Federal Practice 3d, § 131.40[3][e][ii]); *see also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402–03, (1940) ("There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government."). Thus, the second element of res judicata – the subsequent action involves the same parties or their privies – is satisfied.

c. Plaintiffs' claim that the enforcement of the settlement agreement in *Dumont* violates their rights could have been litigated in the prior action.

The third element of res judicata considers whether a claim in the subsequent action was litigated *or could have been litigated* in the prior action. *Kane*, 71 F.3d at 560. Both *Dumont* and instant Action involve a challenge to the application of the same contract provision, the interpretation of the same state statutes, and the violations of the same constitutional provisions (*i.e.* the First and Fourteenth Amendments). Compare the *Dumont* Complaint (Ex. 2) ¶¶ 31, 48, 80, 87, PageID.9, 13, 20, 27 with Doc. 1, Cplt., ¶¶ 55, 59-60, 122-68, PageID.21-24, 42-

50. And while the instant action also challenges the approval of the settlement agreement, which was not previously litigated, that claim could have been raised in the prior action, either by appeal, as was done in *Rafferty*, or by bringing a post-judgment motion under Rule 60(b). *See Rafferty*, 54 F.3d at 282 ("The FOP, as defendant-intervenor, was afforded the right to appeal the terms of the [consent decree]…but after filing an appeal…dismissed it and decided not to exercise this right.") Judge Borman "retain[ed] jurisdiction over enforcement of the Settlement Agreement in the [*Dumont*] Action." (Ex. 6, PageID.1469.) Therefore, any challenge to the Settlement Agreement's terms or application could have been brought in that prior action. Because the instant action involves the same claims that were litigated *or could have been litigated* in *Dumont*, res judicata bars this suit.

d. Plaintiffs' claims arise out of the same transaction or series of transactions as the *Dumont* matter.

Finally, the fourth element of res judicata – identity of causes of action – is satisfied. Identity of causes of action exists "if the claims arose out of the same transaction or series of transactions, or if the claims arose out of the same core of operative facts." *Winget v. JP Morgan Chase Bank*, 537 F.3d 565, 580 (6th Cir. 2008). It means there is an "'identity of the facts creating the right of action and of the evidence necessary to sustain each action.'" *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 484 (6th Cir. 1992) (quoting *Westwood Chemical Co. v. Kulick,* 656 F.2d 1224, 1227 (6th Cir. 1981)). Here, not only does

the instant action arise out of the same transaction that gave raise to *Dumont*, but both actions rely on the same facts, and the same set of evidence.

There can be no dispute that the *Dumont* case and the instant Action arise out of the same transaction or series of transactions. Notably, the Plaintiffs borrow the very transaction that gave rise to *Dumont* and incorporated it into their Complaint. (Doc.1, ¶ 80, PageID.29.) Plaintiffs explained that the *Dumont* suit "alleged that [two LGBT couples] had approached …St. Vincent Catholic Charities seeking to adopt a child, but were referred to another agency based on their sexual orientation. The ACLU claimed that the state's decision to continue contracting with these private agencies violated the Establishment and Equal Protection Clauses." (Doc. 1, ¶ 80, PageID.29.) Plaintiffs further explain under the "Factual Allegations" section of their Complaint that as a result of *Dumont*, they "moved to intervene in the lawsuit filed by the ACLU, arguing that the State's decision to contract with St. Vincent…did not violate the Constitution and was protected under state and federal law." (Doc. 1, ¶ 81, PageID.29-30.)

By incorporating the very scenario that gave rise to the *Dumont* litigation into Plaintiffs' Complaint, the Plaintiffs essentially concede that the two cases rely on the same transaction or series of transactions. And because the *Dumont* Complaint and Plaintiffs' Complaint cite to the same factual scenario as having given rise to their allegations, the same evidence undergirds both cases: the terms of CPA contracts, the policies and statements interpreting the contract provisions, the *Dumont* Settlement Agreement; and the laws and statutes allowing agencies to

deny a referral for services. *See Westwood Chemical,* 656 F.2d at 1227 (explaining that an identity of causes of action occurs when the evidence necessary to sustain each action is the same). Much of this "evidence" was already produced as part of *Dumont*, and the Plaintiffs liberally attached such documents to their Complaint in support of their claims. (Doc.1, Exs. A-G, PageID.53-137.) Because both cases arise out of the same transaction and rely on the same facts and evidence, the final element of res judicata is met.

