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

MELISSA BUCK, *et al.* Plaintiffs, v. ROBERT GORDON, *et al.* Defendants.	CASE NO. 1:19-CV-00286 HON. ROBERT J. JONKER United States District Judge ORAL ARGUMENT REQUESTED

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

ADMINISTRATIVE AND EXECUTIVE MATERIALS

INTRODUCTION

The Federal Defendants do not belong in this case. This is a dispute between Plaintiffs and the State of Michigan. Plaintiffs' strained efforts to demonstrate ripeness and standing to sue the Federal Defendants all fail. As to ripeness, there is no credible threat of enforcement by the Federal Defendants, and Plaintiffs' attempts to argue otherwise conflate the actions of the Federal Defendants with those of the State Defendants and elide the fact that 45 C.F.R. § 75.300 operates on *Michigan*, not Plaintiffs. As to standing, Plaintiffs lack both traceability and redressability, and their arguments to the contrary again mischaracterize how § 75.300 operates and ignore the pertinent history in this case. Plaintiffs also still have not pointed to anything the Federal Defendants have actually *done* that has violated Plaintiffs' rights. Accordingly, Plaintiffs' Complaint as to the Federal Defendants should be dismissed.

ARGUMENT

I. Plaintiffs' Claims Against the Federal Defendants Are Not Ripe.

Plaintiffs' claims against the Federal Defendants are not ripe. Fed. Br. 12–19, ECF. No. 45, PageID.1697–1704. Plaintiffs' arguments to the contrary all fail. Pls.' Opp. 24–36, ECF No. 54, PageID.1917–1929.[1]

As an initial matter, Plaintiffs argue that the Court need not even consider whether their claims are ripe because the Sixth Circuit has recently treated ripeness and standing as similar

[1] The State Defendants have also filed a "Response" to the Federal Defendants' Motion to Dismiss. ECF No. 53. To the extent the State Defendants contest the factual allegations in the Federal Defendants' Motion—all of which are drawn either from the Complaint or from other materials that may be considered on a motion to dismiss—the State Defendants acknowledge that the Court is required to accept the factual allegations in the Complaint as true when ruling on a Motion to Dismiss. State Resp. 1, PageID.1874. To the extent the State Defendants contend that Michigan's compliance with § 75.300(c) is "not optional," *id.* at 2, PageID.1875, the Federal Defendants do not dispute that point. But it is also irrelevant. Ripeness does not turn on whether a challenged regulation is "optional"; rather, as explained *infra*, it turns on whether there is a credible threat of enforcement. And as further explained *infra* and in the Federal Defendants' opening brief, there is no such credible threat here.

inquiries. Pls.' Opp. 9–10, 24, PageID.1902–1903, 1917. In particular, Plaintiffs contend that because the Federal Defendants do not dispute that the State Defendants' threats to terminate Plaintiffs' contracts have caused Plaintiffs harm, the Federal Defendants' ripeness arguments must fail. *Id.* This is wrong.

To begin with, that the Sixth Circuit has recently treated ripeness and standing as similar inquiries, *see, e.g.*, *Winter v. Wolnitzek*, 834 F.3d 681, 687 (6th Cir. 2016), does not relieve Plaintiffs of their burden to establish that their claims against the Federal Defendants are ripe. As the Sixth Circuit has explained, "[s]tanding and ripeness *both* originate from Article III's case-or-controversy requirement." *Miller v. City of Wickliffe*, 852 F.3d 497, 506 (6th Cir. 2017) (emphasis added). Accordingly, suits challenging government action "require ripeness as well as standing." *Id.*

Furthermore, contrary to Plaintiffs' claim that the Federal Defendants have somehow "doom[ed]" their ripeness argument by failing expressly to contest injury-in-fact, Pls.' Opp. 10, PageID.1903, the Sixth Circuit has instructed that in the pre-enforcement context (the situation here), "standing and ripeness both ... require [the Court] to answer the same question: have plaintiffs established a credible threat of enforcement?" *Miller*, 852 F.3d at 506. As the Federal Defendants explained in their opening brief, Fed. Br. 16–19, PageID.1701–1704, Plaintiffs' claims against the Federal Defendants are not ripe because "St. Vincent does not face a credible threat of enforcement ... from the Federal Defendants," *id.* at 16, PageID.1701. The notion that the Federal Defendants have somehow forfeited their ripeness argument by disputing the likelihood of enforcement under the rubric of "ripeness" rather than "injury-in-fact" is meritless.

