

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

**BRIEF FOR FEDERAL DEFENDANTS IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

I. Statutory and Regulatory Background..... 3

II. The *Dumont* Litigation and Settlement Agreement 5

III. Plaintiffs and their Alleged Injuries 8

IV. Plaintiffs’ Claims Against the Federal Defendants and Injunctive Relief Sought..... 9

STANDARD OF REVIEW 10

ARGUMENT 11

I. Plaintiffs Have Not Established That They Are Likely To Succeed on the Merits
Against the Federal Defendants. 12

A. Plaintiffs’ Claims Against the Federal Defendants Are Not Ripe. 12

B. Plaintiffs Lack Standing to Sue the Federal Defendants. 18

1. Plaintiffs’ Asserted Injuries Are Not Traceable to the Federal
Defendants. 20

2. Preliminary Injunctive Relief Against the Federal Defendants
Would Not Redress Plaintiffs’ Alleged Injuries. 25

II. Plaintiffs Do Not Satisfy the Other Elements of the Preliminary Injunction Analysis. ... 28

CONCLUSION..... 29

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Abney v. Amgen, Inc.</i> , 443 F.3d 540 (6th Cir. 2006)	28
<i>Adult Video Association v. U.S. Department of Justice</i> , 71 F.3d 563 (6th Cir. 1995)	15
<i>Allen v. Wright</i> , 468 U.S. 737 (1984), <i>abrogated on other grounds</i> , <i>Lexmark Int’l Inc. v. Static Control Components, Inc.</i> , 572 U.S. 118 (2014)	20, 25
<i>Ammex, Inc. v. United States</i> , 367 F.3d 530 (6th Cir. 2004)	21
<i>Anderson v. Charter Twp. of Ypsilanti</i> , 266 F.3d 487 (6th Cir. 2001)	20
<i>Berry v. Schmitt</i> , 688 F.3d 290 (6th Cir. 2012)	17
<i>Bigelow v. Mich. Dep’t of Nat. Res.</i> , 970 F.2d 154 (6th Cir. 1992)	12
<i>Binno v. Am Bar Ass’n</i> , 826 F.3d 338 (6th Cir. 2016)	27
<i>Cooley v. Granholm</i> , 291 F.3d 880 (6th Cir. 2002)	12, 18
<i>Coyne ex rel. Ohio v. Am. Tobacco Co.</i> , 183 F.3d 488 (6th Cir.1999)	25
<i>Crawford v. U.S. Dep’t of Treasury</i> , 868 F.3d 438 (6th Cir. 2019), <i>cert denied</i> , 138 S. Ct. 1441 (2018).....	21
<i>DeBolt v. Espy</i> , 47 F.3d 777 (6th Cir. 1995)	22
<i>Doe v. DeWine</i> , 910 F.3d 842 (6th Cir. 2018)	25
<i>Gonzales v. Nat’l Bd. of Med. Examiners</i> , 225 F.3d 620 (6th Cir.2000)	11

Grove City Coll. v. Bell,
 465 U.S. 555 (1984), *superseded by statute*,
 Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) 14

Jones v. Caruso,
 569 F.3d 258 (6th Cir. 2009) 11

Kiser v. Reitz,
 765 F.3d 601 (6th Cir. 2014) 12, 16

Ky. Press Ass’n, Inc. v. Ky.,
 454 F.3d 505 (6th Cir. 2006) 16

Lujan v. Defs. of Wildlife,
 504 U.S. 555 (1992)..... 18, 19, 20, 25

McKay v. Federspiel,
 823 F.3d 862 (6th Cir. 2016) 17

Miller v. City of Wickliffe,
 852 F.3d 497 (6th Cir. 2017) 16, 17

Nken v. Holder,
 556 U.S. 418 (2009)..... 28

Norton v. Ashcroft,
 298 F.3d 547 (6th Cir. 2002) 12, 18

O’Toole v. O’Connor,
 802 F.3d 783 (6th Cir. 2015) 10

Platt v. Bd. of Comm’rs on Grievances & Discipline of Ohio Supreme Court,
 769 F.3d 447 (6th Cir. 2014) 16

Rasins Landscape & Assocs., Inc. v. Mich. Dep’t of Transp.,
 528 F. App’x 441 (6th Cir. 2013) 26

Renne v. Geary,
 501 U.S. 312 (1991)..... 15

Reno v. Catholic Soc. Servs., Inc.,
 509 U.S. 43 (1993)..... 12

S. Glazer’s Distribs. of Ohio, LLC v. Great Lakes Brewing Co.,
 860 F.3d 844 (6th Cir. 2017) 10, 11

Simon v. E. Ky. Welfare Rights Org.,
 426 U.S. 26 (1976)..... 20, 25, 28

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016)..... 19

Steel Co. v. Citizens for a Better Env’t,
523 U.S. 83 (1998)..... 19

Texas v. United States,
523 U.S. 296 (1998)..... 12, 18

United Steelworkers of Am., Local 2116 v. Cyclops Corp.,
860 F.2d 189 (6th Cir. 1988) 12

Warth v. Seldin,
422 U.S. 490 (1975)..... 20, 21, 25, 27

Winnett v. Caterpillar, Inc.,
609 F.3d 404 (6th Cir. 2010) 11

Winter v. NRDC, Inc.,
555 U.S. 7 (2008)..... 10, 11, 28

Winter v. Wolnitzek,
834 F.3d 681 (6th Cir. 2016) 16

STATUTES

42 U.S.C. § 670..... 3

42 U.S.C. § 671..... 3

42 U.S.C. § 674 3

42 U.S.C. § 2000bb *et seq.*..... 2

Mich. Comp. Laws Ann. § 722.115 (West 2018)..... 4

Mich. Comp. Laws Ann. § 722.124e (West 2018) 4

REGULATIONS

45 C.F.R. § 75.102..... 4, 14, 24

45 C.F.R. § 75.300 *passim*

45 C.F.R. § 1356.60..... 3

Health and Human Services Grants Regulation,
81 Fed. Reg. 45,270 (July 13, 2016)..... 22

Health and Human Services Grants Regulation,
81 Fed. Reg. 89,393 (Dec. 12, 2016) 13, 22

INTRODUCTION

This is a dispute between Plaintiffs and the State of Michigan. Indeed, it is unclear whether Plaintiffs have even stated any claims against the Federal Defendants. And even if Plaintiffs have stated claims against the Federal Defendants, those claims are not ripe and Plaintiffs lack standing to sue the Federal Defendants. For these reasons, and the reasons set forth below, the Court should deny Plaintiffs' motion for a preliminary injunction against the Federal Defendants.

Plaintiffs allege that the State Defendants—the Director of the Michigan Department of Health and Human Services, the Executive Director of the Michigan Children's Services Agency, and the Michigan Attorney General—have threatened to terminate the State's adoption and foster care contracts with child placing agencies that decline to recommend same-sex couples as potential adoptive or foster parents on religious grounds. Plaintiffs have moved for a preliminary injunction to prevent Michigan from terminating its contracts with Plaintiff St. Vincent Catholic Charities, a religiously affiliated agency that declines to recommend same-sex or unmarried couples as potential adoptive or foster parents due to its religious beliefs.

