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

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

Plaintiffs,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; JOOYEUN CHANG, in her 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; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-CV-00286

HON. ROBERT J. JONKER

Oral Argument Requested

PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

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CONCISE STATEMENT OF REASONS SUPPORTING PLAINTIFFS' POSITION

Plaintiffs satisfy the requirements of Article III.

Federal Defendants have already caused Plaintiffs harm both directly and indirectly: By justifying and supporting Michigan's decision to take actions that would require St. Vincent to close down its foster care and adoption ministry and by promulgating a regulation that they claim makes St. Vincent's conduct illegal. The claim that Federal Defendants don't plan to enforce their regulation against Plaintiffs *today* is cold comfort to St. Vincent's employees and the families they support—including Plaintiffs Chad and Melissa Buck—as that intention could change tomorrow.

An injunction against the challenged regulation would also redress Plaintiffs' injuries by either requiring or encouraging Michigan to change its policy, and by removing at least one motivating factor causing their injuries. Both the State and Federal Defendants have harmed Plaintiffs, and both are before this Court as proper defendants, allowing this Court to grant Plaintiffs the complete relief to which they are entitled.

Federal Defendants concede that Plaintiffs have alleged an injury in fact. This alone defeats their ripeness arguments, as recent Supreme Court and Sixth Circuit precedent hold that the ripeness inquiry is identical to the injury-in-fact analysis for standing in the pre-enforcement context. But regardless, Plaintiffs have satisfied the requirements for a ripe controversy as Federal Defendants regulation is *already* harming Plaintiffs, and Plaintiffs face a credible fear of enforcement.

PRELIMINARY STATEMENT

Federal Defendants seek to be excused from a lawsuit that challenges a regulation they promulgated. Even more remarkably, Federal Defendants do not dispute that the regulation applies to St. Vincent, nor do they deny that it burdens St. Vincent today. Instead, they argue that the federal government does not currently plan to bring enforcement action against St. Vincent or Michigan and thus they attempt to insulate their regulation from this Court's review. But Plaintiffs' allegations are more than sufficient to satisfy the requirements of Article III.

Plaintiffs have standing to challenge 45 C.F.R. § 75.300 ("the federal regulation"). Federal Defendants concede that Plaintiffs have suffered a concrete and particularized injury. Plaintiffs easily satisfy the remaining standing requirements. First, Plaintiffs' injuries are "fairly traceable" to Federal Defendants' actions because the federal regulation purports to directly regulate Plaintiffs' conduct and because Michigan has sought to enforce the federal regulation against St. Vincent. Second, a declaratory judgment and injunction against enforcement of the federal regulation would redress Plaintiffs' injuries by removing at least one direct cause of

their harm and by likely requiring (or strongly encouraging) Michigan to stop violating Plaintiffs' rights.

Plaintiffs' claims are also ripe for review. The Supreme Court and the Sixth Circuit have recently held that in the pre-enforcement context, the standing and ripeness inquiries are identical. Thus, to the extent Plaintiffs have satisfied the requirements for standing, their claims are also ripe. But even were this Court to separately analyze ripeness—which now mirrors the injury-in-fact analysis for standing—Plaintiffs' claims are ripe for three separate reasons. First, the federal regulation has *already* harmed Plaintiffs by causing St. Vincent's staff and their foster and adoptive parents to question the agency's ability to operate in the future and also by justifying Michigan's own enforcement actions. Second, Plaintiffs face a credible fear of future enforcement of the regulation as Federal Defendants merely claim that the current administration has no present intention of enforcing the regulation against Plaintiffs—there is no guarantee they won't change their mind tomorrow, or two years from now. And finally, the federal regulation is chilling Plaintiffs' protected first amendment activity by hampering their ability to engage in their religious ministry of serving those most in need.

Plaintiffs also satisfy the prudential ripeness considerations (fitness and hardship), although the Sixth Circuit has recently cast doubt on their continued viability.

At bottom, delaying or denying relief against the Federal Defendants' regulation will cause Plaintiffs irreparable harm. Without relief, St. Vincent will be forced to close down a decades-old religious ministry, causing dozens of foster and adoptive parents (including Plaintiffs Chad and Melissa Buck) to lose the support of an agency that has provided years of invaluable care and assistance. Remarkably, Federal Defendants do not dispute these facts—they simply point the finger at Michigan. But their attempt to pass the buck fails under binding precedent.

FACTS OF THE CASE

The facts underlying this dispute have already been spelled out in numerous documents put before the Court, and in the Court's own opinion. *See* Order Denying Mot. to Trans. Venue and Interv., ECF No. 52, PageID.1853-1859. So instead of recounting those facts, Plaintiffs focus here on the federal statutes and regulations structuring the flow of funds from the federal government through the State of Michigan and on to St. Vincent and the families it supports.

Title IV-E of the Social Security Act was enacted "[f]or the purpose of enabling each State to provide . . . foster care," adoption, and related services to children in need. 42 U.S.C. § 670. Title IV-E contains a non-discrimination clause that applies to a "State [and] any other entity in the State that receives funds from the Federal Government," but this clause does not cover sexual orientation or gender identity. 42 U.S.C. § 671(a)(18)(A).

