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

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; JOOYUEN 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; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

PLAINTIFFS' OPPOSITION TO STATE DEFENDANTS' MOTION TO TRANSFER OR, ALTERNATIVELY, TO DISMISS

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INTRODUCTION

This is a Lansing case. All Plaintiffs reside in Lansing. The State Defendants reside in Lansing. Even the Proposed Intervenors reside in Lansing. This case is about St. Vincent, the Bucks, Ms. Flore, and their ability to continue their important work serving children and families in Lansing. It is not about the State's relationship with the Dumonts or any other parties. The Plaintiffs' claims against the State have never been heard on their merits; they have not been raised in any other action, and can and should be heard now—in the Plaintiffs' (and the State's) home forum.

Michigan's arguments rest on the claim that the Court's actions here are constrained by a "consent decree" in *Dumont v. Gordon*. But no such consent decree exists, only a private contract. Without a consent decree, the State's primary arguments for venue transfer and dismissal fall away. What remains is a hodgepodge of arguments that confuse a motion to dismiss with an investigation of the merits, rely on inapplicable law, and overlook the specific allegations included in Plaintiffs' complaint.

Plaintiffs have more than adequately pleaded their case against the State Defendants, and that case can only be heard in this Court.

STATEMENT OF THE LAW

A case can be transferred only to a district in which the action could have been brought in the first instance. 28 U.S.C. §1404(a). If the case could not have been brought in the transferee court, transfer is inappropriate as a matter of law. *See, e.g., Means v. United States Conference of Catholic Bishops*, 836 F.3d 643, 651 (6th Cir. 2016). If the case *could* have been brought in the alternative district, courts balance private and public interest factors to determine whether transfer is appropriate. *See Steelcase, Inc. v. Smart Techs.*, Inc., 336 F. Supp. 2d 714, 719-20 (W.D. Mich. 2004).

When considering a motion to dismiss, 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)).

ARGUMENT

I. State Defendants' Venue Transfer Motion should be denied.

State Defendants seek to transfer this case to the Eastern District, but there are three independent reasons why venue would be inappropriate there. First, venue is barred by 28 U.S.C.§ 1391(e)(1), which limits where Plaintiffs can sue Federal Defendants. Second, venue is also barred by § 1391(b) because none of the State Defendants reside in the Eastern District, nor did a substantial part of the events giving rise to this case occur there. Third, (assuming venue would be *permissible* in the Eastern District as a matter of law, which it is not) both the public and private interest factors weigh strongly in favor of remaining in this district.

A. Venue is not appropriate in the Eastern District because Plaintiffs could not have sued the Federal Defendants there.

Venue can only be proper in the Eastern District if both the State and Federal Defendants can be sued there. But the Federal Defendants could not have been sued there, so the transfer argument fails at the outset.

In cases involving federal defendants, venue is limited by § 1391(e).[1] This provision states in relevant part that:

> [a] civil action in which a defendant is an officer or employee of the United States . . . may . . . be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred[.]

28 U.S.C. §1391(e)(1). In this case, venue is proper in the Western District because the Plaintiffs reside here, and also because the events giving rise to the action occurred here. State Defendants do not raise arguments under part (B) or (C); they argue that venue is proper in the Eastern District under part (A) because "a defendant" resides there. But as discussed below, "a defendant" here refers only to federal defendants. As § 1391(e) goes on to explain: "additional persons" may be joined pursuant to other venue provisions. *Id.*

Accordingly, when there are both federal *and* non-federal defendants, the court must: (1) look to § 1391(e) to determine where venue is

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[1] No party contests that venue is permissible in the Western District; the Federal Defendants make no argument regarding venue in their Motion to Dismiss. Br. in Support of Mot. to Dismiss, ECF No. 45 at PageID.1681. And State Defendants only argue that venue should be transferred to the Eastern District based on the convenience factors, not that it is impermissible here. *Id.* at PageID.1681. Memo. in Support of Mot. to Transfer, ECF No. 30 at PageID.553.

appropriate for the federal defendants, and then (2) look to other venue provisions to determine if venue is appropriate for the remaining defendants. Venue lies in the district where it is appropriate for *both* sets of defendants. This analysis, as explained below, leads to one conclusion: venue is proper only in the Western District.[2]

The State Defendants argue that venue as to the *Federal* Defendants is appropriate in the Eastern District under § 1391(e) because *State* Defendant Nessel resides there. This argument is doubly flawed. The term "a defendant" only applies to federal defendants *and* Defendant Nessel does not reside in the Eastern District.

1. *Section 1391(e)(1)(A) applies only to Federal Defendants.*

Section 1391(e)(1)'s reference to "a defendant" only applies to *federal* defendants. Accordingly, in order for venue to be proper under § 1391(e)(A), at least one *federal* defendant needs to reside in the chosen district. But none reside in the Eastern District. This conclusion is supported by the text and structure of the statute itself, the relevant case

[2] Proposed Intervenors argue that venue should be assessed for the Federal Defendants under 28 U.S.C. §1391(c)(2). This provision does not cover federal entities, which are instead covered *by name* in § 1391(e). Accordingly, their arguments are irrelevant to this Court's venue analysis.

law, and the statute's legislative history.

First, the plain language and structure of §1391(e)(1) make clear that its analysis is limited to federal parties. Immediately after addressing venue for federal defendants, § 1391(e)(1) explains that "*[a]dditional persons* may be joined as parties . . . with such other venue requirements as would be applicable *if the United States or one of its officers, employees, or agencies were not a party*." 28 U.S.C. §1391(e)(1) (emphasis added). These references to "additional persons" and to analyzing venue *as if* the federal defendants were not part of the case makes clear that § 1391(e)(1) encompasses only federal defendants, not any "additional persons." This, combined with the fact that § 1391(e)(1) previously uses the term "a defendant" in reference *only* to "an officer or employee of the United States," § 1391(e)(1), confirms that when a court must determine where "a defendant in the action resides" under § 1391(e)(1)(A), only *federal* defendants are relevant. Here, no Federal Defendant resides in the Eastern District.