Plaintiffs, however, seek injunctive relief not only against the State of Michigan, but also against the federal government. Specifically, Plaintiffs seek an injunction prohibiting the Federal Defendants from enforcing against the State of Michigan a federal regulation that requires recipients of federal adoption and foster care funds not to discriminate on the basis of sexual orientation in administering programs supported by such funds.

Plaintiffs' request for a preliminary injunction against the Federal Defendants should be denied. Plaintiffs cannot demonstrate a likelihood of success on the merits against the Federal Defendants.

First, Plaintiffs' claims against the Federal Defendants are not ripe. Under applicable Sixth Circuit case law, Plaintiffs have identified no credible threat that the Federal Defendants will enforce the federal non-discrimination regulation against Michigan based on St. Vincent's conduct in this case. To the contrary, no one disputes that the Federal Defendants provided funding to Michigan under the State's prior policy of providing religious accommodations to adoption and foster care agencies. In addition, as Plaintiffs acknowledge, the Federal Defendants have taken the position that, under certain circumstances, religious exceptions from the non-discrimination regulation are required under the federal Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.* And the Federal Defendants recently granted such an exception to South Carolina for a faith-based foster care agency in that state that uses religious criteria in selecting prospective foster parents.

Second, Plaintiffs lack standing to sue the Federal Defendants for their alleged injuries in this case. Plaintiffs' injuries are not traceable to the Federal Defendants, and injunctive relief against the Federal Defendants would not redress Plaintiffs' injuries. St. Vincent faces the threat of contract termination because of four actions by the State of Michigan: (1) Michigan's inclusion of non-discrimination provisions in its contracts with adoption and foster care agencies; (2) Michigan's decision to enter into a settlement agreement with the ACLU that requires the State to enforce those provisions; (3) Michigan's decision to stop granting religious exemptions to agencies like St. Vincent that decline to recommend same-sex couples as potential adoptive or foster parents on religious grounds; and (4) Michigan's failure to seek an exception from the federal non-discrimination regulation for St. Vincent. The Federal Defendants are not responsible for any of those actions. Plaintiffs also have not shown that an injunction against the Federal Defendants would redress their injuries by causing Michigan to reverse course and begin

accommodating St. Vincent’s religious exercise. Indeed, the State’s conduct to date, taken together with statements from State officials, strongly suggests that Michigan would follow the same course of action here in the absence of the federal regulation.

Because their claims against the Federal Defendants are not ripe and because they lack standing to sue the Federal Defendants, Plaintiffs cannot demonstrate a likelihood of success on the merits against the Federal Defendants. Nor can they prevail on the other factors required for a preliminary injunction. The Court should therefore deny Plaintiffs’ motion as to the Federal Defendants.

BACKGROUND

I. Statutory and Regulatory Background

Title IV-E of the Social Security Act authorizes federal funding to states “[f]or the purpose of enabling each State to provide, in appropriate cases, foster care . . . [and] adoption assistance” for eligible children. 42 U.S.C. § 670.¹ Title IV-E additionally prohibits states and their subgrantees from “deny[ing] to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved.” 42 U.S.C. § 671(a)(18)(A). The statute does not include a prohibition on denials based on sexual orientation. Instead, HHS has promulgated a regulatory provision as part of its Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards (HHS UAR), rooted in an HHS “public policy requirement,” that no person may be

¹ To be eligible for Title IV-E payments, a state must submit a foster care and adoption assistance plan for HHS approval containing certain features. *Id.* § 671(a). States with a compliant plan receive Title IV-E funding for a portion of the state’s foster care maintenance and adoption assistance payments made each quarter. *Id.* § 674(a)(1)–(2). A state may also receive reimbursement for administrative expenses necessary for the provision of child placement services and the proper and efficient administration of the Title IV-E state plan. *Id.* § 674(a)(3). These expenses may include activities such as training, case management, and recruitment and licensing of foster homes. 45 C.F.R. § 1356.60(b)–(c). States have discretion to engage third parties to provide many of these services.

“denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on . . . sexual orientation.” 45 C.F.R. § 75.300(c). The provision also prohibits discrimination based on “religion.” *Id.* Another provision in the HHS UAR authorizes HHS to issue “[e]xceptions on a case-by-case basis” from this and other grant regulations except where otherwise required by law. *See* 45 C.F.R. § 75.102(b).

Title IV-E provides states with significant latitude to determine how and under what conditions the state will license or approve prospective foster or adoptive parents. The Act does not prohibit states from establishing additional criteria otherwise allowed by law for licensing foster family homes or approving adoptive families. As such, states have substantial flexibility in establishing licensing criteria for foster families and approval requirements for adoptive families. It is within the authority of each state to determine which entities to contract with and which services or activities the contractor will perform.

Under Michigan law, a child placing agency may not facilitate foster care placements or adoptions for foster children unless it is licensed by the Michigan Department of Health and Human Services (MDHHS). *See* Mich. Comp. Laws Ann. § 722.115 (West 2018). A Michigan statute passed in 2015 protects the religious rights of such agencies by specifying that agencies “shall not be required to provide any services if those services conflict with, or provide any services under circumstances that conflict with, the child placing agency’s sincerely held religious beliefs.” *Id.* § 722.124e(2); *see also id.* § 722.124e(3) (prohibiting state and local government units from “tak[ing] an adverse action against a child placing agency” that declines to provide a service that conflicts with the agency’s “sincerely held religious beliefs”). “[F]oster care management and adoption services provided under a contract with [MDHHS]” do not fall under this protection. *See id.* § 722.124e(7)(b).

According to Plaintiffs, after the 2015 law was passed, MDHHS interpreted the law to mean that MDHHS could not penalize or terminate contracts with religious child placing agencies that decline to work with prospective same-sex or unmarried foster parents. Compl. ¶ 61, ECF No. 1, PageID.24. Plaintiffs further state that, although MDHHS determined the 2015 statute might not apply to certain “child-specific adoption contracts,” MDHHS granted “case-by-case exemptions” that allowed agencies “to continue operating according to their religious beliefs.” *Id.* ¶ 62, PageID.24.

To become a foster or adoptive parent in Michigan, an individual must be recommended for approval and receive a license from the State. *See id.* ¶ 43, PageID.18; Mem. of Law in Supp. of Pls.’ Mot. for a Prelim. Inj. [PI Memo] at 5, ECF No. 6, PageID.175. MDHHS contracts with child placing agencies like St. Vincent to recruit and evaluate prospective foster and adoptive parents. *See* Compl. ¶ 22–23, PageID.10–11; PI Memo at 5–6, PageID.175–176. As part of the evaluation process, the child placing agency conducts a “home study” in which the agency “analyzes the relationships in the home and provides a recommendation [to MDHSS] regarding placing children in that home.” Compl. ¶ 44, PageID.18. MDHHS then makes a final decision regarding approval and licensure. *See* PI Memo at 5, PageID.175.