Instead, 45 C.F.R. § 75.300—a regulation written and promulgated by Defendant United States Department of Health and Human Services (HHS)—imposes additional requirements on entities that receive IV-E funding. This regulation states that "[t]he Federal awarding agency must communicate to the non-Federal entity all relevant public policy requirements . . . and incorporate them either directly or by reference in the terms and conditions of the Federal award," § 75.300(a), and that "[t]he non-Federal entity [recipient] is responsible for complying with all requirements of the Federal award," § 75.300(b). *See also* 42 U.S.C. § 671(a)(18) (applying the regulations to both "the State [and] *any other entity in the State* that receives funds from the Federal Government and is involved in adoption or foster care placements"); Federal Defs.' Br. in

Supp. of Mot. to Dismiss, ECF No. 45, PageID.1689 (stating that Title-IV(E) imposes obligations on "states and their subgrantees," and that § 75.300(c) is incorporated into the existing terms and conditions of all Title IV(E) grants).

One such public policy requirement imposed by these regulations is that "no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as . . . gender identity[] or sexual orientation." Complaint, ECF No. 1, PageID.22; 45 C.F.R. § 75.300(c). Title IV-E funds may be withdrawn for failure to comply with relevant regulations, including § 75.300(c). ECF No. 1, PageID.22, 34; Summary Statement of *Dumont v. Gordon* Settlement Agreement, p. 1, https://perma.cc/Q4L6-U3CT. Accordingly—and claiming that it did so "in compliance with this federal requirement"—Defendant Michigan Department of Health and Human Services (MDHHS) has mandated that all adoption and foster care agencies comply with its own similar non-discrimination policies. ECF No. 1, PageID.35.

The requirements imposed by § 75.300, however, are in conflict with Charitable Choice provisions elsewhere in federal law. For example, 45 C.F.R. § 260.34 applies to funding provided under the Temporary Aid for Needy Families (TANF) program. Under this provision, "a religious organization that receives funding through the TANF program will retain its independence from Federal, State, and local governments and may continue to carry out its mission, including the definition, practice and expression of its religious beliefs." § 260.34(d); *see also* ECF No. 1, PageID.34 (discussing similar requirements in 45 C.F.R. § 87.3(a)).

Section 75.300 also violates the Religious Freedom Restoration Act (RFRA), which requires that any federally-imposed burden on religious exercise be the "least restrictive means" of accomplishing a "compelling government interest." 42 U.S.C. § 2000cc-1(a)(1). And even HHS has recently acknowledged that requiring Miracle Hill Ministries (a faith-based South Carolina child placement agency) to comply with the requirements of § 75.300 "would violate RFRA." ECF No. 45 at PageID.1699. This is why HHS exempted South Carolina and Miracle Hill from § 75.300 based on its authority under 45 C.F.R. § 75.102(b) to authorize "[e]xceptions on a case-by-case basis." Federal Defendants have

not granted Plaintiffs the same exception. *Id.*, PageID.1709. Nor have they instructed Michigan to act in a manner compliant with RFRA when disbursing federal funds.

States also pay close attention to the requirements imposed by these regulations because they rely heavily on this funding. ECF No. 1, PageID.21-22; *see* ECF No. 45, PageID.1688-1689. As Michigan has acknowledged, "a significant portion of funding" for their foster care case management and adoption services comes from Title IV-E grants. Summary Statement of *Dumont v. Gordon* Settlement Agreement, p. 1, https://perma.cc/Q4L6-U3CT. Indeed, "about 66% of out-of-home placement costs" for qualifying Michigan children are paid for with Title IV-E funds, and over 45% of Michigan's $243.5 million foster care program budget came from the federal government during the 2018–2019 fiscal year. *Budget Briefing: HHS Human Services*, House Fiscal Agency, https://perma.cc/EE85-2Y4D. Thus, Michigan compensates St. Vincent in part with Title IV-E funds through Michigan's foster care case management or adoption program budget. This is done through *per diem* payments made after St. Vincent has placed a foster child in a licensed home, or upon the completion of an adoption. ECF No. 1, PageID.22.

STATEMENT OF THE LAW

When considering a motion to dismiss under Rule 12(b)(6), courts "construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations as true, and examine whether the complaint contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 793 (6th Cir. 2016) (citing *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). A plaintiff need only "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable," and the standard does not "impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Id.* at 793-94 (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 556 (2007)). The same standard applies to facial attacks on subject matter jurisdiction under Rule 12(b)(1). *See United States v. A.D. Roe Co.*, 186 F.3d 717, 722 (6th Cir. 1999).[1]

[1] "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Courts may also consider other documents in the record as long as the

ARGUMENT

I. Plaintiffs have standing to sue Federal Defendants.

To have standing, a plaintiff must show injuries that are "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). Federal Defendants argue that Plaintiffs' injuries lack traceability and redressability, but do not dispute—and thus concede—that Plaintiffs' injuries are "concrete, particularized, and actual or imminent." *See* ECF No. 45, PageID.1705.

Federal Defendants argue that Plaintiffs' injuries are not traceable to them nor redressable by a favorable ruling, but binding precedent says otherwise. The federal regulation, according to both State and Federal Defendants, acts directly on St. Vincent, and enables unlawful conduct by State Defendants. A declaratory judgment and injunction against enforcement of this regulation will provide relief for Plaintiffs. Under *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701 (6th Cir. 2015), this is more than sufficient to establish both causation and redressability.

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document's relevance is not materially in dispute. *Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783, 797 (6th Cir. 2012).