Second, the courts that have addressed this issue are also consistent in limiting § 1391(e)(1)'s analysis to federal defendants. As Wright & Miller explains, § 1391(e)(1)(A) "applies only to *proper* federal

defendants" and "was not intended to allow a federal agency or official to be sued in any judicial district in which a *nonfederal* defendant might reside." 14D Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §3815 (4th ed. 2013) (emphasis added). In *A.J. Taft Coal Co. v. Barnhart*, for example, the court concluded that "'a defendant' in 1391(e)(1) refers only to federal agencies and officers." 291 F. Supp. 2d 1290, 1300-01 (N.D. Ala. 2003) (citing *Lamont v. Haig*, 590 F.2d 1124, 1128-29 (D.C. Cir. 1978)); *see also Miller v. Oceanside Police Dep't*, No. 08-1304, 2009 WL 3327217, at *1 (W.D. Tenn. Oct. 9, 2009) ("The last sentence of subsection (e) 'distinguishes between certain federal defendants and all nonfederal defendants.'"); *Rogers v. Civil Air Patrol*, 129 F. Supp. 2d 1334, 1338 (M.D. Ala. 2001) ("[T]he term 'a defendant' in section 1391(e)(1) refers only to a federal officer or agency defendant in the case, and not to 'any' defendant, including a non-federal one."); *Reuben H. Donnelley Corp. v. Fed. Trade Comm'n*, 580 F.2d 264, 266 (7th Cir. 1978) ("Section 1391(e)(1) provides that venue is proper in any district in which 'a (federal) defendant in the action resides.'").

Finally, were this Court to adopt the broad interpretation put forward by the State Defendants, it would contradict clear legislative intent by

subjecting federal defendants to suit in any venue in which any other non-federal defendant happens to reside. "There is no indication in the language of the statute or the legislative history that Congress intended to allow a federal agency or official to be sued in any judicial district in which a non-federal defendant might reside." *Nat'l Ass'n of Life Underwriters v. Clarke*, 761 F. Supp. 1285, 1292-93 (W.D. Tex. 1991). Accordingly, the term "defendant" in § 1391(e)(1)(A) is limited to federal defendants.

Thus, venue for the Federal Defendants under § 1391(e)(1)(A) is limited to districts in which a *federal* defendant resides; this precludes venue in the Eastern District as both Federal Defendants perform their official duties in Washington, D.C. *See Reuben H. Donnelley Corp.*, 580 F.2d at 266-67 & n.3 (observing that "[t]he residence of a federal officer has always been determined by the place where he performs his official duties[,]" and holding that the Federal Trade Commission resided in only Washington, D.C., even though it has a regional office in Chicago); *E.V. v. Robinson*, 200 F. Supp. 3d 108, 113 n.3 (D.D.C. 2016) (same); 17 Moore's Federal Practice, § 110.31 (Matthew Bender 3d ed. 2018) ("For purposes of [Section 1391(e)(1)], a federal agency sued in its own name is

considered to be a resident of the District of Columbia only.").

2. No defendants reside in the Eastern District.

What is more, not a single defendant actually resides in the Eastern District. All State Defendants reside only in the district where their official duties are performed, which here is the Western District. *Infra* at 10 n.3. Accordingly, because *no* defendants reside in the Eastern District, this provides a separate and independent reason why venue is not appropriate under § 1391(e)(1) as to the Federal Defendants: even *assuming* the State's interpretation of the term "a defendant" is right, not a single defendant actually resides in the Eastern District.

Thus, if this Court concludes either that § 1391(e)(1)'s analysis is limited to federal defendants <u>or</u> that none of the State Defendants reside in the Eastern District, transfer to the Eastern District is barred by § 1391(e)(1)'s limitation on venue for federal defendants.

B. Even assuming the Federal Defendants were not parties to the case, venue is not appropriate in the Eastern District because the State Defendants do not reside there.

Even if the Federal Defendants were not parties to this case (a fact which forecloses this and State Defendants' remaining arguments at the outset), venue would still not be appropriate in the Eastern District.

Under 28 U.S.C. §1391(b), a plaintiff may bring a civil action (1) in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located" or (2) in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred[.]" State Defendants have made an argument only under part (1), claiming Defendant Nessel resides in the Eastern District.[3]

State Defendants argue that Defendant Nessel resides in both Michigan districts, making venue appropriate under § 1391(b)(1). ECF No. 30 at PageID.554. This argument is foreclosed by binding case law.

"Where a public official is a party to an action in his official capacity, he resides in the judicial district where he maintains his official

[3] Because State Defendants have not raised any argument under (2), it is waived. Proposed Intervenors argue that venue is appropriate under (2), but even if that argument were not waived, it would fail. The events giving rise to this lawsuit all occurred in the Western District: this is where the contract was signed, this is where the payments were made, this is where the services are being performed, and this is where the decisionmakers enforcing the state policies at issue reside. Nor does the Dumont settlement agreement create a substantial connection to the Eastern District. The settlement agreement, as Plaintiffs have explained before, Opp. to Mot. to Intervene, ECF No. 37 at PageID.1376-1377; Reply in Support of Mot. for Prelim. Inj., ECF No. 42 at PageID.1547, is just a contract between the State of Michigan and the Proposed Intervenors. It did not resolve the legal rights of the *Buck* Plaintiffs.

residence, that is, where he performs his official duties." *O'Neill v. Battisti*, 472 F.2d 789, 791 (6th Cir. 1972). In *Battisti*, the Sixth Circuit held that the Ohio State Supreme Court "resides" for purposes of § 1391(b)(1) "in the place where it performs its official duties, that is, Columbus, the State Capital and the seat of State Government." *Id.* The Court rejected the argument that venue is proper in a different Ohio district, limiting the state defendants to one "official residence." *Id.*

Similarly, in *Northern Kentucky Welfare Rights Association v. Wilkinson*, the Sixth Circuit held that venue for suits against the Governor of Kentucky was "improper in the Western District under the first element of 28 U.S.C. § 1391(b)," because the action could only be brought in the district that constituted the undisputed "official residence of all the defendants . . . the state capital." No. 90-6268, 1991 WL 86267, at *3 (6th Cir. May 24, 1991).

This court has come to the same conclusion. For example, *Jones v. White* held that for "a public official serving in Isabella County . . . 'resides' in that county for purposes of venue over a suit challenging official acts." No. 1:10-CV-414, 2010 WL 2302291, at *1 (W.D. Mich. June 4, 2010). Thus, venue was "proper only in the Eastern District." *Id.*;

see also Hubbard v. Hayman, No. 1:07-CV-379, 2007 WL 1976153, at *1 (W.D. Mich. July 3, 2007) ("Defendant is a public official serving in Genessee County, and he 'resides' in that county for purposes of venue over a suit challenging official acts."); *Palmer v. Caruso*, No. 1:09-CV-977, 2009 WL 4251114, at *4 (W.D. Mich. Nov. 25, 2009) (same); *Page v. Birkett*, No. 1:09-CV-81, 2009 WL 528962, at *1 (W.D. Mich. Feb. 27, 2009) (same).