II. The *Dumont* Litigation and Settlement Agreement

On September 20, 2017, the ACLU filed a lawsuit against MDHHS alleging that MDHHS was violating the Establishment and Equal Protection Clauses of the U.S. Constitution by contracting with child placing agencies that decline on religious grounds to recommend same-sex couples as potential adoptive or foster parents. Compl. ¶ 80, PageID.29; *see also* Compl. *Dumont v. Gordon*, No. 17-cv-13080 (E.D. Mich. Sept. 20, 2017), ECF No. 1, PageID.1. Although MDHHS initially defended the suit, following the election of a new Michigan Attorney General (Defendant Nessel) in November 2018, MDHHS settled with the ACLU on March 22,

2019. Compl. ¶ 89, PageID.32; *see also* Stipulation of Voluntary Dismissal with Prejudice, *Dumont v. Gordon*, No. 17-cv-13080 (E.D. Mich. Mar. 22, 2019), ECF No. 82, PageID.1437.²

In the Settlement Agreement, MDHHS agreed to continue including a “Non-Discrimination Provision” in contracts with child placing agencies. Ex. 1 at 2. This provision, which MDHHS was already including in contracts prior to the settlement, requires child placing agencies that contract with MDHHS to “comply with the Department’s non-discrimination statement prohibiting discrimination ‘against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability’ in the provision of services under contract with the Department.” *Id.* at 1; *see also* PI Memo Ex. 9, ¶ 2.9.c, ECF No. 6-9, PageID.326. (copy of St. Vincent’s current foster care contract with MDHHS).³ The Settlement Agreement specifies that the Non-Discrimination Provision prohibits, among other things, “turning away or referring to another [child placing agency] an otherwise potentially qualified LGBTQ individual or same-sex couple” and “refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple.” Ex. 1 at 2. MDHHS further agreed “to enforce the Non-Discrimination Provision . . . against a [child placing agency] that the . . . Department determines is in violation of” the Provision, “up to and including termination of the [c]ontracts” with the agency. *Id.* at 3; *see also id.* (“In the event a [child placing agency] refuses to comply with the Non-Discrimination Provision . . . within a reasonable time after notification by the Department of a Contract

² A copy of the Settlement Agreement, which was attached as Exhibit A to the Stipulation of Voluntary Dismissal with Prejudice in *Dumont*, is attached to this brief as Exhibit 1.

³ Plaintiffs identify Exhibit 9 to their PI Memo as a copy of St. Vincent’s current contract with MDHHS in footnote 37 of their PI Memo. *See* PI Memo at 31, n.37, PageID.201.

Violation, the Department will terminate the [agency's] Contracts.”). The Settlement Agreement does not contain a religious exemption.

In a “Summary Statement” accompanying the Settlement Agreement, Defendant Nessel (the new Michigan Attorney General) explained that under the Agreement, “MDHHS must take action to enforce its existing contracts where an agency has accepted a referral [of a child from MDHHS] and later violates the non-discrimination provision[] by refusing to work with LGBTQ individuals interested in fostering or adopting any of the children it has accepted.” Ex. 2 at 3.⁴ Nessel further stated that MDHHS is required to include the non-discrimination provision in its contracts with child placing agencies as a condition of receiving Title IV-E funds from the federal government. *See id.* at 1 (“As a condition of receiving these federal funds, the United States Department of Health and Human Services requires that states’ Title IV-E-funded programs prohibit discrimination on the basis of sexual orientation or gender identity. In compliance with this federal requirement, MDHHS contracts mandate that, except for an agency’s sole discretion to decide whether to accept a referral from MDHHS, all agencies must comply with MDHHS’s non-discrimination statement when providing state-contracted services.” (citing 45 C.F.R. § 75.300(c)); *see also id.* at 3 (characterizing the non-discrimination provision as “federally required”).

Significantly, Nessel’s statement did not indicate that religious agencies could continue to receive case-by-case exemptions if recommending same-sex couples as potential adoptive or foster parents conflicted with the agencies’ religious beliefs. To the contrary, Nessel took the position that once an agency accepts a child for placement under a contract with MDHHS,

⁴ Plaintiffs cite Defendant Nessel’s summary statement on pages 26 and 49 of their PI Memo. *See* PI Memo at 26 n.36, PageID.196; *id.* at 49, n.50, PageID.219; *see also* Compl. ¶ 91, n.22, PageID.33; *id.* ¶ 99, n.25, PageID.35. For ease of reference, a copy of the summary statement is attached to this brief as Exhibit 2.

Michigan law “does not provide [the] agency with discretion to refuse to provide the accepted child or individual with state-contracted foster care case management or adoption services that conflict with its sincerely held religious beliefs.” *Id.* at 2.

III. Plaintiffs and their Alleged Injuries

Plaintiff St. Vincent Catholic Charities is a religiously affiliated child placing agency that has provided foster care and adoption services in Michigan for over 50 years. Compl. ¶ 69, PageID.26. St. Vincent provides training, supervision, and support for each foster care and adoptive family with which it partners. *Id.* ¶ 70, PageID.26. In accordance with its sincerely held religious beliefs regarding marriage, St. Vincent declines to recommend same-sex or unmarried couples for licensing with MDHHS as potential adoptive or foster parents. *See id.* ¶ 67, PageID.25–26; PI Memo at 2, PageID.172. According to St. Vincent, it does not do so because as part of the licensing recommendation process, an agency must submit to MDHHS “a written approval of the relationships in the home and confirmation that the agency has determined the home is suitable for the placement of children.” Compl. ¶ 44, PageID.18. St. Vincent explains that “as a Catholic organization, St. Vincent cannot provide a written recommendation to the State endorsing an adult relationship that would conflict with St. Vincent’s sincere religious beliefs.” PI Memo at 16, PageID.186. If a same-sex or unmarried couple seeks assistance from St. Vincent in becoming foster or adoptive parents, St. Vincent refers the couple to another agency that can help them. Compl. ¶ 67, PageID.25–26; *see also* PI Memo at 16–17, PageID.186–187. A same-sex or unmarried couple that has been certified for approval by the State through another agency can adopt children in St. Vincent’s care. *See* Compl. ¶¶ 31–32, PageID.14–15; PI Memo at 41, PageID.211. St. Vincent merely declines to provide the recommendation for approval itself based on its religious beliefs and its understanding that

recommending a same-sex or unmarried couple for approval constitutes an endorsement of the couple's relationship.

Plaintiffs Melissa and Chad Buck have adopted five special-needs children through St. Vincent and continue to rely on St. Vincent services for training and support as they raise their children. Compl. ¶¶ 10–11, PageID.6–7. Plaintiff Shamber Flore is a former foster child who was adopted through St. Vincent and who now volunteers with St. Vincent as a mentor for foster children. *Id.* ¶ 12, PageID.7.