All this dooms Federal Defendants' ripeness arguments, as the Supreme Court and the Sixth Circuit treat the Article III ripeness inquiry as essentially coterminous with the injury-in-fact requirement for standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 n.5 (2014) ("[T]he Article III standing and ripeness issues in this case 'boil down to the same question.'"); *Winter v. Wolnitzek*, 834 F.3d 681, 687 (6th Cir. 2016) ("The line between Article III standing and ripeness in preenforcement First Amendment challenges has evaporated."); *Miller v. City of Wickliffe*, 852 F.3d 497, 506 (6th Cir. 2017) ("A plaintiff meets the injury-in-fact requirement—and the case is ripe—when the threat of enforcement of that law is 'sufficiently imminent.'"). Thus, as Plaintiffs' injuries satisfy the Article III standing requirements, they are also ripe.[2]

A. Plaintiffs' injuries are fairly traceable to Federal Defendants.

To have Article III standing, a plaintiff's injury must be "fairly traceable" to the defendant's actions. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). A plaintiff must therefore show that her injury was

[2] Nonetheless, Plaintiffs rebut Federal Defendants' ripeness arguments below in Part II, demonstrating ripeness under both the Article III and the (now-defunct) prudential ripeness requirements.

a "consequence of the defendant['s] actions," *Warth v. Seldin*, 422 U.S. 490, 505 (1975). "In the nebulous land of 'fairly traceable,' where causation means more than speculative but less than but-for, the allegation that a defendant's conduct was *a motivating factor* in the third party's injurious actions satisfies the requisite standard." *Parsons*, 801 F.3d at 714 (emphasis added).

For government conduct in particular, the Supreme Court and the Sixth Circuit have held that government entities cannot avoid liability by arguing that the harm was indirect. "[T]he fact that a defendant was one of multiple contributors to a plaintiff's injuries does not defeat causation." *Id.*; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1995) ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded.").

As the Sixth Circuit held in *Parsons*, "it is still possible to motivate harmful conduct without giving a direct order to engage in said conduct." 801 F.3d at 714. There, the Department of Justice (DOJ) had designated the plaintiffs as a criminal gang, which allegedly prompted unlawful actions be local law enforcement. *Id.* at 707-08. DOJ argued that the harms caused by local law enforcement officials were not fairly traceable

to DOJ. But the Sixth Circuit disagreed, explaining that at the pleading stage, it was more than sufficient for plaintiffs to allege "that the [local] law enforcement officials themselves acknowledged that the DOJ gang designation had caused them to take the actions in question." *Id.* at 714. The Sixth Circuit thus rejected the argument that "causation [wa]s broken by the independent law enforcement officers' voluntary conduct," *id.*, and instead concluded that plaintiffs had "satisf[ied] the fairly traceable requirement," *id.* at 715.

Other courts have come to similar conclusions, acknowledging that a harm can be fairly traceable despite the intervening actions of third parties or other contributing harms. *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013) (causation is satisfied where defendant's regulation was partially responsible for frustrating plaintiff's first amendment rights, even where unrelated injury would also have hindered assertion of those rights); *Barnum Timber Co. v. EPA*, 633 F.3d 894, 899-901 (9th Cir. 2011) (causation satisfied where defendant's listing of plaintiff's property as "impaired water body" may have only been one contributing factor to decreasing property value). Here, the Plaintiffs' injuries are fairly traceable to Federal Defendants' actions for

at least two reasons. *First*, the federal regulations are a direct cause of Plaintiffs' injuries. Federal Defendants themselves assert that Title IV-E and its accompanying regulations impose requirements on "states and their subgrantees." ECF No. 45, PageID.1689; *see* 42 U.S.C. § 671(a)(18) (applying the regulations to both "the State [and] any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements"). St. Vincent contracts directly with Michigan to provide these services. Federal Defendants are therefore arguing on the one hand that § 75.300 directly regulates St. Vincent while on the other that Plaintiffs' injuries flow *only* from "actions by the State of Michigan." ECF No. 45, PageID.1707. Both cannot be true. To the extent that the federal regulation can be interpreted—as they have been by Michigan and the Federal Defendants—to directly require St. Vincent to violate its sincere religious beliefs (and thus harm Plaintiffs), that is more than sufficient to show direct causation.

In fact, § 75.300 requires that Federal Defendants "must communicate to the non-Federal entity all relevant public policy requirements [including the challenged non-discrimination provision] . . . and

incorporate them either directly or by reference in the terms and conditions of the Federal award." 45 C.F.R. § 75.300(a). And, as applicable to Michigan and St. Vincent, it further states that "[t]he non-Federal entity is responsible for complying with all requirements of the Federal award." 45 C.F.R. § 75.300(b). The federal government cannot promulgate a regulation that requires immediate compliance, communicate that regulation to states and their subgrantees, and then disclaim responsibility for any harm it caused. *See Parsons*, 801 F.3d at 714.[3]

Second, Michigan has stated that the federal regulation was a motivating factor in its decision to adopt its own policy (also challenged in this case). This is more than sufficient to satisfy the traceability requirement. Defendant Nessel has stated that "a significant portion of funding" for foster care and adoption services comes from the federal Title IV-E program, and that Michigan was acting "in compliance with [the] federal requirement[s]" when it drafted its own challenged policy.

[3] In *DeOtte v. Azar*, for example, the court ruled that federal regulations created a situation in which, "by choosing to adhere to their religious beliefs, not only are the Individual Plaintiffs excluded from the . . . market, they are forced to violate federal law." Order at 24, *DeOtte v. Azar*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019), ECF No. 76.