The Federal Defendants also plainly argued in their opening brief that Plaintiffs have not established a cognizable injury vis-à-vis the Federal Defendants. As the Federal Defendants

explained, because § 75.300(c) "does not operate directly against St. Vincent ... [t]he harm that Plaintiffs allege [against the Federal Defendants] is the negative consequences that would result to St. Vincent ... if HHS enforced section 75.300(c) against Michigan based on St. Vincent's religiously motivated practice." Fed. Br. 13, PageID.1698. But because Plaintiffs "have adduced no facts showing that HHS has any intention of enforcing section 75.300(c) against Michigan based on St. Vincent's religiously motivated practice," Plaintiffs "have not shown any likelihood that this alleged harm will come to pass." *Id.*

Indeed, Plaintiffs' strained effort to dismiss Federal Defendants' ripeness argument serves only to highlight why the Federal Defendants' argument is *correct*. As noted above, the Sixth Circuit has instructed that in the pre-enforcement context, standing and ripeness "require [the Court] to answer the same question: *have plaintiffs established a credible threat of enforcement*?" *Miller*, 852 F.3d at 506 (emphasis added). And as the Federal Defendants explained in their opening brief, there is no credible threat of enforcement here on the part of the Federal Defendants because "there is no indication that the Federal Defendants have taken any steps to withhold any portion of Michigan's federal foster care and adoption grants based on St. Vincent's religiously motivated conduct." Fed. Br. 17, PageID.1702. To the contrary, the Federal Defendants did not take any enforcement action based on St. Vincent's conduct during the two-plus years § 75.300(c) was on the books prior to the *Dumont* settlement agreement, and the Federal Defendants' most recent relevant action was to *grant* an exception from § 75.300(c) to another state, South Carolina, so that South Carolina could continue to accommodate the religious practices of a faith-based child placing agency in that state. *See id.* at 13–15, PageID.1698–1700.

Plaintiffs claim that they face a "credible" threat of enforcement from the Federal Defendants because the Federal Defendants could conceivably decide to enforce § 75.3000(c) against Michigan based on St. Vincent's religiously motivated conduct at some point in the future. Pls.' Opp. 30, Page ID.1923. This, of course, proves too much, as it would render ripeness doctrine (as well as standing doctrine, to the extent the two merge in the pre-enforcement context) virtually void. A governmental entity can almost *always* change its position on whether to enforce a law or regulation in a particular context. For good reason, then, the Sixth Circuit has consistently required some showing that "the same conduct has drawn enforcement actions or threats of enforcement in the past" before finding a threat of enforcement to be "credible." *Kiser v. Reitz*, 765 F.3d 601, 609 (6th Cir. 2014). Here, of course, Plaintiffs have offered no indication that St. Vincent's religiously motivated conduct has drawn any enforcement actions or threats of enforcement from the Federal Defendants. Indeed, as described above, the opposite is true.

Plaintiffs attempt to avoid the need to show *some* hints or threats of enforcement by the Federal Defendants by citing a variety of cases outside the Sixth Circuit. Pls.' Opp. 31–32, PageID.1924–1925. None is on point.

