No. 18-5680

In the United States Court of Appeals for the Sixth Circuit

ALICIA M. PEDREIRA, *et al.*,

Plaintiffs-Appellants,

v.

SUNRISE CHILDREN'S SERVICES, INC., *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Kentucky (Louisville Division),
Hon. Charles R. Simpson III, Case No. 3:00-cv-210

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RULE 26.1 DISCLOSURE

Pursuant to 6th Circuit Rule 26.1, Appellants make the following disclosures:

Plaintiffs-Appellants Alicia M. Pedreira, Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant are individuals. No Plaintiff is a subsidiary or affiliate of a publicly owned corporation, and there is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

Dated: January 17, 2019

/s/ R. Stanton Jones
R. Stanton Jones

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INTRODUCTION

Plaintiffs, four Kentucky taxpayers, allege that the Commonwealth of Kentucky is violating the Establishment Clause by funding Sunrise Children's Services—an organization that has a long and documented history of egregious religious proselytization, coercion, and discrimination with respect to the children in its care. After more than a decade of litigation and negotiations, Plaintiffs and the Commonwealth agreed in 2013 to settle all claims in exchange for permanent changes to Kentucky's foster-care system. Now, the Commonwealth, together with Sunrise, seeks to repudiate its obligations under the Settlement Agreement. And they have convinced the district court to deny entry of the Settlement as a consent decree on the basis that modification of existing Kentucky regulations is required to lawfully implement the Settlement.

That is both wrong as a matter of Kentucky law and directly contrary to the Commonwealth's longstanding prior practice and repeated representations, both to this Court and the district court. Existing Kentucky statutes and regulations already confer ample authority for the Commonwealth to implement every term of the Settlement Agreement. In fact, to our knowledge, the Commonwealth implemented the Settlement's terms concerning its relationships with private childcare providers for at least three years without enacting new regulations. The Commonwealth did not violate the law in doing so.

Moreover, even if Kentucky law did require new regulations to implement the Settlement Agreement, that would not be a valid reason to disapprove the Settlement. The Commonwealth agreed to initiate the process of enacting regulations, if legally necessary, to implement the Settlement, and nothing in federal or state law precludes Kentucky from doing so.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs-Appellants respectfully submit that oral argument should be heard. This appeal concerns the validity of a settlement that would protect the rights of all Kentucky taxpayers and all children in Kentucky's foster-care system. The appeal also presents complex questions of Kentucky administrative law and federal law relating to consent decrees.

STATEMENT OF JURISDICTION

The district court had federal-question jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiffs raise claims under the Establishment Clause of the First Amendment to the U.S. Constitution. On May 29, 2018, the district court entered an order denying Plaintiffs' motion for voluntary dismissal with prejudice and approval of the Settlement Agreement as a consent decree. Order (R. 589, Page ID 6707). On June 28, 2019, Plaintiffs timely filed their notice of appeal from that order. Notice of Appeal (R. 592, Page ID 6712–14).

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) and *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981). *See* Order (ECF No. 32-2).

STATEMENT OF THE ISSUES

1. Whether Kentucky law requires the Commonwealth of Kentucky to enact new regulations to implement a settlement agreement that—in accordance with existing statutes and regulations—protects children in Kentucky's foster-care system against religious proselytization, coercion, and discrimination by state-funded childcare providers.

2. If Kentucky law does require new regulations, whether that was a valid basis for the district court's refusal to approve the settlement agreement, where the Commonwealth agreed to initiate the process of enacting new regulations—if legally necessary—to implement the settlement.

STATEMENT OF THE CASE

A. Early Proceedings

Plaintiffs Alicia M. Pedreira, Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant are four Kentucky taxpayers. Defendant Sunrise Children's Services—formerly known as "Kentucky Baptist Homes for Children"—is a private, religiously affiliated organization that contracts with the Commonwealth of Kentucky to provide services for children in the Commonwealth's custody. Sunrise operates residential facilities for children and facilitates foster-care

placements. Since 2000, Sunrise has received more than $100 million in state funds. *See Pedreira v. Kentucky Baptist Homes for Children*, 579 F.3d 722, 725 (6th Cir. 2009) ("*Pedreira I*").