Summary Statement of *Dumont v. Gordon* Settlement Agreement, p. 1, https://perma.cc/Q4L6-U3CT; ECF No. 1, PageID.21-22. She explained further that "[a]s a condition of receiving these federal funds, the United States Department of Health and Human Services requires that states' Title IV-E-funded programs prohibit discrimination on the basis of sexual orientation or gender identity." *Id.* And as Plaintiffs alleged in their complaint, State Defendants "have interpreted 45 CFR § 75.300(a) to apply to St. Vincent Catholic Charities and operate to require the State to force St. Vincent to violate its sincere religious beliefs." ECF No. 1, PageID.22-23. [4]

Federal Defendants protest that any injury to Plaintiffs is exclusively the result of Michigan's failure to secure an exemption from the federal regulation. ECF No. 45, PageID.1709. But when the federal government blames Michigan for failing to seek an exemption *from the federal regulation at issue in this case*, that is a strikingly direct concession that the harms have been caused *by the federal regulation at issue in this case*. But even if one should only focus on the failure to give an exemption,

[4] Michigan has already initiated an investigation into St. Vincent's conduct, ECF No. 1, PageID.30, but claims it has not completed its investigation and enforcement because of this lawsuit.

surely the federal government bears at least some blame for failing to grant one, just as Michigan bears some blame for failing to request one. What is more, the Federal Defendants are not limited to RFRA exemptions—they could also clarify that the Charitable Choice regulations protect St. Vincent's right to operate according to its religious beliefs. *See* ECF No. 1, PageID.34 (discussing application of 45 C.F.R. § 87.3(a)); *see also* 45 C.F.R. § 260.34(d). That they have not done so imposes direct harms on Plaintiffs.

HHS already has the authority to issue regulatory "[e]xceptions on a case-by-case basis." 45 C.F.R. § 75.102(b). But here, Federal Defendants have failed to exercise that authority even though they have admitted that they were required to do so by federal law in a similar situation. Federal Defendants granted an exception to South Carolina precisely "because [HHS] concluded that requiring Miracle Hill to comply [with the same challenged regulation] would violate RFRA." ECF No. 45, PageID.1699. HHS further acknowledged that "Miracle Hill's sincere religious exercise would be substantially burdened by application of the religious nondiscrimination requirement of § 75.300(c)," and that "subjecting Miracle Hill to that requirement . . . is *not* the least

restrictive means of advancing a compelling government interest on the part of HHS." *Id.*, PageID.1699-1700 (emphasis added). Here too, Federal Defendants recognize that Plaintiffs' conduct raises RFRA concerns. ECF No. 45, PageID.1710-1712 n.10.

In attempting to show a lack of standing, Federal Defendants offer two purportedly analogous cases, but neither bears any resemblance to this one. In the first, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 28, 42 (1976), the plaintiffs failed to show that their injuries (the denial of medical services by hospitals because they could not pay the fees) were fairly traceable to the Internal Revenue Service (IRS), which had allegedly adopted a policy of granting "favorable tax treatment" to hospitals that refused services to indigents. The Supreme Court rejected this argument, noting that it was "purely speculative" whether the hospitals denied service to the plaintiffs "[with or] without regard to the tax implications." *Id.* at 42-43. The plaintiffs had not "establish[ed]" that the relevant hospitals "[we]re dependent upon [charitable] contributions" such that a change in tax treatment would have any effect their actions. *Id.* at 44. In the second, *Warth v. Seldin*, the plaintiffs alleged that zoning laws had caused their injuries (in the form of unavailability of low-income

housing). 422 U.S. at 493. But the Supreme Court found the *true* cause of the harm to be "the economics of the area housing market" and stated that the plaintiffs "rel[ied] on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had the defendants acted otherwise[.]" *Id.* at 506-07. These cases thus stand for the unremarkable proposition that *hypothetical* injuries, or injuries premised upon unsubstantiated speculation, are insufficient for standing.

In contrast, Plaintiffs here have substantiated their claims with specific factual allegations showing that Federal Defendants' actions have caused their injuries. Plaintiffs allege that Federal Defendants, by their promulgation of regulations, have caused harm to Plaintiffs, and that Michigan's actions in enforcing Federal Defendants' policies have caused them further harm. ECF No. 1, PageID.21-23. The nature of these injuries is not "purely speculative," nor merely the result of "economics" or any other analogous free-standing cause. Michigan itself lays the blame at the feet of the Federal Defendants. *Id*. This case, unlike *Simon* and *Warth*, thus presents a clearly traceable pattern of federal

regulation, state enforcement, and infringement upon Plaintiffs' constitutional rights.

Federal Defendants cannot enact a harmful regulation and then claim that the consequences do not concern them; Plaintiffs' injuries are fairly traceable to Federal Defendants' regulation, whether the federal government enforces the regulation itself or whether it induces—via millions of dollars in federal funding—states to do so instead. The federal government cannot "induce the States to engage in activities that would themselves be unconstitutional" with funding carrots or sticks. *South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987).

B. A favorable ruling would redress Plaintiffs' injuries.

An injury is redressable if "a judicial decree can provide prospective relief that will remove the harm." *Doe v. Dewine*, 910 F.3d 842, 850 (6th Cir. 2018) (internal quotation marks omitted). To prevail, Plaintiffs "need not show that a favorable decision will relieve [their] *every* injury." *Parsons*, 801 F.3d at 715. The "relevant standard is likelihood—whether it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (internal quotation marks omitted). A declaratory judgment or injunction against Federal

Defendants' enforcement of the federal regulation will redress Plaintiffs' injuries for three reasons.