In *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), the plaintiff had "nothing more" than the State's "litigation position" that the challenged regulation did not apply to the plaintiff's conduct to indicate that there was no credible threat of enforcement, *id.* at 710–11. Here, by contrast, there is both a history of non-enforcement by the Federal Defendants as to St. Vincent's religiously motivated conduct and recent action (the granting of an exception to South Carolina) that is directly inconsistent with an alleged threat of enforcement. In *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995), private third parties could bring suit under the

challenged law when the agency decided not to act, with the result that "even without [an agency] enforcement decision," the petitioners were "subject to litigation challenging the legality of their actions," *id.* at 603. There is no such private enforcement mechanism here. And in *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996), agency representatives had made statements "indicat[ing] that they will some day enforce" the challenged regulation, *id.* at 17. Here, there are no such statements.

Plaintiffs attempt on a variety of grounds to distinguish *Adult Video Association v. U.S. Department of Justice*, 71 F.3d 563 (6th Cir. 1995), including that it was decided prior to recent cases treating ripeness and standing as similar inquiries. Pls.' Opp. 33 n.9, PageID.1926. Those cases, however, did not overturn *Adult Video*. And in any event, *Adult Video* held that the plaintiff's failure to identify any "statements or actions" indicating that the defendant agency intended to bring an enforcement action against the plaintiff *also* defeated the plaintiff's standing. *See* 71 F.3d at 567. Thus, to the extent ripeness and standing have now merged in the pre-enforcement context, *Adult Video* is clearly still relevant.

Plaintiffs alternatively argue that their claims against the Federal Defendants are ripe because, according to Plaintiffs, § 75.300(c) has caused them harm. Pls.' Opp. 25–29, PageID.1918–1922. This argument, like much of Plaintiffs' Opposition, conflates the actions of the Federal Defendants with those of the State Defendants and elides the fact that the regulation operates on *Michigan*, not Plaintiffs. As explained above, because § 75.300(c) operates directly on Michigan—not Plaintiffs—any harm the regulation causes Plaintiffs would have to come by virtue of its operation on *Michigan*. And because there has never been any hint of an enforcement action by the Federal Defendants against Michigan based on St. Vincent's

religiously motivated conduct, any harm Plaintiffs can identify at this point must have been caused by Michigan, not the regulation.

For this reason, Plaintiffs' citations to *NRA v. Magaw*, 132 F.3d 272 (6th Cir. 1997), and other cases finding ripeness where a law had a "direct and immediate" impact on a plaintiff's business, *id.* at 286, are inapposite. Under *Magaw*, when a law "creates substantial economic burdens and compliance is coerced by the threat of enforcement," ripeness requirements may be satisfied where the law "can realistically be expected to be enforced against a plaintiff singled out for regulation." *Id.* at 290. Here, however, there is no "threat of enforcement" by the Federal Defendants against Plaintiffs, much less any possibility that § 75.300(c) "can realistically be expected to be enforced" against Plaintiffs, for the obvious reason that *§ 75.300(c) does not operate on Plaintiffs*. At best, Plaintiffs' argument here supports the view that *Michigan* could establish ripeness against the Federal Defendants on the basis of an "immediate" impact by § 75.300(c) on *Michigan*'s operations. It does not extend the chain down to Plaintiffs.

Plaintiffs offer one final basis for ripeness, namely, that § 75.300(c) is "chilling" their exercise of First Amendment rights. Pls.' Opp. 33–34, PageID.1926–1927. But this gets Plaintiffs nowhere, because the central ripeness question "in the pre-enforcement, First Amendment context" is "have plaintiffs established a credible threat of enforcement?" *Miller*, 852 F.3d at 506. As discussed, there is no credible threat of enforcement here by the Federal Defendants.