Federal courts across the country have also interpreted "reside" in § 1391(b)(1) as limited to one official residence. For example, in *Stanton-Negley Drug Company v. Pennsylvania Department of Public Welfare*, the court held that venue was improper because the state officials did not officially reside in the Western District. No. 07-1309, 2008 WL 1881894, *5 (W.D. Pa. Apr. 24, 2008). The court stated that "for purposes of venue a state official's residence is located at the state capitol, even where branch offices of the state official's department are maintained in other parts of the state." *Id.* at *4. (emphasis added) (citation omitted). Similarly, the Southern District of New York has held that the "[r]esidence of state officials for the purpose of venue should be deemed to be [the] official residence." *Procario v. Ambach*, 466 F. Supp. 452, 454

(S.D.N.Y. 1979).

State Defendants cite only one case in response—*Bay County Democratic Party v. Land*, 340 F. Supp. 2d 802, 808 (E.D. Mich. 2004)—claiming it stands for the proposition that some state officials can reside in multiple districts. But *Bay* is inapposite. It recognized the limitation imposed by *Battisti* on § 1391(b)(1) and explained that it was instead analyzing venue under part (b)(2) (as amended in 1990) which permits a plaintiff to "file his complaint in any forum where a substantial part of the events or omissions giving rise to the claim arose." *Id.* at 806.[4] Accordingly, *Bay*'s analysis is not inconsistent with binding Sixth Circuit precedent on this issue; and to the extent there is any confusion caused by *Bay*, a non-binding Eastern District opinion cannot override either binding Sixth Circuit precedent or the clear weight of the case law on this issue.

There is also no question that Nessel and all State Defendants officially reside in the Western District. As the Michigan Constitution

[4] In fact, Proposed Intervenors cite *Bay County* for their analysis under part (b)(2)—so apparently they do not think *Bay County* analyzes venue under part (b)(1) either. Mem. in Support of Mot. to Transfer, ECF No. 22 at PageID.495.

makes clear, "[t]he seat of government shall be at Lansing." Mich. Const. art III, §1. This is also where the State's executive branch is located, which includes the offices of the Governor and the Attorney General.[5]

In fact, all the Plaintiffs, all the State Defendants, and all the Proposed Intervenors reside in the Western District. Accordingly, even setting aside the Federal Defendants, venue would not be proper in the Eastern District and this case cannot, as a matter of law, be transferred there.

C. Plaintiffs' choice of forum is given significant weight and both the private and public interest factors favor the Western District.

Even if it were possible to transfer venue to the Eastern District, both the public and private interest factors would still favor remaining in the Western District.

There is a "strong presumption in favor of the plaintiff's choice of forum," which may only be overcome when the "private and public interest factors *clearly point* towards" holding the trial in another forum.

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[5] While all State Defendants officially reside in the Western District, the State only takes issue with Defendant Nessel's residence, ECF No. 30 at PageID.554. For this reason, Plaintiffs do not individually address each State Defendant here.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) (emphasis added). When a defendant brings a motion to transfer venue under 28 U.S.C. §1404(a), "[t]he burden is on the defendant to persuade the court that transfer is appropriate and should be granted." *Evans Tempcon, Inc. v. Index Indus., Inc.*, 778 F. Supp. 371, 377 (W.D. Mich. 1990). Indeed, the plaintiff's choice of forum is to be given "paramount consideration." *Brown Co. of Waverly, LLC v. Superior Roll Forming, Inc.*, No. 1:09-CV-802, 2009 WL 4251093, at *2 (W.D. Mich. Nov. 25, 2009) (citation omitted). And that choice "should rarely be disturbed." *Reese v. CNH Am. LLC*, 574 F.3d 315, 320 (6th Cir. 2009) (citation omitted).

1. Private Interest Factors

The private interests include "(1) the convenience to the parties; (2) the convenience of witnesses; (3) the relative ease of access to sources of proof; (4) the availability of process to compel attendance of unwilling witnesses; (5) the cost of obtaining willing witnesses; (6) the practical problems indicating where the case can be tried more expeditiously and inexpensively; and (7) the interests of justice." *Steelcase, Inc. v. Smart Techs.*, Inc., 336 F. Supp. 2d 714, 719-20 (W.D. Mich. 2004) (citation omitted). The private interest factors weigh strongly in favor of venue in

the Western District.

First, the Western District is the most convenient forum for the parties. A plaintiff's home forum enjoys a presumption of convenience. *Cincinnati Ins. Co. v. O'Leary Paint Co.,* 676 F. Supp. 2d 623, 632 (W.D. Mich. 2009) ("When the home forum has been chosen, it is reasonable to assume that this choice is convenient.") (quoting *Piper Aircraft Co.*, 454 U.S. at 255-56). In this case, the Western District is not only Plaintiffs' home forum, but it is also the home forum for all parties except the Federal Defendants. Additionally, in order to overrule this presumption, "the balance of convenience must be strongly in favor of the moving party." *A & D Tech., Inc. v. C.E.E., LLC*, No. 09-11662, 2009 WL 2448551, at *10 (E.D. Mich. Aug. 10, 2009). The Defendants fail to meet this standard.

Proposed Intervenors argue that the Eastern District is convenient because Plaintiffs intervened in *Dumont*. However, intervening in a case does not imply convenience. Rather, Plaintiffs chose to intervene in an *inconvenient* forum—the Eastern District—in order to protect their rights.

Second, the Western District is the more convenient venue for

witnesses. Should this case go through discovery, the vast majority of witnesses reside in the Western District. St. Vincent's employees and all individual plaintiffs reside in or around Lansing, and the State certainly cannot argue that it is inconvenient to litigate a case in the district that encompasses the State capital. Indeed, all but one of State Defendants' affidavits submitted along with their preliminary injunction motion response were executed in Ingham County.

Third, ease of access to sources of proof favors the Western District. Developments relevant to Plaintiffs' claims warrant fact discovery beyond the discovery that occurred in *Dumont*. This discovery will come primarily from the State Defendants, and is located primarily in the Western District. And the fact that prior litigation occurred in the Eastern District does not mean that any documents relevant to this matter are there—none of the documents obtained in discovery were filed with the court. As far as Plaintiffs are aware, the documents at issue in this case either reside on digital sources equally available in any district or reside primarily in the Western District.

Fourth, to the extent that Plaintiffs will seek to call additional witnesses who may be unwilling to attend, they are likely to reside in the

Western District. *Fifth*, the cost of obtaining testimony from willing witnesses favors the Western District for the reasons discussed above: St. Vincent and the State Defendants are both based in the Western District. Defendants make no argument in favor of the Eastern District on these factors, but suggest that are not relevant because this case is not "witness-intensive." ECF No. 30 at PageID.555. This argument simply misses the point: to the extent that either party will be putting on evidence or calling witnesses, the most convenient district for this case is the Western District, meaning that these factors cut against transfer.