First, finding the federal regulation unconstitutional as applied to Plaintiffs will likely invalidate Michigan's policy as well. In lawsuits concerning the violation of constitutional rights, it is often the case that "the fates of federal and state laws are intertwined." *Hollis v. Lynch*, 827 F.3d 436, 442 (5th Cir. 2016). In *Hollis*, the district court had ruled that the presence of a state law with the same effect as a federal law invalidated the plaintiff's second amendment claim on redressability grounds. The Fifth Circuit reversed, however, concluding that "if [the court] were to hold a federal law unconstitutional on Second Amendment grounds, it is likely that [the analogous] state law would also be unconstitutional." *Id.* (cleaned up). Similarly, if this Court were to rule in favor of Plaintiffs' first amendment claims against Federal Defendants, it is very likely that Michigan's new policy would also be found unconstitutional.

Federal Defendants seem to argue that because there are multiple causes for Plaintiffs' injuries, this Court is unable to provide redress. That argument misconstrues the purpose of the redressability

requirement. It does not exist to give two defendants, each contributing to the same injury, a defense by allowing them to point at the other's bad conduct; this would allow any injury with multiple contributing causes to go unredressed. Instead, the redressability requirement ensures that that a plaintiff cannot obtain redress for an injury that "results from the independent action of some third party not before the court." *Simon*, 426 U.S. at 42. The presence of two overlapping unconstitutional policies causing Plaintiffs harm does not nullify the Court's ability to provide redress, especially where all of the parties causing harm are before the court (as is the case here).[5]

Second, relief against Federal Defendants would resolve the ambiguity created by § 75.300(c); ambiguity that has allowed Michigan to pursue discriminatory policies that harm Plaintiffs. Much of the federal funding for Michigan's child welfare programs is provided through TANF block grants. *Budget Briefing: HHS - Human Services*, House Fiscal Agency (Jan. 2019), https://perma.cc/EE85-2Y4D. But

[5] Indeed, without the opportunity for such federal relief, any redress gained in the Plaintiffs' claims against Michigan would be highly uncertain: if ordered to stop its harmful enforcement, Michigan would claim that it was violating federal regulations. Dismissal of Federal Defendants could create, not solve, a redressability problem.

"[w]henever a State or local government uses Federal TANF funds," it is subject to the "Charitable Choice" provisions that govern the disbursement of those funds. 45 C.F.R. § 260.34(a). These provisions ensure that when "a religious organization that participates in the TANF program[, it] will retain its independence from Federal, State, and local governments and may continue to carry out its mission, including the definition, practice and expression of its religious beliefs." 45 C.F.R. § 260.34(d); *see also* 45 C.F.R. § 87.3(a) (preventing discrimination in the "selection of service providers . . . on the basis of the organization's religious character or affiliation."); ECF No. 1 at PageID.34-35. These Charitable Choice provisions run counter to the requirements of § 75.300(c). A favorable ruling against Federal Defendants, however, would clarify the law and remove the ambiguity that has harmed Plaintiffs both directly and indirectly. *See infra* 25-34.

Third, an injunction against Federal Defendants will, at a minimum, provide partial direct redress of Plaintiffs' injuries by ensuring that the federal government cannot enforce the challenged regulation against Plaintiffs. Redressability is satisfied if this Court's order will remove even just *one* of multiple motivating factors causing an alleged injury. In

Parsons, the plaintiffs alleged that one reason why local law enforcement took action against them was DOJ's gang designation. The Sixth Circuit concluded that plaintiffs satisfied Article III redressability:

> While we cannot be certain whether and how the declaration sought by the Juggalos will affect third-party law enforcement officers, it is reasonable to assume a likelihood that the injury would be partially redressed where, as here, the Juggalos have alleged that the [local] law enforcement officers violated their rights because of the 2011 [federal] NGIC Report.

Parsons, 801 F.3d at 717. Here too, an injunction against the federal regulation would provide redress—removing at least one cause of Plaintiffs' harm and one justification for Michigan's actions—even though "we cannot be certain whether and how" such relief will "affect third-part[ies]" like Michigan. *Id.*[6] And this case is even easier than *Parsons* because this Court *can* grant Plaintiffs complete relief for the harms they have alleged (by issuing an injunction against all

[6] Even *were* Michigan to declare an intention to continue enforcing its own policy against Plaintiffs today, it is unclear that—with the removal of the Federal Defendants' imprimatur—State Defendants would actually do so tomorrow. Indeed, experience in this case and in others has shown that Michigan can change litigation positions. *See, e.g.*, Mot to Withdraw the State of Michigan from March 19, 2018 Amicus Br. in Supp. of Def.-Appellant, *Freedom From Religion Found., Inc. v. County of Lehigh*, No. 17-3581 (3d Cir. Jan. 29, 2019); Mot. to Withdraw the State of Michigan from April 26, 2018 Amicus Br. in Supp. of Defs.-Appellants, *Gaylor v. Mnuchin*, 919 F.3d 420 (7th Cir. 2019) (No. 18-1277); Mot. to Withdraw the State of Michigan from June 13, 2018 Amicus Br. in Supp. of Def.-Appellee, *Horton v. Midwest Geriatric Mgmt., LLC*, No. 18-1104 (8th Cir. Jan. 29, 2019).

defendants), thus removing any speculation as to what practical effect a ruling by this Court would have.

Because the Supreme Court has indicated that standing and ripeness are merged in cases such as this, the Court need go no further. *See Kiser v. Reitz*, 765 F.3d 601, 607 (6th Cir. 2014) (this Circuit now looks to the "the constitutional standing framework"—and specifically the "injury in fact" analysis—when assessing ripeness). But were it to consider ripeness, it would find Plaintiffs' claims ripe, too.