For good measure, Plaintiffs also argue that they satisfy the prudential ripeness factors. Pls.' Opp. 34–36, PageID.1927–1929. As to the first factor—whether the factual record is sufficiently developed to allow for adjudication—the Federal Defendants explained in their opening brief that it is difficult to know what the factual record would even *look like* were the

Federal Defendants to bring an enforcement action based on St. Vincent's religiously motivated conduct, given that the Federal Defendants have never brought such an action in analogous circumstances and have given no indication that they *would* bring such an action. Fed. Br. 19, PageID.1704. That the Federal Defendants do not currently "anticipate serving discovery," Pls.' Opp. 36, PageID.1929, does not somehow make this hypothetical factual record any less hypothetical. Plaintiffs also would not suffer hardship if judicial review of their claims against the *Federal Defendants* is denied at this time, given the absence of any indication that the Federal Defendants intend to enforce § 75.300(c) against Michigan based on St. Vincent's religiously motivated conduct in this case.

II. Plaintiffs Lack Standing to Sue the Federal Defendants.

As explained, there is no credible threat of enforcement in this case by the Federal Defendants. Thus, Plaintiffs lack standing to sue the Federal Defendants. *See Miller*, 852 F.3d at 506 (in the pre-enforcement context, "[s]tanding and ripeness both . . . require [the Court] to answer the same question: have plaintiffs established a credible threat of enforcement?"). Plaintiffs further lack standing because they cannot show traceability or redressability. Fed. Br. 19–28, PageID.1704–1713. Plaintiffs' arguments to the contrary fail. Pls.' Opp. 9–24, PageID.1902–1917.

A. Plaintiffs' Asserted Injuries Are Not Traceable to the Federal Defendants.

The Federal Defendants did not cause Plaintiffs' alleged injuries. Rather, Michigan did. Fed. Br. 20–26, PageID.1705–1711. Plaintiffs assert two reasons why their alleged harms are purportedly traceable to the Federal Defendants. Pls.' Opp. 10–19, PageID.1903–1912. Both are wrong.

First, Plaintiffs claim that § 75.300 is a "direct cause" of their injuries. *Id.* at 13–14, PageID.1906–1907. In support of this argument, Plaintiffs cherry-pick a few words from the Federal Defendants' opening brief and assert that the Federal Defendants have taken the position that § 75.300 "directly regulates St. Vincent." *Id.* Not so. In fact, the Federal Defendants stated multiple times in their opening brief that the regulation does *not* directly regulate St. Vincent. Fed. Br. 13, PageID.1698; *id.* at 20, PageID.1705. Rather, the Federal Defendants explained that § 75.300 "directly regulates *Michigan*, which is the Federal Defendants' grantee." *Id.* at 13, PageID.1968.

Remarkably, Plaintiffs ignore these statements, pointing instead to a brief reference in the background section of the Federal Defendants' brief to a completely different statutory provision, 42 U.S.C. § 671(a)(18). Pls.' Opp. 13, PageID.1906 (citing Fed. Br. 4, PageID.1689). But that provision, which sets forth requirements for state eligibility for Title IV-E, *see* 42 U.S.C. § 671(a), *also* does not directly regulate St. Vincent. Plaintiffs' entire argument is built on sand.

Section 75.300 also does not "directly require" St. Vincent to violate its religious beliefs. Pls.' Opp. 13, PageID.1906. Section 75.300(c) prohibits *Michigan* from discriminating on the basis of sexual orientation in administering its Title IV-E grants. *See* 45 C.F.R. § 75.300(c) ("Recipients must comply with [the non-discrimination requirement] in the administration of programs supported by HHS awards.").[2] But how Michigan chooses to enforce its contracts with

[2] To the extent Plaintiffs suggest that 45 C.F.R. § 75.300(a) and (b) directly regulate St. Vincent or establish some sort of direct relationship between the Federal Defendants and St. Vincent, Pls.' Opp. 13–14, PageID.1906–1907, that is wrong. Like with § 75.300(c), HHS administers and enforces these provisions directly on Michigan, not St. Vincent. More broadly, *none* of the provisions of 45 C.F.R. Part 75 "directly regulate" subgrantees such as St. Vincent. HHS's ability to enforce these provisions depends on the existence of a direct relationship between HHS and the regulated party. But in the case of subgrantees, HHS has no such relationship.