Sixth, there is no reason why this case could be tried more expeditiously or inexpensively in the Eastern District. The State Defendants argue that this case should be transferred to the Eastern District given Judge Borman's familiarity with the *Dumont* litigation. But even if this case were transferred to the Eastern District, it could be assigned to any judge in the district. Judge Borman retained jurisdiction only over the settlement agreement's enforcement as between the Proposed Intervenors and the State Defendants, and neither State Defendants nor Proposed Intervenors have even argued that St. Vincent could seek to enforce this agreement as non-parties to it. Moreover, the

case which State Defendants have designated as a "related case," *see* Defs. Notice of Related Case, ECF No. 38 at PageID.1457, is currently pending in front of Judge Hood, not Judge Borman.[6]

Even assuming this case were before Judge Borman, his familiarity is limited to the procedural aspects of the *Dumont* litigation. The only pleading Judge Borman addressed on its merits was a motion to dismiss, which focused on plaintiffs' standing. And the only discovery-related documents filed with the court were preliminary witness lists. This hardly constitutes familiarity with the issues raised in *this* case, many of which are different from those addressed in *Dumont*.

This Court is likely already at least as familiar with the underlying legal issues and the corresponding facts in *Buck v. Gordon* given the completed preliminary injunction briefing filed in this case—something that was never placed before Judge Borman.

Finally, the interests of justice are served by litigating this matter in

[6] What is more, Plaintiffs in that case have filed a motion to transfer venue to the Western District, arguing that as a matter of law the case must be in this district and that the public and private interest factors favor adjudication here. Motion to Change Venue, *Catholic Charities West Michigan v. Michigan Dep't of Health and Human Servs*, No. 2:19-cv-11661 (E.D. Mich. June 19, 2019), ECF No. 9.

the Western District; this is a dispute centered around a government and an agency both based here, the facts underlying this dispute took place here, and the judgment of this court would be enforced here. Transfer would undermine the interests of justice by further delaying Plaintiffs' urgent motion for preliminary injunction, subjecting Plaintiffs, their employees, and the families and children they serve to further uncertainty and confusion. Transferring this case to the Eastern District would disserve resolution of a dispute that has occurred locally in Plaintiffs' chosen form.

In sum, the private interest factors weigh in favor of maintaining this case in the Western District.

2. Public Interest Factors

The public interests considered by this Court include "(i) the enforceability of the judgment; (ii) practical considerations affecting trial management; (iii) docket congestion; (iv) the local interest in deciding local controversies at home; (v) the public policies of the fora; and (vi) the familiarity of the trial judge with the applicable state law." *Steelcase*, 336 F. Supp. 2d at 720. The public interest factors weigh strongly in favor of venue in the Western District.

First, the enforceability of the judgment favors this district. As explained above, the parties are primarily based in the Western District, making enforcement of this Court's order easy to accomplish in Plaintiffs' home forum and where State Defendants reside. The State Defendants, however, argue that relief would require invalidating a consent decree entered by Judge Borman in the Eastern District. As Plaintiffs have explained at length, ECF No. 37 at PageID.1376-1377, ECF No. 42 at PageID.1547, the *Dumont* settlement agreement was not a consent decree. It was instead a private contract between the parties. What is more, the agreement is not binding to the extent it is "prohibited by law or court order." Order on Stipulation of Dismissal at PageID.1445, *Dumont v. Gordon*, No. 17cv13080, (E.D. Mich. Mar. 22, 2019), ECF No. 83. Thus, should this Court enter an order inconsistent with that agreement, the agreement simply would not apply in that circumstance. There is thus no concern that this Court's jurisdiction over the *Buck* case would raise any comity concerns.

Second, the practical considerations affecting trial management weigh in favor of venue in the Western District. Plaintiffs seek injunctive relief that would be enforced in this jurisdiction. Obtaining injunctive relief

and enforcing that relief would be most efficient in the State Defendants' and Plaintiffs' home forum.

State Defendants go so far as to suggest Plaintiffs are "forum shopping." ECF No. 30 at PageID.557-558. How a Plaintiff forum shops by filing in her home district, against defendants residing in the same district, is unexplained. State Defendants are seeking to move this case to a jurisdiction where none of the parties reside based on a private contract to which Plaintiffs are not a party and which does not bind or even purport to affect their legal right to bring a lawsuit in this jurisdiction.

The State Defendants also claim that Plaintiffs' choice of forum is deserving of less weight because Plaintiffs are seeking declaratory relief. This is wrong as a matter of fact and law. The case law they cite addresses only instances in which the roles of the plaintiffs and defendants have been reversed due to preemptive action by someone who would be a "natural" defendant. *See O'Leary Paint*, 676 F. Supp. 2d at 631. Here, Plaintiffs are the "natural plaintiffs," they are not preempting a lawsuit that the State was likely to file, nor have they sought a declaratory judgment in an inconvenient forum. Plaintiffs instead are seeking

affirmative, injunctive relief in the district where the Defendants' actions are going to affect Plaintiffs' rights. This is neither forum shopping nor preemptive litigation.

Third, docket congestion is not only conceded by Defendants, but also weighs in favor of the keeping this case in the Western District. While both courts are overloaded, the Western District outperforms the Eastern District on multiple important measures and has a lower total number of filings per active judgeship than the Eastern District. Federal Court Management Statistics—Profiles, United States District Courts (Mar. 31, 2019), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2019.pdf.

Fourth, the local interest in deciding this case in Plaintiffs' and State Defendants' home forum certainly favors the Western District.

Fifth and *sixth*, the public policies of the fora and the familiarity of the trial judge with applicable state law do not favor one district over the other, and certainly do not favor transfer. What is more, should the State want to set policy on this issue, that policy would be set in *Lansing*, which is in the Western District.

Thus, should this Court consider the public and private interest

factors at play in this case, there is no question that the Western District is the proper venue for this action and that transfer to the Eastern District should be denied.

II. Defendants' Motion to Dismiss should be denied.

A. Defendant Nessel is a proper party and her actions are relevant.

State Defendants argue that Defendant Nessel should be dismissed because she is immune and her conduct is irrelevant. Their arguments fail.

First, Michigan argues that Defendant Nessel is not responsible for the State's change in policy. ECF No. 30 at PageID.560-561. But the Complaint chronicles at length the policy changes which occurred on Attorney General Nessel's watch. Complaint, ECF No. 1 at PageID.89-105. It also includes allegations that, prior to Defendant Nessel's election, other state officials demonstrated evidence of religious targeting and hostility in violation of the Free Exercise Clause and then-existing state policies. ECF No. 1 at PageID.81-89. Such actions are relevant to the question of religious targeting and shed light on the chain of events.[7] And

[7] *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719 (2018) (considering history of commission's decision and

the existence of additional religious targeting by other state officials does not preclude targeting by Defendant Nessel.