For all the above reasons, *Dumont* bars the present litigation and this Court should dismiss this matter based on the doctrine of res judicata. It should be noted, however, that the Plaintiffs are not without relief. While the *Dumont* settlement operates as a final judgment on the merits, as with any final judgment, Plaintiffs may seek relief from that judgment under Rule 60(b) or by appealing the judgment as was done in *Rafferty*. What they cannot do is collaterally attack that final judgment by coming to a new court and cloaking their claims as a constitutional challenge, when at their essence, they are a challenge to the enforcement of the settlement agreement. Allowing Plaintiffs to proceed with this litigation would frustrate the purpose of res judicata, which is to promote the finality of judgments, increase certainty, discourage repeat litigation and conserve judicial resources. *Westwood Chemical*, 656 F.2d at 1227.

B. This Court lacks subject matter jurisdiction under Rule 12(b)(1).

1. The Individual Plaintiffs cannot satisfy the requirements of Article III standing and neither the

Individual Plaintiffs nor SVCC have standing to assert the rights of foster children.

a. Article III standing requires a plaintiff to have a personal interest.

Standing is a threshold requirement for invoking federal-court jurisdiction. *Binno v. American Bar Assoc.*, 826 F.3d 338, 344 (6th Cir. 2016). A plaintiff's personal interest in the litigation must exist both at the commencement of the suit and throughout the suit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000). Standing is a threshold requirement for invoking federal-court jurisdiction. *Binno*, 826 F.3d at 344. For standing to exist, a plaintiff must show: (1) a "concrete, particularized, and actual or imminent" injury; (2) that is "fairly traceable" to the defendant's alleged conduct; and (3) that the court could redress by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992).

The injury necessary to invoke constitutional standing must be concrete and palpable, not merely abstract or hypothetical. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Adult Video Ass'n v. Dep't of Justice*, 71 F.3d 563, 567 (6th Cir. 1995). Generalized grievances "against allegedly illegal governmental conduct" are insufficient. *U.S. v. Hayes*, 515 U.S. 737, 743 (1995). Instead, there must be a "real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 221 (1974). Otherwise, allowing courts to oversee legislative or executive action

"would significantly alter the allocation of power . . . away from a democratic form of government[.]" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

Here, because the Individual Plaintiffs' claims are premised on SVCC's contractual relationship to State Defendants, they lack standing. Moreover, to the extent SVCC and the Individual Plaintiffs attempt to assert the claims on behalf of foster care children (Doc.1, ¶¶ 4, 22, PageID.4, 10-11.), they also lack standing.

b. The Individual Plaintiffs fail to show an actual or imminent injury.

The Individual Plaintiffs have not demonstrated an invasion of any legally protected interest. *Lujan*, 504 U.S. at 560–561. Plaintiffs assert that the "policies" of State Defendants prevent them from being foster parents or volunteering for a CPA. (Doc. 1, ¶¶ 118-119, PageID.41.) But there are numerous other state-contracted agencies throughout Michigan (Doc. 1, ¶ 23, PageID.11.), and there is no right to be a foster care parent. *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 844-47 (1977); *Renfro v. Cuyahoga Cty Dep't of Human Servs*, 884 F.2d 943, 944 (6th Cir. 1989). Nor does serving as a volunteer generally confer standing. *Medalie v. Bayer Corp.*, 510 F.3d 828, 830 (8th Cir. 2007); *Ass'n of Cmty. Org. for Reform Now v. Fowler*, 178 F.3d 350, 367 (5th Cir. 1999).

The alleged "change in policy" on which Plaintiffs premise their action, however, are comprised of provisions in foster care and adoption contracts that Plaintiff SVCC agreed to follow nearly four years ago, as well as provisions in a Consent Decree ordered in *Dumont*. It is uncontested that the individual Plaintiffs

are not parties to the foster care or adoption contracts between the Department and SVCC. Accordingly, their only path to a cognizable right in enforcing them is as third-party beneficiaries, which they fail to even allege. Even had they made such allegations, however, the Individual Plaintiffs – former foster parents and a volunteer – are not intended beneficiaries of the contracts.