St. Vincent and—in particular—whether it chooses to afford St. Vincent a religious exemption related to those contracts is determined by Michigan, not the Federal Defendants.

Plaintiffs' second asserted basis for traceability is Michigan's attempt to justify its threatened termination of St. Vincent's contracts by pointing to § 75.300(c) as a "motivating factor" for its decision. Pls.' Opp. 14–15, PageID. 1907–1908. This argument also fails.

As the Federal Defendants explained in their opening brief, Fed. Br. 22–25, PageID.1707–1710, Plaintiffs' threatened injuries in this case flow from four actions by Michigan, none of which is traceable to the Federal Defendants:

> (1) Michigan's inclusion of non-discrimination provisions in its contracts with adoption and foster care services; (2) Michigan's decision to enter the *Dumont* Settlement Agreement, which obligates the State to enforce those non-discrimination provisions; (3) Michigan's decision to stop granting religious accommodations to agencies like St. Vincent that decline to recommend same-sex couples as potential adoptive or foster parents; and (4) Michigan's failure to seek an exception from 45 C.F.R. § 75.300(c) from HHS to the extent the State believes section 75.300(c) prevents it from accommodating St. Vincent's religious exercise.

Fed. Br. 22, PageID.1707. Michigan's efforts to shift blame to the Federal Defendants or claim that the Federal Defendants somehow forced its hand do not give Plaintiffs standing to sue the Federal Defendants. *See Anderson v. Charter Twp. of Ypsilanti*, 266 F.3d 487, 498 (6th Cir. 2001) ("In order to satisfy [the requirements of Article III], a plaintiff must 'establish that, *in fact*, the asserted injury was the consequence of the defendants' actions ....'" (emphasis added) (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975))). This is particularly true given the absence of any credible threat of enforcement by the Federal Defendants. *See Winter*, 834 F.3d at 687.

Parsons v. U.S. Department of Justice, 801 F.3d 701 (6th Cir. 2015), is inapposite. To begin, *Parsons* was not a pre-enforcement challenge, so whether there was a credible threat of enforcement was not relevant to the plaintiff's standing. Here, by contrast, the lack of a credible

threat of enforcement by the Federal Defendants defeats Plaintiffs' standing, *see Miller*, 852 F.3d at 506, regardless of whether Michigan claims the federal regulation "motivated" its decision to terminate St. Vincent's contracts. Moreover, in *Parsons* there was no dispute that the defendant *had in fact* motivated the third-parties' allegedly injurious conduct. Here, by contrast, as the Federal Defendants explained in their opening brief, Fed. Br. 22–25, PageID.1707–1710, a careful review of Plaintiffs' Complaint, as well as other materials that may be considered on a motion to dismiss, reveals that the Federal Defendants did not cause Michigan to take *any* of the steps that have led to the point where St. Vincent now faces contract termination.

Plaintiffs' efforts to dismiss the relevance of two Supreme Court cases, *Simon v. Eastern Kentucky Welfare Rights Organization* (*EKWRO*), 426 U.S. 26 (1976), and *Warth v. Seldin*, 422 U.S. 490 (1975), *see* Pls.' Opp. 17–19, PageID.1910–1912, also fail. In *EKWRO*, there was no traceability because the plaintiff's allegations did not demonstrate that the denials of hospital care resulted from the challenged IRS ruling rather than from "decisions made by the hospitals without regard to the tax implications." 426 U.S. at 43. Similarly here, Plaintiffs' threatened injuries flow from a series of decisions by Michigan that were not the result of the challenged regulation. And in *Warth*, the key point was not that the plaintiffs' injuries were the result of "economics," *per se*, but rather that the plaintiffs' allegations "suggest[ed]" that their injuries were a "consequence of the economics of the area housing market, *rather than of respondents' assertedly illegal acts*." 422 U.S. at 506 (emphasis added). Again, a careful review of the Complaint and other materials that may be considered on a motion to dismiss shows that Plaintiffs' alleged injuries in this case are the consequence of a series of decisions by Michigan, rather than the result of the challenged regulation.