For similar reasons, Defendant Nessel's statements prior to assuming office are relevant. The State relies upon *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), but *Trump* was an Establishment Clause case that turned largely on deference to the executive branch in the area of national security. *Id.* Plaintiffs are bringing Free Exercise claims, and courts deciding Free Exercise claims commonly look to prior statements and actions to determine whether religious targeting occurred.[8] Ultimately, this is not an argument for dismissal, but an argument about the admissibility of evidence, which is premature at this stage.

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evidence of how other complaints were handled); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) ("[W]e must look at available evidence that sheds light on the law's object, including . . . 'historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the [act's] legislative or administrative history.") (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993)).

[8] *See, e.g., Masterpiece*, 138 S. Ct. 1719 (2018); *Ward v. Polite*, 667 F.3d 727, 737 (6th Cir. 2012) (holding that "evidence of religious-speech discrimination" from decisionmakers was relevant to Free Exercise case); *Shrum v. City of Coweta,* 449 F.3d 1132, 1145 (10th Cir. 2006) ("[p]roof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral.").

Michigan also claims Defendant Nessel is immune from suit. First, qualified immunity only applies to damages claims, so Nessel is an appropriate defendant for Plaintiffs' claims for injunctive relief. *Flagner v. Wilkinson*, 241 F.3d 475, 483 (6th Cir. 2001). Second, prosecutorial immunity only applies when the actions taken by the Attorney General are limited to those of an *advocate*—for example, preparing and making legal arguments in court. *Skinner v. Govorchin*, 463 F.3d 518, 525 (6th Cir. 2006) ("The analytical key to prosecutorial immunity . . . is advocacy[.]"). "If the challenged actions of the prosecutor were not performed in his role as advocate . . . then only '[q]ualified immunity' applies." *Id.* By contrast, civil suits against state attorneys general for unconstitutional enforcement actions have been permitted since *Ex Parte Young*. 209 U.S. 123, 161 (1908) (state attorney general was "proper party to a suit" challenging constitutionality of state law).

As Attorney General, Defendant Nessel has the responsibility not only to defend cases, but also to enforce the law, as well as a wide variety of duties "exercised at common law," *Attorney Gen. v. Michigan Pub. Serv. Comm'n*, 625 N.W.2d 16, 23 (2000). Here, Plaintiffs alleged that "Defendant Nessel has been instrumental in framing MDHHS's current

policy regarding the enforcement of MDHHS contracts and state law governing religious child welfare providers." ECF No. 1 at PageID.15. And they have alleged that Defendant Nessel's new interpretation of federal and state law led to a new policy at DHHS. *Id.* at PageID.57, 91. The complaint also alleges that Nessel "directed DHHS" to adopt a new policy which penalizes St. Vincent. *Id.* at PageID.99. By her own admission, Nessel played a crucial role in changing the State's position regarding its interpretation of a State law and its promulgation of new enforcement requirements. *Id.* at PageID.91, 94-100. As her office's announcement of the settlement explains, the Attorney General was the one who recommended resolving the case on what she deemed terms "consistent with the law and existing agency contracts[.]" *Id.* at PageID.91; *see also* Exhibit, ECF No. 37-2 at PageID.1424 (full text of announcement). Given these allegations, several of which rely upon or are confirmed by the Attorney General's own public statements, Plaintiffs have adequately pled a claim against Defendant Nessel based upon her role in shaping DHHS policy and her actions to promote and ensure enforcement of the new policy. *See id.* (directing where and how to file complaints). Nessel is a proper defendant.

B. Res judicata does not apply here.

Michigan claims that this action is barred by res judicata. Not so. State Defendants' arguments rest largely on the notion that the settlement agreement in *Dumont* was a consent decree. Plaintiffs have explained at length why this argument is incorrect. *See* ECF No. 37 at PageID.1376-1378; ECF No. 42 at PageID.1547-1550. Briefly, the settlement agreement does not claim to be a consent decree, was not incorporated into any order of the court, has not been called a consent decree by the State (outside its filings in this Court), and is not even called a consent decree by Proposed Interveners.[9]

But there is a more fundamental problem with State Defendants' arguments: they asserted no cross-claims against St. Vincent, the Bucks, or Ms. Flore in the *Dumont* case, and the *Buck* Plaintiffs asserted no claims against State Defendants. In fact, the State took the position in *Dumont* that state law and the Constitution required it to accommodate

[9] Since the Federal Defendants were not party to *Dumont v. Gordon*, Plaintiffs' claims against the Federal Defendants cannot be barred (nor do the Federal Defendants argue that they are). The remainder of this section will discuss only the claims brought against the State Defendants.

St. Vincent's religious exercise. In short, the *Dumont* court adjudicated no claims by or against the *Buck* Plaintiffs here.

The State correctly notes that res judicata applies when all four elements are met: "(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 v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995). But none of those elements are met here. Even if they were, the State's argument would still fail, because Plaintiffs' claims are premised upon developments that occurred after the pleadings in *Dumont* and may therefore be the subject of a new action.

1. *Res judicata does not apply because Plaintiffs' claims arose after the* Dumont *pleadings.*

The Supreme Court has recognized that the "development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305-06 (2016), *as revised* (June 27, 2016); *see also* Restatement (Second) of Judgments § 24, Comment *f* (1980) ("Material operative facts occurring after the decision of an action with

respect to the same subject matter may . . . comprise a transaction which may be made the basis of a second action not precluded by the first."). Here, the development of new material facts that post-date *Dumont* has given rise to new legal, factual, and evidentiary questions. Plaintiffs are challenging a new state policy and new state enforcement actions which occurred after the *Dumont* case was filed. See ECF No. 1 at PageID.3, 35-37. They comprise a new transaction, so Plaintiffs' claims are not barred.

Events occurring after the answers were filed in *Dumont* were not required to be asserted in *Dumont*. It is hornbook law that "[A]n after-acquired claim, even if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, need not be pleaded supplementally; the after-acquired claim is not considered a compulsory counterclaim under Rule 13(a) and a failure to interpose it will not bar its assertion in a later suit." 6 Fed. Prac. & Proc. Civ. § 1428 (3d ed.); *see also Kane*, 71 F.3d at 560 ("Simply put, the Kanes could not have asserted a claim that they did not have at the time."). Since the State's new policy and its threat to terminate its relationship with Plaintiffs occurred after the answer was filed in *Dumont*, claims stemming from those actions are after-acquired claims.