A third party is not a beneficiary of a contract unless "the contract establishes that [it] has undertaken a promise directly to or for that person." *Schmalfeldt v. North Pointe Ins. Co.*, 469 Mich. 422, 428-30; 670 N.W.2d 651 (Mich. 2003); *see also Koenig v. City of South Haven*, 460 Mich. 667, 675-84; 597 N.W.2d 99 (Mich. 1999). In making this determination, "a court should look no further than the form and meaning of the contract itself." *Schmalfeldt*, 469 Mich. at 428.

In the present case, neither the foster care nor the adoption contracts specifically mention any promise undertaken for the benefit of the Individual Plaintiffs. And neither contract states that any promise has been undertaken for the category of foster parents or volunteers. Similarly, the *Dumont* Consent Decree, which incorporated the settlement agreement terms, contains no express creation of rights for the Individual Plaintiffs and certainly not for a party that wishes to *violate* the non-discrimination clauses of the contracts.

Accordingly, because the Individual Plaintiffs cannot show an invasion of a legally cognizable interest, they cannot show an injury that is concrete and particularized, or even actual or imminent. Under these circumstances, the Individual Plaintiffs have failed to allege a basis for a hypothetical injury, let alone

one that is "actual or imminent." Instead, Plaintiffs appear to make a generalized grievance against the mere existence of the foster care and adoption contracts or the *Dumont* Consent Decree, which is insufficient to establish standing. *Hayes*, 515 U.S. at 743.

c. The Individual Plaintiffs fail to allege injuries that are fairly traceable to State Defendants' conduct.

The injuries alleged by the Individual Plaintiffs are not "fairly traceable" to the State Defendants' alleged conduct. *Lujan*, 504 U.S. 560-61. The Individual Plaintiffs base their claims on contract provisions agreed to by Plaintiff SVCC and the Department. They further challenge the enforcement of the *Dumont* Consent Decree, which incorporated a settlement agreement entered into by the *Dumont* plaintiffs and the *Dumont* defendants. The Individual Plaintiffs were not parties to either the contracts or the settlement agreement underlying the *Dumont* Consent Decree. Thus, their alleged injuries are not "fairly traceable" to State Defendants. To the extent they have suffered any cognizable injury, it is "fairly traceable" to SVCC's voluntary assent to the non-discrimination clause in its foster care and adoption contracts with the State of Michigan.

Plaintiffs' alleged injury – that they are prevented from serving as foster parents or volunteering for a CPA – may have other sources. As an initial matter, to the extent the Buck plaintiffs' claimed injury is an inability to adopt the sibling of one of their other children, Doc. 1, ¶ 118, PageID.42, their claim has no merit because they have admitted that they can adopt any child in the state through

MARE. (Doc. 1, ¶ 31, PageID.14.) This would necessarily include the sibling of one of their children.

More broadly, however, all three of the Individual Plaintiffs claims are rooted not in the state's action, but rather in their unreasonable refusal to work with any CPA other than SVCC, despite the existence of over 90 other CPAs in Michigan.[8] (Doc. 1, ¶ 23, PageID.11.) They raise generalized grievances, that are abstract and hypothetical, against State Defendants. It is wholly insufficient to establish standing. *Hayes*, 515 U.S. at 743; *Whitmore*, 495 U.S. at 155; *Adult Video Ass'n*, 71 F.3d at 567.

Regarding traceability, standing is more difficult to establish when the injury is indirect. *Parsons v. U.S. D.O.J.*, 801 F.3d 701, 713 (6th Cir. 2015). The Individual Plaintiffs neither assert nor have suffered a direct injury from State Defendants; rather, their claim is that they might, at some point, suffer an injury derived from the alleged injuries suffered by SVCC. Moreover, Individual Plaintiffs' claims are premised on their preference to only work with SVCC. Thus, it is the Individual Plaintiffs own unwillingness to work with other providers, not any conduct traceable State Defendants, that causes their alleged harm. (Doc. 1, ¶¶ 23-24, 31, 118-19, PageID.11-12, 14, 41.) The Individual Plaintiffs' claims are simply too tenuous to establish standing.

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[8] It is uncontested that they have the ability to work with other CPAs in Michigan. It is further undisputed that other CPAs cannot discriminate against the Individual Plaintiffs due to the very non-discrimination clause they now challenge in this Court.

d. The injuries asserted by the Individual Plaintiffs cannot be redressed by a favorable ruling.