According to Plaintiffs, St. Vincent's contract with MDHHS is up for renewal in October 2019. *Id.* ¶ 105, PageID.37. Plaintiffs say that they worry MDHHS will refuse to renew its contract with St. Vincent based on St. Vincent's religiously based policy of declining to recommend same-sex couples as potential adoptive or foster parents and instead referring such couples to another agency. *See id.*, PageID.37; *see also* PI Memo at 26–27, PageID.196–197. Plaintiffs also assert that MDHHS could seek to terminate its contract with St. Vincent prior to October on the ground that St. Vincent is violating the contract's non-discrimination provision. *See* PI Memo at 27, PageID.197; PI Memo at Ex. 9, ¶ 2.9.c, PageID.326. According to Plaintiffs, if St. Vincent loses its contract with MDHHS, St. Vincent will no longer be able to provide foster care or adoption services because the State of Michigan is the only source of public foster care and adoption referrals, and without such referrals, St. Vincent would have to shut down its programs. Compl. ¶ 27, PageID.13–14. Plaintiffs Melissa and Chad Buck and Shamber Flore in turn assert that they would lose the ability to continue receiving support from, and volunteering with, St. Vincent. *Id.* ¶ 118–119, PageID.41.

IV. Plaintiffs' Claims Against the Federal Defendants and Injunctive Relief Sought

Plaintiffs allege that Michigan's threatened termination of St. Vincent's adoption and foster care contracts violates their free exercise and free speech rights and would cause them

irreparable harm. Accordingly, they seek preliminary injunctive relief against the State Defendants.

But Plaintiffs also seek a preliminary injunction against the Federal Defendants. Notably, Plaintiffs do not allege that the Federal Defendants themselves have violated Plaintiffs' rights. Rather, they say that injunctive relief against the Federal Defendants is "necessary" so that "Michigan cannot use the perceived threat of federal enforcement as an excuse to violate Plaintiffs' rights." PI Memo at 48–49, PageID.218–219. As noted above, in her statement accompanying the *Dumont* Settlement Agreement, Defendant Nessel asserted that an HHS regulation, 45 C.F.R. § 75.300(c), mandates inclusion of a non-discrimination provision in MDHHS contracts. *See Ex. 2* at 1. This statement appears to be the basis for Plaintiffs' requested relief against the Federal Defendants. *See Compl.* ¶¶ 94, 97, 99, PageID.34–35; PI Memo at 48–49, PageID.218–219. Plaintiffs thus ask this Court for a preliminary injunction prohibiting the Federal Defendants from "taking any enforcement action under 45 C.F.R. § 75.300(c)" in response to St. Vincent's policy of not recommending same-sex or unmarried couples as potential adoptive or foster parents, or in response to any efforts by Michigan to accommodate St. Vincent's religious beliefs.

STANDARD OF REVIEW

"Preliminary injunctions are extraordinary and drastic remedies never awarded as of right." *O'Toole v. O'Connor*, 802 F.3d 783, 788 (6th Cir. 2015). "[T]hat is why the plaintiff bears the burden to justify relief, even in First Amendment cases." *Id.* Meeting this burden requires "a clear showing that the plaintiff is entitled to such relief." *S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 848-49 (6th Cir. 2017) (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008)).

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. Of the four factors, likelihood of success on the merits “is the most important,” *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009), and “a finding that there is simply no likelihood of success on the merits is usually fatal,” *Gonzales v. Nat’l Bd. of Med. Examiners*, 225 F.3d 620, 625 (6th Cir.2000); *see also Great Lakes Brewing Co.*, 860 F.3d at 849 (“[A] preliminary injunction issued where there is simply no likelihood of success on the merits must be reversed.” (quoting *Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 408 (6th Cir. 2010)).

ARGUMENT

The Court should deny Plaintiffs’ motion for a preliminary injunction against the Federal Defendants. As noted above, Plaintiffs do not allege that the Federal Defendants have violated Plaintiffs’ rights. Rather, they seek injunctive relief against the Federal Defendants to prevent the State Defendants from relying on the federal non-discrimination regulation and the possibility of federal enforcement as justification for their alleged violations of Plaintiffs’ rights. Thus, it is unclear whether Plaintiffs have even stated any claims against the Federal Defendants in the first place.

In any event, Plaintiffs are unlikely to succeed on the merits against the Federal Defendants because their claims against the Federal Defendants (to the extent they raise any) are not ripe and because they lack standing to sue the Federal Defendants. Plaintiffs also will not suffer imminent, irreparable harm in the absence of a preliminary injunction against the Federal Defendants because there is no threat of enforcement by the Federal Defendants. Finally, neither

the balance of the equities nor the public interest warrants an injunction against the Federal Defendants.

I. Plaintiffs Have Not Established That They Are Likely To Succeed on the Merits Against the Federal Defendants.

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

To invoke the Court's jurisdiction, Plaintiffs must establish that their claims are "ripe for judicial review." *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002). "If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *Bigelow v. Mich. Dep't of Nat. Res.*, 970 F.2d 154, 157 (6th Cir. 1992). The ripeness doctrine rests both on "Article III limitations on judicial power" and on "prudential reasons for refusing to exercise jurisdiction." *Kiser v. Reitz*, 765 F.3d 601, 606 (6th Cir. 2014) (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)).

The Sixth Circuit has laid out a three-part test for determining ripeness. Under this test, the court examines: "(1) the likelihood that the harm alleged will ever come to pass; (2) whether the factual record is sufficiently developed to allow for adjudication; and (3) hardship to the parties if judicial review is denied." *Norton*, 298 F.3d at 554. The first factor—the likelihood that the harm alleged will actually come to pass—is the most important. *See United Steelworkers of Am., Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 194 (6th Cir. 1988) ("We pay particular attention to the likelihood that the harm alleged by plaintiffs will ever come to pass.").

Accordingly, "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Cooley v. Granholm*, 291 F.3d 880, 883–84 (6th Cir. 2002) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted)). Plaintiffs' claims against the Federal Defendants are not ripe under the Sixth Circuit's test.

As noted above, Plaintiffs seek an injunction barring enforcement of 45 C.F.R. § 75.300(c) based on St. Vincent’s religiously motivated practice of declining to recommend same-sex couples as prospective adoptive or foster parents. Of course, section 75.300(c) does not operate directly against St. Vincent. It directly regulates *Michigan*, which is the Federal Defendants’ grantee. The harm that Plaintiffs allege, therefore, is the negative consequences that would result to St. Vincent—loss of funding, loss of contracts, etc.—if HHS enforced 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, however, because they 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 of declining to recommend same-sex couples as potential adoptive or foster parents.