This rule looks at the case at the time the answers are filed: "By definition, an after-acquired counterclaim does not exist at the time of serving of the original answer and counterclaim. Therefore, an after-acquired claim is not considered a compulsory counterclaim under Rule 13(a), and failure to introduce it will not bar its assertion in a later lawsuit." *Marais v. JPMorgan Chase Bank, N.A.*, 676 F. App'x 509, 512 (6th Cir. 2017) (quoting *Davenport v. Richfood*, No. 3:07-CV-595, 2008 U.S. Dist. LEXIS 51297, at *15 (E.D. Va., June 13, 2008); *see also Bluegrass Hosiery, Inc. v. Speizman Indus., Inc.*, 214 F.3d 770, 772 (6th Cir. 2000) ("Even though the claims at issue in this case arose out of the same transaction, these claims were not compulsory counterclaims because they were not claims that Bluegrass 'had' at the time it was required to file its responsive pleading.")

At the time of that answer, the state had not taken enforcement action against St. Vincent, and represented that it could not. The Intervenor-Defendants' (Plaintiffs here) answer was filed later the same day. Therefore, Plaintiffs did not "acquire" the claims against State Defendants until later, when Michigan abandoned this policy and announced its intent to penalize religious child welfare agencies. State

Defendants now argue that their policy has been the same all along, but Plaintiffs were entitled to rely upon the State's public actions and representations to the court, not on confidential internal investigations or the private opinions of state officials. The claims raised here were not possessed by Plaintiffs at the time the answers were filed in *Dumont*, therefore they cannot be barred.

This fact disposes of State Defendants' res judicata argument. But Plaintiffs need not rest on after-acquired claims alone: none of the four elements of res judicata are met here.

2. There was no final decision on the merits of Plaintiffs' claims.

No court has entered final judgments on any of the claims brought by Plaintiffs in this case. First, the State argues that *Dumont* ended in a consent decree, a final decision on the merits. They are wrong. *See* ECF No. 37 at PageID.1376-1378; ECF No. 42 at PageID.1547-1550. Second, to the extent Michigan rests on Judge Borman's dismissal of the *Dumont* case with prejudice, that is a final judgment only on the claims of the Dumonts and Busk-Suttons; the *Buck* Plaintiffs did not bring any claims in that case, nor were any claims asserted against them. The lack of any cross-claims is fatal to Michigan's arguments.

Where former co-defendants brought no cross-claims against each other, res judicata does not apply. In *United States v. Berman*, the Sixth Circuit held that res judicata did not bar a case between two former co-defendants: "Res judicata is also inapplicable as there was no adjudication between the present parties in the state trial since both the government and the Bermans were defendants in the state action and neither filed a cross-claim against the other." *United States v. Berman*, 884 F.2d 916, 923 & n.9 (6th Cir. 1989) (citing *American Triticale, Inc. v. Nytco Serv., Inc.,* 664 F.2d 1136, 1147 (9th Cir. 1981)). In *American Triticale,* the Ninth Circuit held that "although American and Nytco were parties to the Oklahoma suit, they were both defendants to the action; . . . neither American nor Nytco filed a cross-claim against the other." 664 F.2d at 1147. As a result, "there was no adjudication of a cause of action between those parties. Res judicata, therefore, is inapplicable to the present action because there was no adjudication between the same parties on any cause of action let alone the same cause of action." *Id.* Similarly, in *Peterson v. Watt*, the Ninth Circuit rejected application of res judicata between Nevada and the United States, who had been co-defendants in the previous case: "The scope of [the prior] action was

limited to determination of the Petersons' claim and did not include any claim, or adversity of any kind, between Nevada and the United States." 666 F.2d 361, 363 (9th Cir. 1982). Because State Defendants and *Buck* Plaintiffs asserted no cross-claims against each other in *Dumont*, there was no adjudication of a cause of action between those parties, and res judicata cannot apply.

State Defendants rely on *Rafferty v. City of Youngstown*, 54 F.3d 278 (6th Cir. 1995), but it is inapplicable. The crux of that case was a consent decree, which the defendant-intervenors initially appealed, then dropped their appeal. *Rafferty*, 54 F.3d at 280. They later participated in settlement negotiations and "acquiesced and approved of the stipulated settlement." *Id.* at 283. *Rafferty* has never been applied outside the consent decree context.[10] The *Dumont* settlement was not a consent decree. Nor did the *Dumont* intervenors participate in settlement negotiations, a fact the State admits, much less acquiesce to the settlement. The settlement agreement purported only to resolve the

[10] The only case citing *Rafferty* outside the consent decree context cites it merely for the standard of review. *See Harris v. Am. Postal Workers Union*, 198 F.3d 245, 1999 WL 993882, at *2 (6th Cir. 1999) (table opinion) (citing *Rafferty*).

ACLU's constitutional claims brought against the State in *Dumont*—these are obviously different from, and certainly cannot preclude, the claims brought here by Plaintiffs. *Rafferty* does not apply.[11]

3. The partial privity of parties is irrelevant.

While Plaintiffs and State Defendants (other than Defendant Nessel) were also parties to the *Dumont* case, that is irrelevant. *Dumont* "did not include any claim, or adversity of any kind, between" the co-defendants, and without the claims asserted between the parties, res judicata does not apply. *Peterson,* 666 F.2d at 363.

4. The claims here were not litigated in Dumont *and were not required to be.*

The claims in this case were not adjudicated in *Dumont*. That case involved an Establishment Clause and Equal Protection Clause challenge to the State's practice of accommodating religious child welfare agencies. Complaint, *Dumont v. Gordon*, 17cv13080, PageID.19 (E.D. Mich. Sept. 20, 2017), ECF No. 1. This case primarily involves Free

[11] Nor does *Tu Nguyen v. Bank of Am., N.A.*, 516 F. App'x 332, 335 (5th Cir. 2013), which involves a plaintiff who stipulated to dismissal of his own claims with prejudice and later filed a nearly-identical suit. Plaintiffs here (defendant-intervenors in *Dumont*) made no claims and dismissed no claims in *Dumont*.

Exercise and Free Speech claims against the State's policy targeting and discriminating against religious agencies and attempting to compel and place unconstitutional conditions on their speech. ECF No. 1 at PageID.42-50.[12] These different claims raise different legal issues and rest on different facts; merely stating they arise from the "First and Fourteenth Amendments" is much too vague. ECF No. 30 PageID.567. Nor are the claims are limited to the same "contract provision," *see id.*; Plaintiffs challenge a new state policy and new state enforcement actions, neither of which existed until the *Dumont* litigation ended. And St. Vincent seeks to be free from religious discrimination or speech compulsion in both its current contracts as well as its ability to receive future contracts, like the new adoption contract which would ordinarily begin October 1.

Nor were Plaintiffs' claims required to be brought in the prior action. In making such determinations, courts generally look to whether unasserted claims were compulsory counterclaims under Fed. R. Civ. P.

[12] For purposes of this discussion, Plaintiffs are not including the RFRA claims, which are asserted only against Federal Defendants. State Defendants have not claimed that res judicata exists against the Federal Defendants.