II. Plaintiffs' claims against Federal Defendants are ripe.

Plaintiffs' claims are ripe, particularly because they involve first amendment rights. The Sixth Circuit has held that "'the ripeness doctrine is somewhat relaxed' in First Amendment cases." *Miles Christi Religious Order v. Twp. of Northville*, 629 F.3d 533, 541 (6th Cir. 2010) (quoting *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 350-51 (2d Cir. 2005)). There are at least three different ways in which a regulation can cause an injury even before the government has enforced it. First, when the regulation on its face imposes already-existing burdens on the regulated party and requires their immediate compliance. Second, when there is a credible threat of enforcement under the

challenged regulation and plaintiff has alleged an intention to engage in a course of conduct implicating the Constitution. And third, when the regulation chills protected first amendment activity. *See Miller*, 852 F.3d at 506 (credible threat of enforcement); *Hyman v. City of Louisville*, 53 F. App'x 740, 743 (6th Cir. 2002) ("[P]re-enforcement review is usually granted . . . when a statute 'imposes costly, self-executing compliance burdens or if it chills protected First Amendment activity.'") (quoting *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997)). Here, the federal regulation harms Plaintiffs in all three ways (though Plaintiffs need allege only one).

A. Federal Defendants' regulation has already harmed Plaintiffs.

When "regulations ha[ve] the status of law and ha[ve] an immediate impact on the day-to-day operations of the petitioners' businesses," the "impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review" because the "promulgation of the regulations puts petitioners in a dilemma: Either they must comply with the [regulations] and incur the costs . . . or they must follow their present course and risk prosecution." *Magaw*, 132 F.3d at 285-86 (internal citations and quotations omitted); *see also*

Peachlum v. City of York, 333 F.3d 429, 435 (3d Cir. 2003) ("Our stance toward pre-enforcement challenges stems from a concern that a person will merely comply with an illegitimate statute rather than be subjected to prosecution."). The Supreme Court has long recognized that "where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance," the case is ripe. *Abbott Labs. v. Gardner*, 387 U.S. 136, 153 (1967).

Accordingly, when a law imposes obligations on a party and requires compliance, the controversy is ripe: "The premise that threats of enforcement need not be required is supported by cases that find sufficient hardship in the burden of complying with assertedly invalid regulatory requirements." 13B Wright & Miller, Federal Practice & Procedure § 3532.5 (3d ed. 2019 update). In *DeOtte v. Azar*, for example, the court found that *even though* "[p]laintiffs are not subject to 'penalties for violating the individual mandate,'" "the text of a law communicates what the law requires," and thus the law still required compliance even though there was no penalty attached to its violation. Order at 25, *DeOtte v. Azar*, No. 4:18-cv-00825 (N.D. Tex. June 5, 2019), ECF No. 76. This

was sufficient to satisfy ripeness as plaintiffs were still "forced to choose between violating their beliefs or violating the law." *Id.* at 26; *see also Free Speech Coal., Inc. v. Attorney Gen. U.S.*, 825 F.3d 149, 165-67 (3d Cir. 2016) (a claim is justiciable where "the regulation is directed at [p]laintiffs in particular; it requires them to make significant changes in their everyday business practices; and if they fail to observe the rule they are quite clearly exposed to the imposition of strong sanctions even where there is no pending prosecution." (internal alterations and citation omitted)).

The same is true here. Federal Defendants do not deny that the challenged regulation applies to Plaintiffs. And the challenged regulation has already caused Plaintiffs harm: According to State and Federal Defendants' construction of the regulation, it threatens the future of St. Vincent's ministry by requiring the agency to either violate its religious beliefs or close its doors. As a result, St. Vincent has "lost two staff members due in part to concern over the agency's future," and several current families have approached St. Vincent with questions regarding potential government enforcement actions and the impact this will have on the "services many of [them] rely on daily." ECF No. 1,

PageID.37, 39; Seyka Decl., ECF No. 42-2, PageID.1569-1570.[7] St. Vincent may also be losing out on prospective foster or adoptive families as a result of the federal regulations and the uncertainty the have caused. These harms have detracted from St. Vincent's ability to carry out its religious mission and have made it harder to continue serving those most in need in the Lansing community. *See* ECF No. 1, PageID.39-40; ECF No. 42-2, PageID.1569.

This "additional cloud of uncertainty," and the present and tangible harms it has caused are more than sufficient at the pleading stage to demonstrate that the controversy is ripe. *See* ECF No. 42-2, PageID.1570. This is particularly true because Michigan has pointed to the federal regulation as a reason for its policy change. The federal regulations are thus *already* causing harm to St. Vincent. ECF No. 1, PageID.37, 39-42; ECF No. 42-2, PageID.1570.[8]

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[7] This Court may look to documents in the record beyond the Complaint when their validity and relevance are not materially disputed. *Supra* n.1. The Seyka Declaration is relevant to the harms Plaintiffs are suffering and is validity is not in dispute. And it is particularly relevant here as it describes additional harms that have arisen and worsened *after* the Complaint was filed due to the ongoing uncertainty described above.

[8] This is a far cry from *Cooley v. Granholm*, 291 F.3d 880, 883 (6th Cir. 2002), a pre-*Driehaus* case cited by Federal Defendants in which the claims were unripe because the court found that "the case is presently hypothetical" as the record contained *no*

Given these present harms, Plaintiffs are entitled to "official adjudication" of their claims in place of "public disobedience" of the challenged regulation. *Magaw*, 132 F.3d at 287; *Susan B. Anthony List*, 573 U.S. at 158-59 ("[W]e do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.").