To begin with, section 75.300(c) had been on the books for over two years before Michigan changed its policy regarding St. Vincent, *see* 81 Fed. Reg. at 89,395 (Dec. 12, 2016) (promulgating section 75.300(c)); PI Memo at 1, PageID.171 (dating Michigan’s policy change to March 2019), and there is no indication that the Federal Defendants took any steps during those two-plus years to enforce the regulation based on St. Vincent’s religiously motivated conduct. There is also no indication that the Federal Defendants would do so now if Michigan reverted to its former policy. It is also not clear that section 75.300(c) would even apply to St. Vincent’s practice of declining to recommend same-sex couples as potential adoptive or foster parents in the first place, given that the regulation applies “in the administration of programs supported by HHS awards,” 45 C.F.R. § 75.300(c), and according to Plaintiffs, St. Vincent pays for recruitment and evaluation of prospective adoptive and foster care parents through private funds rather than money from the State. *See* Compl. ¶¶ 72–76, PageID.27–28; PI Memo at 14–

15, Page ID.184–185.⁵ According to Plaintiffs, “only *after* a child is placed in [a] certified family’s home do St. Vincent and the family begin to receive funding from the State.” Compl. ¶ 72, Page ID.27 (emphasis added); *see also Grove City Coll. v. Bell*, 465 U.S. 555, 570–74 (1984) (reading the phrase “program or activity” for purposes of Title IX’s prohibition on sex discrimination to apply only to the specific education program or activity receiving federal funding and not to the entire school), *superseded by statute*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, §3, 102 Stat. 28, 28-29 (1988).

Moreover, HHS recently granted an exception from section 75.300(c) to South Carolina for a faith-based foster care agency, Miracle Hill Ministries, that uses religious criteria in selecting among prospective foster parents.⁶ Miracle Hill limits recruitment of foster parents to individuals of a particular religion because it “believe[s] those who hold certain positions of spiritual influence and leadership—including foster parents—should share [Miracle Hill’s] religious mission and beliefs.” Ex. 3 at 2. Another provision in the HHS UAR, 45 C.F.R. § 75.102(b), authorizes HHS to grant exceptions from program requirements—including section 75.300(c)—on a “case-by-case basis” where not otherwise required by law. Pursuant to this authority, in January of this year, HHS granted South Carolina an exception from section 75.300(c)’s religious non-discrimination requirement⁷ for Miracle Hill because it concluded that

⁵ Plaintiffs acknowledge that in an “exceptional case[.]” involving “foster children being placed with relatives,” the State could enter into a “separate, child-specific contract to directly pay for home study services.” Compl. ¶ 73, Page ID.27–28. However, Plaintiffs state that St. Vincent has “has never been a party to such a contract for the provision of home study services for an LGBTQ couple.” *Id.*, PageID.28.

⁶ Plaintiffs cite HHS’s letter to South Carolina granting the exception on page 49 of their PI Memo. *See* PI Memo at 49, n.51, PageID.219. For ease of reference, a copy of the letter is attached to this brief as Exhibit 3.

⁷ Section 75.300(c) prohibits discrimination on a variety of grounds in addition to sexual orientation, including “religion.”

requiring Miracle Hill to comply would violate RFRA and because of the significant programmatic burden that would attend enforcement of the regulation under the circumstances. *See Ex. 3.* According to HHS, “Miracle Hill’s sincere religious exercise would be substantially burdened by application of the religious nondiscrimination requirement of § 75.300(c),” and “subjecting Miracle Hill to that requirement . . . is not the least restrictive means of advancing a compelling government interest on the part of HHS.” *Id.* at 3. Thus, for the alleged harm Plaintiffs posit to come to pass, HHS would have to take action—enforce section 75.300(c) against Michigan on the ground that St. Vincent is purportedly failing to comply with that section’s sexual orientation non-discrimination requirement due to its religious beliefs—that past HHS practice strongly suggests the agency would not take.

Adult Video Association v. U.S. Department of Justice, 71 F.3d 563 (6th Cir. 1995), is instructive here. In that case, an association of adult video stores sought a declaratory judgment that a sexually explicit film the stores wished to sell was not obscene. *See id.* at 565. The stores claimed they needed the declaratory judgment in order to protect them from prosecution under federal obscenity laws. *See id.* The Sixth Circuit found that the plaintiffs had failed to establish that the alleged harm—federal prosecution—would come to pass because they could “point to no action or statement by the federal government indicating that it intend[ed] to take action with respect to [the film].” *Id.* at 568. Similarly, in this case, Plaintiffs have identified no action or statement by the Federal Defendants indicating that they intend to enforce 45 C.F.R. § 75.300(c) against Michigan because of St. Vincent’s religiously motivated conduct in this case. And indeed, the Federal Defendants’ practice before Michigan changed its policy suggests that any risk of enforcement is entirely speculative. *See also Renne v. Geary*, 501 U.S. 312, 321–22 (1991) (case not ripe for review where there was “no factual record of an actual or imminent

application of” the challenged law); *Ky. Press Ass’n, Inc. v. Ky.*, 454 F.3d 505, 509 (6th Cir. 2006) (plaintiff failed to establish that alleged harm would come to pass where government could “reasonably interpret” applicable laws in way that would avoid alleged harm).

Sixth Circuit case law on First Amendment pre-enforcement challenges buttresses this conclusion. Although the basis for Plaintiffs’ claim against the Federal Defendants is not entirely clear, Plaintiffs assert First Amendment claims against the State Defendants and thus case law in that area is at least instructive.

In the First Amendment context, the Sixth Circuit has said that a pre-enforcement challenge to a law or regulation is ripe “when the threat of enforcement of that law is ‘sufficiently imminent.’” *Miller v. City of Wickliffe*, 852 F.3d 497, 506 (6th Cir. 2017) (quoting *Platt v. Bd. of Comm’rs on Grievances & Discipline of Ohio Supreme Court*, 769 F.3d 447, 451 (6th Cir. 2014)). The threat of enforcement is sufficiently imminent, in turn, when “(1) the plaintiff alleges ‘an intention to engage in a course of conduct’ implicating the Constitution and (2) the threat of enforcement of the challenged law against the plaintiff is ‘credible.’” *Id.* (quoting *Platt*, 769 F.3d at 451–52).

Here, although St. Vincent undoubtedly engages in a course of conduct that implicates the Constitution when it declines to recommend same-sex couples as potential adoptive or foster parents on religious grounds, it does not face a credible threat of enforcement—at least not from the Federal Defendants. “A threat of future enforcement may be ‘credible’ when the same conduct has drawn enforcement actions or threats of enforcement in the past.” *Kiser*, 765 F.3d at 609. Thus, the Sixth Circuit has found a credible threat of enforcement where the plaintiff received a letter from a state agency notifying the plaintiff that the agency had investigated his conduct and determined he had violated state law. *See id.*; *see also Winter v. Wolnitzek*, 834 F.3d

681, 687 (6th Cir. 2016) (letter notifying plaintiff that a complaint had been filed against her and requesting a response in writing constituted credible threat of enforcement); *Berry v. Schmitt*, 688 F.3d 290, 297 (6th Cir. 2012) (letter informing plaintiff that he had violated challenged regulation and cautioning him against future violations constituted credible threat of enforcement). By contrast, the Sixth Circuit has said there is no credible threat of enforcement when there is “no indication” that the plaintiff will be punished. *See Berry*, 688 F.3d at 296–97.