13(a). *See, e.g., Kane*, 71 F.3d at 561 ("Whether the indemnity claim is barred turns on Fed. R. Civ. P. 13"); *Bauman v. Bank of Am., N.A.*, 808 F.3d 1097, 1101-02 (6th Cir. 2015) (claims were not barred where they were not compulsory in prior action). Since no claims were brought against Plaintiffs, they had no compulsory counterclaims. *See, e.g., United States v. Confederate Acres Sanitary Sewage & Drainage Sys., Inc.*, 935 F.2d 796, 799 (6th Cir. 1991) ("Under Federal Rule of Civil Procedure 13(g), cross-claims against co-defendants are permissive. . . . The district court, therefore, could not compel Confederate Acres to litigate its potential 'taking' claims before the district court.") (citing *Answering Serv., Inc. v. Egan*, 728 F.2d 1500, 1503 (D.C. Cir. 1984)); *see also Egan,* 728 F.2d at 1503 ("the compulsory counterclaim rule . . . makes a claim compulsory only when it is asserted against an 'opposing party.'" (citation omitted)). Because State Defendants were not opposing parties, the Plaintiffs here were under no obligation to bring claims against them.

This is why the cases Michigan cites are inapplicable. In *Kane*, 71 F.3d at 558, the plaintiff had been a third-party defendant in a prior action. In that action, another Defendant (Magna) "filed a third-party

complaint," and the plaintiffs in that case "then amended their complaint to assert claims against [third-party defendant] directly." Final judgment was rendered against the third-party defendant. *Id.* A later suit by the third-party defendant against its former co-defendant was barred because the claims were compulsory counterclaims in the first action. *Id.* at 563. Here, no one in *Dumont* asserted claims against St. Vincent, the Bucks, or Ms. Flore. Accordingly, they were under no obligation to assert counterclaims and *Kane* does not apply. The State also asserts, without citation, that Intervenors should have objected to the settlement or appealed. If the settlement had been a consent decree, a fairness hearing would have been warranted and an appeal might have followed. *See Pedreira v. Sunrise Children's Servs., Inc.*, 802 F.3d 865 (6th Cir. 2015) (remanding consent decree for fairness hearing). But the court merely dismissed the case without incorporating the agreement into its order. The court did not adjudicate the rights of St. Vincent, the Bucks, or Ms. Flore, so they are free to bring their claims here. *See Peterson*, 666 F.2d at 363 ("Thus, if such a claim is neither asserted nor litigated, the parties cannot be barred from asserting it in a later action by principles of res judicata, waiver, or estoppel.").

Michigan makes much of the fact that, when intervening in *Dumont*, Plaintiffs said they would "appeal a settlement." On this point, Plaintiffs confess one error: that of imprecision. Had the settlement taken the form of a consent decree, they could have exercised their rights to oppose it, but the settlement wasn't a consent decree. The State Defendants and *Dumont* Plaintiffs chose to enter into a private contract rather than fully litigate their dispute or enter into a consent decree that would have raised the possibility of appeal. That choice is not binding on the Plaintiffs here.

5. The causes of action are not the same.

Plaintiffs are asserting claims that were not asserted in *Dumont* and which arose after *Dumont*. Michigan makes much of the fact that Plaintiffs discussed the *Dumont* litigation in their complaint and introduced some evidence adduced there. But "[a] partial overlap in issues of law and fact does not compel a finding that two claims are logically related" for purposes of preclusion. *Bauman*, 808 F.3d at 1101. Here, Plaintiffs are making claims that were not made in *Dumont*. Those claims do not arise out of the same transaction or occurrence—the *Dumont* plaintiffs sued over Michigan's decision to protect religious child

welfare providers; the *Buck* Plaintiffs sued over Michigan's newfound policy of penalizing religious child welfare providers and its new enforcement against them. These claims involve "different legal, factual, and evidentiary questions." *Id.*[13] None of Plaintiffs' claims are barred by res judicata.

C. Plaintiffs are not asserting RFRA claims nor damages claims against State Defendants.

Michigan moves to dismiss any claims asserted against it under RFRA, 42 U.S.C. 2000bb. Plaintiffs are only asserting RFRA claims against the Federal Defendants. RFRA may be relevant to assess the State's professed fear of penalty under federal law, but Plaintiffs do not assert this claim directly against the State.

Plaintiffs also do not assert any damages claims against State Defendants. They seek only declaratory and injunctive relief against

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[13] For the same reason, *Westwood Chemical Co. v. Kulick* is inapplicable; there, the parties at issue in the appeal had litigated and settled their claims against each other in a prior action. 656 F.2d 1224, 1225-27 (6th Cir. 1981). Other cases upon which Michigan relies are inapplicable since they deal with determinations of law regarding parties and order of proceedings which are particular to bankruptcy litigation. *See Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 481 (6th Cir. 1992) (turning on specific issues of bankruptcy procedure); *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 568 (6th Cir. 2008) (same).

State Defendants and nominal damages against the Federal Defendants. ECF No. 1 at PageID.9, 52.

D. The Court has subject matter jurisdiction.

1. *Defendants do not dispute that St. Vincent has standing in its own right.*

State Defendants do not challenge St. Vincent's standing to sue in its own right. State Defendants make the irrelevant argument that Plaintiffs cannot assert the rights of foster children. ECF No. 30 at PageID.576-577. Plaintiffs are not suing over the Free Exercise and Free Speech rights of foster children; they are fighting to continue their religious exercise of serving them. Moreover, the negative impact of the State's actions on foster and adoptive children is not a claim, but an issue of fact relevant to Plaintiffs' claims and State Defendants' defenses. *See* Mem. in Support of Mot. for Prelim. Inj., ECF No. 6; State Def. Resp. to Prelim. Inj. Mot., ECF No. 34 at PageID.959.

2. *The Individual Plaintiffs satisfy the requirements for Article III standing.*

The Bucks and Ms. Flore (collectively, Individual Plaintiffs) have alleged facts sufficient to demonstrate that their injuries 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).

Defendants make several arguments muddling the requirements and (in some cases) attacking Plaintiffs' case on the merits rather than challenging a necessary element of standing. The Supreme Court has cautioned that "although federal standing often turns on the nature and source of the claim asserted, it in no way depends on the merits of the [claim]." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 624 (1989) (internal quotation omitted). Only a failure to show actual injury, causation, or redressability will suffice to disprove standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

a. The Individual Plaintiffs have demonstrated actual or imminent injury.