B. Federal Defendants' threat of enforcement is credible.

In addition to the harm *already* caused by the challenged regulations, Plaintiffs face imminent future harms. "[P]laintiff meets the injury-in-fact requirement—and the case is ripe—when the threat of enforcement of that law is 'sufficiently imminent.'" *Miller*, 852 F.3d at 506 (citation omitted). More specifically, "[t]he threat of enforcement is sufficiently imminent when '(1) the plaintiff alleges "an intention to engage in a course of conduct"' implicating the Constitution and (2) the threat of enforcement of the challenged law against the plaintiff is 'credible.'" *Id.* (citation omitted); *Berry v. Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012) (similar). "[W]here threatened action by [the] *government* is concerned,"

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evidence of anyone actually suffering or likely to suffer the harm alleged. *Id.* There, a challenge to a state euthanasia law was deemed unripe because the plaintiff doctors no longer practiced in Michigan and couldn't identify "a current patient" impacted by the law. *Id.* Unlike the out-of-state doctors and hypothetical patients in *Cooley*, St. Vincent is operating in Michigan today and its current programs are already being harmed by the regulation.

the Supreme Court has held, "we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *Susan B. Anthony List*, 573 U.S. at 158-59. Indeed, as the Third Circuit has held, "in cases involving fundamental rights, even the remotest threat of prosecution . . . has supported a holding of ripeness[.]" *Peachlum*, 333 F.3d at 435 (citation omitted).

1. Plaintiffs are engaging in conduct protected by the First Amendment and that conduct is threatened by the challenged regulations. Federal Defendants argue that they have no current intention to punish St. Vincent or Michigan for allegedly violating this law. But this puts Plaintiffs between a rock and a hard place: Either St. Vincent has to violate its sincere religious beliefs (something it cannot do), ECF No. 1, PageID.39, or it has to continue operating in a way that Federal Defendants claim violates the law—in constant fear of government investigation and closure.

2. The threat of enforcement against Plaintiffs is also credible. Federal Defendants' non-binding promise not to enforce the law is no guarantee of protection. Nothing prevents Federal Defendants from changing their mind tomorrow—or two years from now. And courts have repeatedly

found credible threats of enforcement in similar circumstances. For example, in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), the court rejected the argument that the "State's litigation position" of promised nonenforcement prevented the plaintiff (NCRL) from having standing. *Id.* 710-11. As the court explained, plaintiff "has no guarantee that the Board might not tomorrow bring its interpretation more in line with the provision's plain language. Without such a guarantee, NCRL will suffer from the reasonable fear that it can and will be prosecuted . . . and its constitutionally protected speech will be chilled as a result." *Id.* Similarly, in *Chamber of Commerce of the United States v. Federal Election Commission*, the D.C. Circuit held that there was a credible threat of enforcement because there was nothing to prevent the FEC "from enforcing its rule at any time with, perhaps, another change of mind of one of the Commissioners." 69 F.3d 600, 603 (D.C. Cir. 1995); *see also New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996) (same). So too here. The threat of future prosecution against Plaintiffs hinges solely on the discretion of HHS. Federal Defendants could change their position at any time based on a change of leadership, administration, or even just a

change of heart. Constitutional protections are thin indeed if they do not protect Plaintiffs in such a situation.

The threat of enforcement is also credible because the challenged regulation has caused third parties to take action in compliance with the regulation. And actions by a third party constitute evidence of the credibility of enforcement. *Susan B. Anthony List*, 573 U.S. at 165 (recognizing that "the specter of enforcement [by the Commission] is so substantial that the [third-party] owner of the billboard refused to display SBA's message after receiving a letter threatening Commission proceedings."). That is certainly the case here, as State Defendants have sought to enforce the federal regulation against Plaintiffs in order to comply with their purported understanding of its federal funding requirements. *See* ECF No. 1, PageID.34.

At bottom, the federal government's ever-looming threat of future enforcement is being used to "coerce individuals into acting contrary to their religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). This more than satisfies the low bar for threats of enforcement implicating first amendment rights. *Peachlum*, 333 F.3d at

435 ("even the remotest threat of prosecution" can be sufficient in legal challenges implicating fundamental rights).[9]

C. The challenged federal regulation is chilling protected first amendment activity.

Even absent an immediate threat of enforcement, a regulation is ripe for pre-enforcement challenge if it chills protected first amendment activity. "In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill." *Amelkin v. McClure*, 74 F.3d 1240, 1996 WL 8112, *4-5 (6th Cir. 1996) (unpublished opinion); (quoting 13A Wright & Miller, Federal Practice and Procedure § 3532.5 (2d ed. 1984)). Indeed, it may be that "the government may choose never to put the law to the test by initiating a prosecution, while the presence of the statute on the books nonetheless chills constitutionally protected conduct."

[9] *Adult Video Association v. United States Department of Justice*, 71 F.3d 563 (6th Cir. 1995), is not the contrary. There, plaintiffs' claims were not ripe because they did not seek an injunction or a declaration that a federal law was unconstitutional; instead, they brought a "*pre-application, as applied* challenge" to an "admittedly valid federal antiobscenity law." *Id.* at 567. Further, *Adult Video* based its ripeness analysis on the "prudential considerations" which the Supreme Court and this Court have recently rejected. *Supra* 34-35. And even under the prudential factors, this case is easily distinguishable as Plaintiffs here—unlike in *Adult Video*—can point to a federal law that the defendants allege prevents them from engaging in protected first amendment activity, activity which they are engaging in *today*. *See id.* at 567-68 (concluding that the facts were not sufficiently developed and that plaintiffs failed to allege any threat of prosecution).