In this case, 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. To the contrary, as discussed above, the Federal Defendants did not take any enforcement action based on St. Vincent’s conduct during the two-plus years section 75.300(c) was in effect prior to Michigan’s policy change. And they granted an exception from 75.300(c) to South Carolina so that South Carolina could continue to accommodate the religious practices of a faith-based child placing agency in that state. Under these circumstances, there is no credible threat of enforcement by the Federal Defendants and thus no “sufficiently imminent” threat. *See Miller*, 852 F.3d at 506 (to be sufficiently imminent, threat must be “credible”); *id.* at 507 (no credible threat of enforcement where city “never indicated that it would . . . enforce the [challenged] Ordinance against plaintiffs”); *McKay v. Federspiel* 823 F.3d 862, 870 (6th Cir. 2016) (no credible threat of enforcement in suit challenging court order banning electronic recording devices in county building where there was “simply no evidence in the current record that anyone ha[d] ever been held in contempt—or even subject to contempt proceedings—for violating the challenged order”). Thus, Plaintiffs’ pre-enforcement challenge to section 75.300(c) is not ripe. *See Miller*, 852 F.3d at 506.

The second and third factors of the Sixth Circuit’s ripeness test do not alter this conclusion. As an initial matter, it is doubtful that a case could be ever be ripe for adjudication absent at least some likelihood that the harm alleged will come to pass. *See Cooley*, 291 F.3d at 883–84 (“[A] claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” (quoting *Texas*, 523 U.S. at 300)); *see also Texas*, 523 U.S. at 300 (treating the likelihood that future events will come to pass as a threshold question before addressing other ripeness factors).

In any event, it is difficult at this point to know what the factual record would look like were the Federal Defendants to bring an enforcement action against Michigan based on the State’s failure to force St. Vincent to violate its religious beliefs, given that there is no indication that the Federal Defendants would bring such an action. *See Norton*, 298 F.3d at 554 (second ripeness factor is “whether the factual record is sufficiently developed to allow for adjudication”). Similarly, it is difficult to conceive what hardship Plaintiffs would suffer from denying judicial review given that they cannot show there is any imminent risk of an enforcement action by the Federal Defendants. *See id.* (third ripeness factor is “hardship to the parties if judicial review is denied”). Because Plaintiffs have not demonstrated any likelihood that the harm alleged—loss of contracts and funding for St. Vincent based on federal enforcement of 45 C.F.R. § 75.300(c) against Michigan for St. Vincent’s religiously motivated conduct—will come to pass, Plaintiffs’ claims against the Federal Defendants are not ripe.

B. Plaintiffs Lack Standing to Sue the Federal Defendants.

As the parties invoking federal jurisdiction, Plaintiffs bear the burden of establishing the three elements that constitute the “irreducible constitutional minimum of standing.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Namely, Plaintiffs must show that they have “(1)

suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted). Without standing, Plaintiffs cannot establish the existence of an Article III case or controversy and thus cannot invoke the jurisdiction of the federal courts. *See, e.g., Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103–04 (1998).

Notably, Plaintiffs do not allege that the Federal Defendants have injured them directly, nor could they. The Federal Defendants do not fund St. Vincent’s services through direct contracts with St. Vincent. Rather, they provide grants to Michigan, which in turn uses those grants to fund various social services within the State. *See* Compl. ¶¶ 55–56, PageID.21–22. Nor do the Federal Defendants directly regulate Plaintiffs. Rather, the Federal Defendants directly regulate the State Defendants, who in turn regulate Plaintiffs.

Plaintiffs’ claim against the Federal Defendants, at base, is that the State Defendants are relying on the federal non-discrimination regulation and the threat of possible federal enforcement *against Michigan* to engage in unconstitutional behavior *against Plaintiffs*. *See* PI Memo at 48–49, PageID.218–219. Plaintiffs allege that Michigan has taken a variety of unconstitutional actions against Plaintiffs, including targeting St. Vincent’s religious beliefs and retaliating against St. Vincent for its religious exercise, in part because of a federal regulation that prohibits discrimination on the basis of sexual orientation in the administration of HHS programs. *See* 45 C.F.R. § 75.300(c). Put differently, it is the Federal Defendants’ direct regulation of a third party—Michigan—that provides the gravamen for Plaintiffs’ complaint against the Federal Defendants.

Where, as here, “a plaintiff’s asserted injury arises from the [federal] government’s allegedly unlawful regulation . . . of someone else,” causation and redressability “ordinarily

hinge on the response of the regulated (or regulable) third party to the government action.” *Lujan*, 504 U.S. at 562 (emphasis omitted). Thus, “it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.” *Id.* For this reason, “when the plaintiff is not himself the object of the government action or inaction he challenges,” standing “is ordinarily ‘substantially more difficult’ to establish.” *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984), *abrogated on other grounds by Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)).

Here, Plaintiffs cannot show either traceability or redressability.

1. Plaintiffs’ Asserted Injuries Are Not Traceable to the Federal Defendants.

Traceability requires an injury “that fairly can be traced to the challenged action of the defendant.” *Simon v. E. Ky. Welfare Rights Org. [EKWRO]*, 426 U.S. 26, 41–42 (1976). Put differently, the plaintiff must show that “the asserted injury was the consequence of the defendants’ actions.” *Anderson v. Charter Twp. of Ypsilanti*, 266 F.3d 487, 498 (6th Cir. 2001) (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975)).

In *EKWRO*, the plaintiffs, a group of indigent individuals who had been denied hospital services because of inability to pay, alleged that by granting tax-exempt status to hospitals that refused to serve indigent patients, the IRS had “encouraged” such hospitals to deny services to indigent individuals such as themselves. 426 U.S. at 42. The Supreme Court determined that the plaintiffs had not shown that their injuries were traceable to the IRS’s actions because they had failed to demonstrate that the denials of service were due to the hospitals’ favorable tax treatment rather than to “decisions made by the hospitals without regard to the tax implications.” *Id.* at 42–43. Similarly, in *Warth*, the Supreme Court held that the plaintiffs, low-income individuals who

claimed that local zoning ordinances prevented them from being able to afford housing inside town limits, had not established traceability because the record indicated that the absence of low-income housing was the “consequence of the economics of the area housing market,” not zoning laws. 422 U.S. at 506–07. The key in both cases was that the plaintiffs had failed to establish that it was the defendants’ actions, rather than some other reason, that had caused the hospitals in *EKWRO* and the homebuilders in *Warth* to take action harmful to the plaintiffs (or to fail to take action beneficial to the plaintiffs). *See also Crawford v. U.S. Dep’t of Treasury*, 868 F.3d 438, 459 (6th Cir. 2019), *cert. denied*, 138 S. Ct. 1441 (2018) (no traceability where plaintiffs’ injuries were due to third party’s “own independent actions” rather than to requirements of challenged law); *Ammex, Inc. v. United States*, 367 F.3d 530, 534 (6th Cir. 2004) (no traceability against government where fuel purchaser alleged that excise tax resulted in higher fuel prices because it was fuel suppliers’ decision to pass tax on to purchasers that caused injury).