To demonstrate the invasion of a "legally protected interest," *Lujan*, 504 U.S. at 560 (1992), plaintiffs need only allege "threatened or actual injury resulting from the putatively illegal action." *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 961 (6th Cir. 2009) (citation omitted). The standard for a legally cognizable interest is a low one, *see, e.g.*, *Lujan*, 504 U.S. at 562-63 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for

purpose of standing."), and the First Amendment right to the free exercise of religion easily qualifies. *See, e.g.*, *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1092-93 (8th Cir. 2011) ("TIZA"). In *TIZA*, the Eighth Circuit found that parents of children in a charter school sued by the ACLU under the Establishment Clause over its alleged "promot[ion] or prefer[ence] [for] the religion of Islam" had "identified a legally cognizable right" (and therefore an actual injury) "because they contend their children's First Amendment right to the free exercise of religion would be infringed if [the school] discontinued the practices challenged by the ACLU." *Id.* at 1091-92. This, the court found, was more than sufficient to constitute an injury in fact. *Id.* at 1092. Individual Plaintiffs have alleged that their exercise of religion will be infringed if the State forces St. Vincent to discontinue its work.

If the State's actions cause St. Vincent to close its adoption and foster program, Melissa and Chad Buck would lose a "crucial source of support," as St. Vincent is "the only agency with institutional knowledge of the Buck's family situation, the challenges faced by their special-needs children, and the difficult dynamics with their birth parents." ECF No. 1 at PageID.2-3. Without St. Vincent's expertise and specialized knowledge

"the Bucks are likely to miss out on the opportunity to foster and adopt a sibling of their five adopted children were he or she to enter the State's care," as placement decisions are made quickly and other agencies would not be aware of the connection. *Id.*; *see also* Buck Declaration, ECF No. 6-2 at PageID.264-266.

The Bucks will also lose access to the "ongoing services" provided by St. Vincent, such as attendance at a monthly parent support group that provides critical resources and training to help in the rearing of their adopted children with special needs. ECF No. 1 at PageID.27. "The Bucks also have a religious mission to serve other foster families, and they do so by working with St. Vincent to support foster and adoptive parents, including through a foster parent support group that St. Vincent facilitates, which also enables them to help support and recruit more foster parents." *Id.* at PageID.7. This group "is the only foster parent support group offered in the tri-county area," meaning that the Bucks would have no other way to exercise their religious mission were St. Vincent to close. *Id.*

Likewise, Shamber Flore will lose the opportunity to "exercise[] her faith by encouraging and mentoring foster children and sharing her own

story of overcoming hardship and abuse to find love and joy," through her partnership with St. Vincent. ECF No. 1 at PageID.3, 7. Without St. Vincent, Shamber would not be able to continue in her role as mentor, thus burdening her own religious ministry: "[Shamber] relies upon the relationships and trust she has built with St. Vincent to serve other families working with St. Vincent." *Id.* at PageID.7. These are not "generalized grievance[s] against the mere existence of the foster care and adoption contracts," as the Defendants allege. ECF No. 30 at PageID.574. They are particular injuries that affect the Bucks and Shamber "in a concrete and personal way" and are therefore sufficient to establish standing. *Lujan*, 504 U.S. at 581.

Defendants' argument that the Individual Plaintiffs are not parties to any contract between the State and St. Vincent is irrelevant. The Bucks and Ms. Flore are not asserting contract claims against the State Defendants; they are alleging constitutional violations. A plaintiff suffering actual injury need not demonstrate privity of contract to prove standing; "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded[.]" *Lujan*, 504 U.S. at 560-61. In this case, third-party beneficiary status is irrelevant.

The Individual Plaintiffs' claims are based upon the injuries that they—like dozens of other foster and adoptive families—will suffer if the State's unconstitutional conduct continues. Because these claims allege a concrete infringement of a legally protected right, the Individual Plaintiffs have alleged actual injury.

b. The Individual Plaintiffs' injuries are fairly traceable to the State's conduct.

The Individual Plaintiffs' injuries are "fairly traceable" *Lujan*, 504 U.S. at 560 (citation omitted), to State Defendants' conduct because those injuries are a direct result of the State's actions in seeking to prevent St. Vincent from providing adoption and foster care services. The State's decision to end its relationship with St. Vincent is the but-for cause of those injuries. St. Vincent cannot continue to offer foster care and adoption services for foster children if it cannot work with the State.

Defendants do not challenge this premise, but instead argue that the Plaintiffs' actions were "unreasonable" and that their claims have "no merit." ECF No. 30 at PageID.574-575. This hyperbole is not an argument on lack of jurisdiction but an attack on the merits; the question this Court must ask is only whether the minimum requirements of

Article III have been met, and here they have been. *See Ariz. State Legislature*, 135 S. Ct. at 2663.

State Defendants also argue that "the existence of over 90 other [adoption agencies] in Michigan" precludes any injury to the Bucks or Ms. Flore. ECF No. 30 at PageID.574-575. This ignores the fact that Plaintiffs have an existing relationship with St. Vincent. They are not merely selecting one agency from the list; they rely upon the "institutional knowledge" and "ongoing support" that St. Vincent provides. ECF No. 1 at PageID.2-3, 21. Without those relationships, their families will miss out on support and services they need. *Id*. at 21. And St. Vincent's deep knowledge of Ms. Flore's experiences and longstanding relationship allows her to connect with children with similar backgrounds and build trust based upon their mutual relationships with St. Vincent. ECF No. 1 at PageID.7, 27. Individual Plaintiffs' injuries would be easily and fairly traceable to State action resulting in the end of such support and services.

c. A favorable ruling would redress the Individual Plaintiffs' injuries.

Individual Plaintiffs can also receive "substantial and meaningful relief" by a favorable decision of the court. *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 715 (6th Cir. 2015) (citation omitted). A plaintiff "need not

show that a favorable decision will relieve his *every* injury," only that it will provide *some* relief. *Id*. In determining redressability, "[t]he relevant standard is likelihood—whether it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.* (citation omitted).

Here, Individual Plaintiffs have alleged concrete injuries that will result if St. Vincent is excluded from the child welfare system and have sought an injunction allowing St. Vincent to continue to operate. ECF No. 1 at PageID.51. If granted, this injunction would protect the Bucks and Flores from losing the support they receive from St. Vincent and from losing the opportunity to continue their religious exercise by working with St. Vincent.

Defendants do not argue that this court is unable to grant the requested relief. Instead, they contend that the relief sought is speculative because the Plaintiffs may be able to alleviate their injuries by seeking out and using other adoptive services. ECF No. 30 at PageID.576. But, as discussed above, the Plaintiffs would lose the relationships, support, and institutional knowledge they rely upon from St. Vincent, as well as the opportunities for engaging in the religious

exercise of serving others, opportunities made possible by their long relationships with St. Vincent. In short, Plaintiffs have shown that a favorable ruling will redress their injuries—that is more than sufficient here.

CONCLUSION

State Defendants' Motion should be denied for all the reasons described above.

Dated: June 24, 2019

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 10,151 words. The word count was generated using Microsoft Word 2019.

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