B. Granting Relief Against the Federal Defendants Would Not Redress Plaintiffs' Alleged Injuries.

Plaintiffs also lack standing because their alleged injuries would not be redressed by a ruling against the Federal Defendants. Fed. Br. 26–28, PageID.1711–1713. Plaintiffs purport to identify three grounds for redressability. Pls.' Opp. 19–24, PageID.1912–1917. None succeeds.

First, Plaintiffs argue that invalidating § 75.300 "will likely invalidate Michigan's policy as well." Pls.' Opp. 20, PageID.1913. In support of this argument, Plaintiffs cite a case outside the Sixth Circuit in which a federal and a state statute *both* operated directly on the plaintiff and *both* independently barred the plaintiff's desired conduct, *Hollis v. Lynch*, 827 F.3d 436, 442 (5th Cir. 2016). A ruling invalidating the federal law in that case, therefore, would have redressed the plaintiff's alleged injury, because it would have removed an independent bar to his ability to engage in the desired conduct. Here, however, § 75.300 does not operate directly on St. Vincent and thus does not serve as an independent bar on St. Vincent's religiously motivated practices. Furthermore, unlike in *Hollis*, where striking down the state statute while keeping the federal statute in place would have perpetuated the plaintiff's alleged injury, invalidating Michigan's policy is all that is needed to remove the legal sanctions St. Vincent now faces. The opposite, however, is not true. Invalidating the federal regulation while leaving Michigan's policy in place would do nothing to redress Plaintiffs' alleged injuries. *Hollis* is simply not on point.

Plaintiffs mischaracterize the Federal Defendants' argument as saying that where an alleged injury has "multiple contributing causes," there is no redressability. Pls.' Opp. 20–21, PageID.1913–1914. This is wrong. Plaintiffs' threatened injuries do not have "multiple" causes. They have one—Michigan. That is only underscored by the fact that there is no indication that granting relief against the Federal Defendants would cause Michigan to reverse course and begin accommodating St. Vincent's sincere religious beliefs, Fed. Br. 27–28, PageID.1712–1713,

whereas granting relief against Michigan *would*.[3] And because the federal regulation is not an *independent* source of injury to Plaintiffs (because it does not operate directly on St. Vincent), the only injuries to be redressed in this case are those caused by *Michigan*. In such circumstances, granting relief against the Federal Defendants is neither necessary nor relevant to redressing Plaintiffs' alleged injuries. *See Coyne ex rel. Ohio v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6th Cir.1999) ("[T]here must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury.").

Plaintiffs' second and third asserted bases for redressability also fail. As to the second, Plaintiffs claim that a ruling against the Federal Defendants would "resolve the ambiguity" § 75.300(c) has purportedly created "that has allowed Michigan to pursue discriminatory policies that harm Plaintiffs." Pls.' Opp. 21, PageID.1914. But § 75.300 doesn't "allow" Michigan to do anything—it imposes *limitations* on Michigan, subject to the exception process.[4]

Plaintiffs' third asserted ground for redressability—that relief against the Federal Defendants will provide "partial direct redress of Plaintiffs' injuries by ensuring that the federal government cannot enforce the challenged regulation[] against Plaintiffs," Pls. Opp. 22,

[3] Plaintiffs' suggestion that if this Court grants relief against Michigan but not the Federal Defendants, Michigan might defy the Court's order on the ground that following the order would mean "violating federal regulations," Pls.' Opp. 21 n.5, PageID.1914, can be dismissed out of hand. To begin with, Michigan has given no indication that it would defy such an order, making Plaintiffs' suggestion entirely speculative. Furthermore, the possibility that a party might defy a court order does not establish redressability where it is otherwise lacking. In any event, in the unlikely scenario the Federal Defendants at some point in the future were to bring an enforcement action against Michigan based on St. Vincent's religiously motivated conduct, the proper party to raise any (alleged) conflict between this Court's order and the federal regulation would be *Michigan*, not Plaintiffs.