Here, Plaintiffs’ threatened injuries flow from four actions by the State of Michigan: (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. All four of these actions by Michigan were necessary for St. Vincent now to be under the threat of contract termination. None is traceable to the Federal Defendants.

First, Michigan's inclusion of provisions prohibiting discrimination on the basis of sexual orientation in its contracts with St. Vincent is not the consequence of the Federal Defendants' actions. To the contrary, MDHHS was already including such a provision in its contracts with St. Vincent *before* 45 C.F.R. § 75.300(c) was promulgated. *Compare* Defs. Nick Lyons and Herman McCall's Mot. to Dismiss Ex. 1 ¶ 2.9.c, *Dumont v. Gordon*, No. 17-cv-13080 (E.D. Mich. Dec. 15, 2017), ECF No. 16-2, PageID.97 (St. Vincent adoption contact, signed by St. Vincent September 12, 2016),⁸ *and id.* Ex. 8 ¶ 2.9.c, ECF No.16-9, PageID.317 (St. Vincent foster care contract amendment 3, signed by St. Vincent June 15, 2016),⁹ *with* Health and Human Services Grants Regulation, 81 Fed. Reg. 89, 393, 89,395 (Dec. 12, 2016) (promulgating 45 C.F.R. § 75.300(c)).¹⁰ Thus, even assuming that inclusion of the non-discrimination provision in St. Vincent's contracts with MDHHS is *consistent* with 45 C.F.R. § 75.300(c), that regulation is not the reason Michigan began including the provision in its contracts. *See DeBolt v. Espy*, 47 F.3d 777, 782 (6th Cir. 1995) (no traceability where plaintiff would have suffered complained-of injury regardless of challenged government action). Relatedly, even if the Court enjoined enforcement of 45 C.F.R. § 75.300(c), there is no guarantee that MDHHS would remove this preexisting provision from its contracts.

Second, Michigan's decision to settle the *Dumont* litigation on terms that obligate Michigan to *enforce* the non-discrimination provisions in its contracts with St. Vincent and other

⁸ For ease of reference, a copy of this contract is attached to this brief as Exhibit 4.

⁹ For ease of reference, a copy of this contract is attached to this brief as Exhibit 5.

¹⁰ The notice of proposed rulemaking for the regulation was issued on July 13, 2016. *See* Health and Human Services Grants Regulation, 81 Fed. Reg. 45,270 (July 13, 2016). This was after the date St. Vincent signed amendment 3 to its foster care contract, which included a non-discrimination provision. *See* Ex. 5 ¶ 2.9.c. Thus, Michigan cannot claim it began including the provision in its contracts in the expectation that HHS would finalize the proposed rule.

child placing agencies, *see* Ex. 1 at 2–3, also is not attributable to the Federal Defendants. The Federal Defendants were not parties to the *Dumont* litigation, nor did they compel Michigan to settle the case in the manner it did. Indeed, Plaintiffs themselves assert that Michigan’s decision to settle the *Dumont* litigation on the terms it did was the result of the election of a new Attorney General with different views on religious freedom and non-discrimination laws as opposed to any specific action by the Federal Defendants. *See* PI Memo at 24, PageID.194 (“[S]hortly after taking office, Attorney General Nessel fired the outside counsel who had been defending the laws and . . . entered into settlement discussions with the ACLU.”); *id.* at 36, PageID.206 (“Although [Defendant Nessel] had previously stated that she would not defend the law she disagreed with, she instead decided to remain involved in the case and adopt an absurd interpretation of the law that rendered it meaningless.”).

Third, Michigan’s decision to stop granting religious exemptions to agencies like St. Vincent is not traceable to the Federal Defendants. According to Plaintiffs, MDHHS used to grant “case-by-case exemptions” to religious child placing agencies so that such agencies could “continue operating according to their religious beliefs.” Compl. ¶ 62, PageID.24. But as just noted, Plaintiffs acknowledge that Michigan’s reversal in policy on this issue was the result of Defendant Nessel’s reinterpretation of Michigan law, not any specific action by the Federal Defendants. *See also* Ex. 2 at 2 (statement by Defendant Nessel that Michigan law “does not provide an agency [that has accepted a referral from MDHHS] with discretion to refuse to provide the accepted child or individual with state-contracted foster care case management or adoption services that conflict with its sincerely held religious beliefs”).

Fourth, Michigan’s failure to seek an exception from 45 C.F.R. § 75.300(c) was not caused by the Federal Defendants. As an initial matter, as noted above, the Federal Defendants

did not take any enforcement action based on St. Vincent's religiously motivated practice during the two-plus years section 75.300(c) was on the books before Michigan changed its policy. There is thus reason to doubt that section 75.300(c) was the reason for Michigan's reversal. It is also not clear that section 75.300(c) would even apply to St. Vincent's conduct in this case given that St. Vincent uses private funds to recruit and evaluate prospective adoptive and foster parents.

And even if Michigan did have concerns about section 75.300(c)'s application to St. Vincent's practices, as discussed previously, another provision in the HHS UAR, 45 C.F.R. § 75.102(b), authorizes HHS to grant exceptions from program requirements on a "case-by-case basis" where not otherwise required by law. Pursuant to this authority, in January of this year HHS granted South Carolina an exception from 45 C.F.R. § 75.300(c) for a faith-based child placing agency in that state, Miracle Hill Ministries, that uses religious criteria in selecting among prospective foster care parents. *See* Ex. 3. Michigan's failure to seek a similar exception here—to the extent it believes 45 C.F.R. § 75.300(c) prevents it from accommodating St. Vincent's religious exercise—is not traceable to the Federal Defendants.

In sum, 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. To the contrary, the Federal Defendants' most recent regulatory action in this space was to *grant* an exception to another state, South Carolina, that wished to provide religious exemptions to foster care agencies. Plaintiffs offer no reason to think the Federal Defendants would not consider a similar exception for Michigan if the State requested one based on an alleged concern that 45 C.F.R. § 75.300(c) might not allow accommodation of St. Vincent's religious exercise.¹¹ That Michigan has failed

¹¹ Although, as noted above, it is unclear whether Plaintiffs have actually stated any claims against the Federal Defendants given that Plaintiffs do not allege the Federal Defendants have violated Plaintiffs' rights, and in any event have failed to satisfy ripeness and standing

to seek an exception from section 75.300(c) and has, instead, threatened to terminate St.

Vincent’s contracts is not traceable to the Federal Defendants. *See Warth*, 422 U.S. at 505 (no traceability where plaintiffs’ alleged injuries “depended on the efforts and willingness of third parties” to take actions beneficial to plaintiffs).