An injury is only redressable if a court order can provide "substantial and meaningful relief" to the plaintiff. *Parsons*, 801 F.3d at 715. To demonstrate redressability, a plaintiff must show that "a favorable decision will relieve a discrete injury[.]" *Id*. Redressability is difficult to establish "where the prospective benefit to the plaintiff depends on the actions of independent actors." *Id*.

Here, Individual Plaintiffs request declaratory and injunctive relief, but the Complaint offers only speculation that their proposed remedy will redress their alleged injuries. *Lujan*, 504 U.S. 560–61. Should they desire to foster in the future, any CPA can license them, providing they meet the Department's licensing standards. Similarly, even if SVCC decides to cease providing foster and adoption services, Ms. Flore would still be able to volunteer at another CPA or with SVCC's other services.

e. All Plaintiffs lack standing to assert the claims of foster children.

Plaintiffs claim that the Department's actions "effect untold thousands of… children in need" and "would lead to delays in the adoption process … for children" that might be matched with parents. (Doc. 1, ¶¶ 115, 117, PageID.39-41.) Essentially, Plaintiffs assert the purported rights of foster children. But none of the named Plaintiffs are foster children. Accordingly, they cannot assert the alleged rights of other individuals. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *Warth v. Seldin*, 422 U.S. 490, 499-502 (1975); *Smith v. Jefferson County Bd. of School*

Comm'rs, 641 F.3d 197, 206 (6th Cir. 2011). As pointed out by Justice Thomas, in concurrence, "[i]t is doubtful whether a party who has no constitutional right at stake in a case should ever be allowed to litigate the constitutional rights of others." *Kowalski*, 543 U.S. at 135 (Thomas, J., conc.).

2. This court lacks jurisdiction because Attorney General Nessel is immune from Plaintiffs' claims.

Plaintiffs named Defendant Nessel because she "is charged with representing state agencies and enforcing state law." (Doc. 1, ¶ 15, PageID.8.) However, Plaintiffs' claims against Attorney General Nessel fail because state attorneys general have absolute immunity as legal advocates for their states. *Brown v. Tennessee Dep't of Labor and Workforce Dev.*, 64 Fed. Appx. 425, 426 (6th Cir. 2003), attached as Ex. 10; *Skinner v. Govorchin*, 463 F.3d 518, 525 (6th Cir. 2006). Attorney General Nessel also has qualified immunity. *Palmer v. Schuette*, __ Fed. Appx. __; 2019 WL 1503803 at *3 (6th Cir. 2019), attached as Ex. 11 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). As for her role in "enforcing state law," this Complaint deals with the enforcement of the settlement agreement -- not state law -- and the authority to enforce that agreement lies with Judge Borman, not Attorney General Nessel. Accordingly, this case should be also be dismissed as against Attorney General Nessel for lack of subject matter jurisdiction. *See* Fed R. Civ. P. Rule 12(b)(1).

3. This court lacks jurisdiction because State Defendants are immune from claims for damages under the Eleventh Amendment.

In addition to declaratory and injunctive relief, Plaintiffs seek "nominal damages." (Doc.1, ¶ e, PageID.52.) But the Eleventh Amendment bars such relief. The Eleventh Amendment bars suits by any individual against a state in federal court, unless the state has expressly waived its immunity. *Edelman v. Jordan*, 415 U.S. 651, 662-63, 673 (1974). Although *Ex Parte Young*, 209 U.S. 123, 155-156 (1908) allows prospective injunctive and declaratory relief, it is limited to compelling a state official to comply with federal law. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). The *Young* exception does not extend to retroactive or monetary relief. *S&M Brands Inc. v. Cooper*, 527 F.3d 500, 507-09 (6th Cir. 2008).

CONCLUSION

For the reasons set forth above, State Defendants respectfully request that the Court grant State Defendants' motion to transfer this Action to the Eastern District of Michigan under 28 U.S.C. § 1404(a), or alternatively, their motion to dismiss under Rule 12(b)(6) and 12(b)(1).

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of W.D. Mich. LCivR 7.2(b)(i) because, excluding the parts exempted by W.D. Mich. LCivR 7.2(b)(i), it contains 10,445 words. The word count was generated using Microsoft Word 2016.

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