[4] The State Defendants' claim that "case-by-case" exceptions (like the South Carolina exception) are granted "only in unusual circumstances," State Resp. 4, PageID.1877, conflates two separate regulatory provisions. 45 C.F.R. § 75.102(a) provides that *classwide* exceptions are granted "only in unusual circumstances." This restriction does not apply to case-by-case exceptions, which are governed by § 75.102(b).

PageID.1915—fails for the obvious reason that the Federal Defendants cannot enforce the regulation against Plaintiffs in any event, *because the regulation does not operate on Plaintiffs*.

Plaintiffs' final claim that granting relief against the Federal Defendants "would provide redress [by] removing at least one cause of Plaintiffs' harm and one justification for Michigan's actions," Pls.' Opp. 22–23, PageID.1915–1916, likewise fails. As explained above, the Federal Defendants did not "cause" Plaintiffs' injuries. Michigan did. Michigan's attempt to point the finger at the Federal Defendants—particularly in the absence of any credible threat of enforcement by the Federal Defendants—does not change this. *See Winter*, 834 F.3d at 687.

III. Plaintiffs Have Not Actually Stated Any Claims Against the Federal Defendants.

As the Federal Defendants have explained, Plaintiffs have failed to actually state any claims against the Federal Defendants, because they have failed to plead any facts identifying anything the Federal Defendants have allegedly *done* that has violated Plaintiffs' rights. Fed. Br. 29–30, PageID.1714–1715.

In response, Plaintiffs cite a handful of allegations from the Complaint that they say provide support for their claims against the Federal Defendants. Pls.' Opp. 37–38, PageID.1930–1931. All but one of those allegations, however, is from the Complaint's recitation of claims rather than its factual allegations. And even that one exception describes conduct by the *State Defendants*, not the Federal Defendants. *See id.* at 37, PageID.1930 (quoting Compl. ¶57, ECF No. 1, PageID.22–23). Indeed, none of the allegations Plaintiffs point to clearly identifies anything the Federal Defendants have actually *done*.[5]

[5] The only allegation Plaintiffs point to that even arguably describes conduct by the Federal Defendants is ¶124 of the Complaint, which appears in Count I of the recitation of claims and uses the term "Defendants" loosely without differentiating between the State and Federal Defendants. *See* Compl. ¶124, PageID.42. As the Federal Defendants explained in their opening brief, a review of the factual allegations of the Complaint that support Count I reveals that those

In the absence of any factual allegations identifying anything unlawful the Federal Defendants have actually done, Plaintiffs have failed to state any claims against the Federal Defendants.

CONCLUSION

The Court should dismiss Plaintiffs' Complaint as to the Federal Defendants.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ANDREW BYERLY BIRGE
United States Attorney

MICHELLE BENNETT
Assistant Branch Director

Dated: August 20, 2019

/s/ *Christopher A. Bates*
CHRISTOPHER A. BATES
Senior Counsel to the Assistant Attorney General
U.S. Department of Justice, Civil Division
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-3307
christopher.a.bates@usdoj.gov

Counsel for the Federal Defendants

---

factual allegations "describ[e] actions by [the] State Defendants" with "no mention of any action by [the] Federal Defendants." Fed. Br. 29, PageID.1714.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Local Civil Rule 7.2(c). I have used the word count function in Microsoft Word 2016 and obtained a count of 4,300 words, excluding the parts of the brief exempted by the Rule.

/s/ *Christopher A. Bates*
CHRISTOPHER A. BATES
Senior Counsel to the Assistant Attorney General
U.S. Department of Justice, Civil Division
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-3307
christopher.a.bates@usdoj.gov

Counsel for the Federal Defendants