2. Preliminary Injunctive Relief Against the Federal Defendants Would Not Redress Plaintiffs’ Alleged Injuries.

Redressability requires the plaintiff to show that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan*, 504 U.S. at 561 (citation and internal quotation marks omitted). “[T]here must be a substantial likelihood that the relief requested will redress or prevent the plaintiff’s injury.” *Coyne ex rel. Ohio v. Am. Tobacco Co.*, 183 F.3d 488, 494 (6th Cir.1999). “An injury is redressable if a judicial decree can provide prospective relief that will remove the harm.” *Doe v. DeWine*, 910 F.3d 842, 850 (6th Cir. 2018) (citation and internal quotation marks omitted).

EKWRO is instructive here. In that case, the Supreme Court found that the plaintiffs had failed to show redressability because it was “purely speculative” that “the desired exercise of the court’s remedial powers”—denying tax-exempt status to hospitals that refused to serve indigent patients—would give the indigent plaintiffs what they wanted—access to hospital services. 426 U.S. at 42–43. “[I]t is just as plausible,” the Court explained, “that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.” *Id.* Similarly, in *Warth*, the Court found no redressability where the record was “devoid of any

requirements, the Federal Defendants acknowledge that requiring a child placing agency to recommend same-sex couples as potential adoptive or foster parents in violation of the agency’s sincerely held religious beliefs could present a potential issue under RFRA if doing so would substantially burden the agency’s exercise of religion and would not be the least restrictive means of furthering a compelling government interest.

indication that . . . were the court to remove the [challenged zoning restrictions], such relief would benefit petitioners.” 422 U.S. at 506. In both cases, the plaintiffs’ failure to establish that granting relief would in fact produce the desired outcome doomed the plaintiffs’ standing. *See also Allen*, 468 U.S. at 758 (no standing in suit by African American parents and children challenging tax exemptions for racially discriminatory private schools where it was “entirely speculative” that withdrawal of tax-exempt status “would lead [a] school to change its policies”); *Rasins Landscape & Assocs., Inc. v. Mich. Dep’t of Transp.*, 528 F. App’x 441, 445 (6th Cir. 2013) (no standing in suit by subcontractor challenging government’s failure to impose sanctions on contractors who had declined to pay subcontractor where it was “unclear that a prime contractor would pay its debts even if sanctioned”).

Here, there is no indication that issuing an injunction against the Federal Defendants would cause Michigan to reverse its decision to stop contracting with agencies like St. Vincent that decline to recommend same-sex couples as potential adoptive or foster parents because of sincerely held religious beliefs. Although Defendant Nessel has said the non-discrimination provisions in Michigan’s contracts with foster care and adoption providers are “federally required,” Ex. 2 at 3, the State has not indicated that it has any intention of changing its policy and allowing St. Vincent to continue serving as a provider in the absence of 45 C.F.R. § 75.300(c). To the contrary, as described above, Michigan was already including non-discrimination provisions in its contracts with St. Vincent *before* section 75.300(c) was even promulgated, indicating that its inclusion of such provisions is not tied to the existence of section 75.300(c). And Michigan did not stop granting case-by-case exemptions until several years *after* section 75.300(c) became effective, suggesting the State’s decision to stop granting such exemptions was not related to the requirements of section 75.300(c). Enjoining enforcement of

section 75.300(c) also would not wipe away the *Dumont* Settlement Agreement, which purports to give Michigan a contractual duty to enforce non-discrimination provisions in contracts with agencies like St. Vincent.

Defendant Nessel also has expressed significant opposition to past efforts to accommodate child placing agencies' religious beliefs. As Plaintiffs note, prior to assuming office as Michigan's Attorney General, Nessel argued, without any reference to the requirements of the First Amendment to the U.S. Constitution, that "there's 'no viable defense'" for the 2015 Michigan religious freedom law for adoption and foster care agencies and that the law's "only purpose is discriminatory animus." *See* Compl. ¶ 92, PageID.33; *see also* PI Memo at 24, PageID.194 (quoting Nessel as saying that the 2015 law's "purpose is to discriminate against people"); PI Memo at 36, PageID.206 (quoting Nessel as saying, "If you are a proponent of this type of bill, you honestly have to concede that you just dislike gay people more than you care about the needs of foster care kids."). Given her past statements on this issue, it is unlikely that Defendant Nessel would change course regarding St. Vincent even if the Federal Defendants were enjoined from enforcing section 75.300(c) against Michigan.

Absent some showing that Michigan would reverse its policy against contracting with agencies like St. Vincent if enforcement of 75.300(c) were enjoined, Plaintiffs cannot show redressability and thus cannot establish standing to sue the Federal Defendants. *See EKWRO*, 426 U.S. at 43 (no redressability where it was "just as plausible" that third party would continue course of action harmful to plaintiff if court granted relief); *Warth*, 422 U.S. at 506 (no redressability where nothing in record suggested requested relief "would benefit petitioners"); *Binno v. Am Bar Ass'n*, 826 F.3d 338, 345 (6th Cir. 2016) (no redressability in suit challenging alleged ABA requirement that law schools use LSAT in admissions decisions because even if

court made LSAT optional, “law schools still could choose to require the LSAT in their admissions process”). And without standing, Plaintiffs cannot succeed on the merits.

II. Plaintiffs Do Not Satisfy the Other Elements of the Preliminary Injunction Analysis.

Because there is no risk of enforcement by the Federal Defendants based on St. Vincent’s religiously motivated conduct in this case, Plaintiffs do not satisfy the other elements of the preliminary injunction analysis.

The second element of the analysis is whether the movant is “likely to suffer irreparable harm in the absence of preliminary relief.” *Winter*, 555 U.S. at 20. Irreparable harm is harm that is “actual and imminent,” not “speculative or unsubstantiated.” *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006). As described above, the harm Plaintiffs allege from the Federal Defendants is not “imminent” because there is no indication that the Federal Defendants will deny federal funding to Michigan under 45 C.F.R. § 75.300(c) based on St. Vincent’s religiously motivated practice of declining to recommend same-sex couples as potential adoptive or foster parents. Any risk of harm to Plaintiffs from the Federal Defendants is at best “speculative” and “unsubstantiated.” *Abney*, 443 F3d at 552.

The third and fourth elements of the preliminary injunction analysis, the balance of the equities and whether an injunction is in the public interest, “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, a preliminary injunction is not in the public interest because there is no threat of enforcement by the Federal Defendants and the only real effect of an injunction would be to validate the State of Michigan’s attempt to use the Federal Defendants as cover for its recent policy change. It is not in the public interest for the federal government to become a tool in state policy disputes.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction against the Federal Defendants should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Local Civil Rule 7.2(b)(i). I have used the word count function in Microsoft Word 2016 and obtained a count of 9,063 words, excluding the parts of the brief exempted by the Rule.

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