Peachlum, 333 F.3d at 435; *see Carey v. Wolnitzek*, 614 F.3d 189, 196 (6th Cir. 2010) (holding that a dispute was ripe where canons "chill[ed]" plaintiff's speech even though Commission had not enforced the canons against the plaintiff).

The challenged federal regulation has chilled Plaintiffs' protected first amendment activity. The legal uncertainty caused by the challenged regulation is harming Plaintiffs and preventing them from serving as many children as they otherwise could by (1) enabling Michigan to pursue an unlawful policy that would shut down the agency, (2) causing staff to leave, (3) raising questions among current parents about the future of the agency and whether they should continue working with them, and (4) deterring prospective parents from working with St. Vincent given the possibility the agency could be shut down at any time. *See supra* 25-33.

D. Plaintiffs also satisfy the now-defunct prudential ripeness factors.

As explained above, the Supreme Court and the Sixth Circuit have held that the prudential ripeness factors (a sufficient factual record and hardship resulting from a delay) are no longer necessary for an Article III case or controversy. *Miller*, 852 F.3d at 506; *Susan B. Anthony List*,

573 U.S. at 167 ("Respondents contend that these 'prudential ripeness' factors confirm that the claims at issue are nonjusticiable. But we have already concluded that petitioners have alleged a sufficient Article III injury.") (citation omitted). That said, even were this Court to consider these factors, they are easily satisfied.

The factual record is sufficiently developed to produce a fair adjudication of the merits. The Sixth Circuit has considered a factual record well-developed when it is "sufficient to present the constitutional issues in a 'clean-cut and concrete form.'" *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 493 (6th Cir. 1995) (quoting *Renne v. Geary*, 501 U.S. 312, 322 (1991)); *see also Susan B. Anthony List*, 573 U.S. at 167-68 (claim was ripe in part because the issue was "purely legal, and [would] not be clarified by further factual development") (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985)).

In this case, Federal Defendants fail to point to any instances of actual uncertainty in the record regarding the federal regulation Plaintiffs challenge or in St. Vincent's religious beliefs. Indeed, Federal Defendants effectively concede that there is no factual dispute that requires further clarification or development by telling this Court that, at least at this

time, "they do not anticipate serving discovery." ECF No. 43, PageID.1671.

Plaintiffs will also endure hardship if this court denies or delays relief on the merits. Review *must* be granted in instances where plaintiffs would be required to "terminate a line of business, make substantial expenditures in order to comply with the Act, or willfully violate the statute and risk serious criminal penalties." *Magaw*, 132 F.3d at 287. Here, as described at length in both the complaint and the preliminary injunction briefing, Plaintiffs have already endured significant hardship and will endure even more if judicial relief is denied. *See* ECF No. 1, PageID.39-43; Mem. In Supp. of Mot. for Prelim. Inj., ECF No. 6, PageID.221-222.

III. Plaintiffs have sufficiently pled claims against Federal Defendants.

To defeat a motion to dismiss, a complaint need only meet the "plausibility standard" articulated in *Twombly*, 550 U.S. at 546. To meet this standard, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 500 U.S. at 545). Federal Defendants do not dispute that

Plaintiffs have alleged sufficient claims against other defendants in this action, and argue only that the case should be dismissed as to them.

Plaintiffs have pled with specificity several claims against Federal Defendants, putting them on notice as to their liability in this case and giving them more than enough information about Plaintiffs' factual and legal claims to allow them to fully participate in the litigation. Indeed, their brief in support of this motion makes clear that they well understand the nature of Plaintiffs' claims against them. These claims include the allegation that Federal Defendants are requiring Michigan to comply with an unlawful regulation (45 C.F.R. § 75.300) that "force[s] St. Vincent to violate its sincere religious beliefs," ECF No. 1, PageID.21-23; "adopting a policy requiring the State to discriminate against child placing agencies with religious objections to same-sex marriage" and therefore "target[ing] St. Vincent's religious beliefs and practices," ECF No. 1, PageID.42; and violating the Religious Freedom Restoration Act, ECF No. 1, PageID.50-51.

In particular, Count VIII of the Plaintiffs' Complaint is a claim under 42 U.S.C. § 2000bb, the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. § 2000bb-3. RFRA "applies to all Federal law, and the

implementation of that law," but not to state law or state actors; the *only* defendants to which Count VIII may apply are those within the federal government.[10] Under Count VIII, Plaintiffs clearly allege that federal law requires the actions that have caused them injury, ECF No. 1, PageID.50-51; that "adverse action against St. Vincent" such as that already taken to enforce federal law "would impose a substantial burden on Plaintiffs' sincere religious exercise," ECF No. 1, PageID.51; and that the resulting burden would neither be "justified by any compelling government interest" nor represent "the least restrictive means" of furthering such interests if they did exist, ECF No. 1, PageID.51.

If the Court believes that additional facts are necessary to properly plead these straightforward claims against Federal Defendants, Plaintiffs are willing to amend their complaint to do so. Fed. R. Civ. P. 15. Nevertheless, Plaintiffs have already alleged enough facts against the Government "to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Accordingly, the Complaint should not be dismissed.

[10] Plaintiffs may rely upon RFRA when arguing about federal law in their claims against State Defendants, but they do not assert RFRA claims against State Defendants.

CONCLUSION

For all the reasons stated above, Federal Defendants' Motion to Dismiss should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit contained in W.D. Mich. L. Civ. R. 7.2(b)(i) because, excluding the parts exempted by W.D. Mich. L. Civ. R. 7.2(b)(i), it contains 8,090 words. The word count was generated using Microsoft Word 2019.

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