Plaintiffs commenced this action in 2000, asserting that (1) the defendant Commonwealth officials[1] violated the Establishment Clause by funding Sunrise, and (2) Sunrise discriminated against actual and potential employees on the basis of religion in violation of the Kentucky Civil Rights Act and Title VII of the Civil Rights Act of 1964. Notice of Filing Original Complaint (R. 543-1, Page ID 6169–88). On July 23, 2001, the district court dismissed the employment-discrimination claims. *See* Order 1 (R. 132, Page ID 26). The parties continued litigating Plaintiffs' Establishment Clause claim for nearly five years. Then, on March 31, 2008, the district court reversed course and dismissed that claim for lack of standing. Order (R. 309, Page ID 2361).

On August 31, 2009, this Court unanimously affirmed the dismissal of the employment-discrimination claims, but held that Plaintiffs have standing as state taxpayers, reversed the dismissal of Plaintiffs' Establishment Clause claim, and remanded the case for further proceedings. *Pedreira I*, 579 F.3d at 725, 733.

[1] Those officials are Secretary for Health and Family Services and Secretary for Justice and Public Safety ("the Commonwealth Defendants"), offices currently held by Adam Meier and John Tilley, respectively.

B. Evidence Adduced in Discovery

In discovery, Plaintiffs uncovered extensive evidence of religious proselytization, coercion, and discrimination at Sunrise facilities. For instance, Plaintiffs received the results of an independent third party's one-on-one exit interviews with children leaving Sunrise residential facilities or foster-care placements. *See* Resp. to Objections, Ex. B (R. 274-3 & 274-4, Page ID 1226–1310). Over a five-year period, at least 85 children—including children at every Sunrise residential facility and in every foster-care region statewide—complained of religious misconduct. *See id.* Notably, all of these complaints post-date the filing of this lawsuit, covering a time when Sunrise knew that its religious practices would be scrutinized. *See id.* The children's complaints include:

- Child "was not allowed to practice own religion. They tried to more or less force me to become a Christian."
- Child "did not have a choice when or when not to attend religious services. Required, if you didn't go you had to clean up or go to group."
- Child "was not allowed to choose when or when not to attend a religious service because [child] 'had to do some type of Bible study during that time or get consequences.'"
- Child "did not have a choice when or when not to attend religious services because [child was] 'forced to go to church [or] would be dropped to level 1 and [forced to] sit in chair.'"
- Child "was not allowed to practice own religion. Child state[s] you had to go [to Christian religious services] or you got in trouble."

- Child "did not have a choice when or when not to attend religious services. 'If you did not go you got into trouble.'"
- Child "did not have a choice when or when not to attend religious services. Child [was] made to go to specific church, restrictions if you resist."
- Child reported that "if you did not go to church you had [to] s[i]t out in the van."

Id.

Discovery revealed additional misconduct by Sunrise. In letters soliciting donations and other support from churches and church parishioners, Sunrise repeatedly referred to its foster families as "in-home missionaries" and stated that Sunrise foster parents "are not performing social work—they are performing Kingdom work." Reply, Ex. H (R. 522-8, Page ID 5847); *see also id.* ("In 2008, Sunrise placed a special focus on our foster families as 'in-home missionaries.'"); *id.* at Page ID 5850 ("Are you called to become an in-home missionary as a foster parent through Sunrise Children's Services? You can provide children in need with the hope and healing that comes only through the love of Christ."); *id.* at Page ID 5852–55 (similar).

C. The Settlement Agreement

On March 12, 2013, after more than a year of negotiations and thirteen years after this case was filed, Plaintiffs and the Commonwealth Defendants agreed upon and executed a Settlement Agreement, which consensually resolved all claims

between them. *See* Settlement Agreement (R. 512-2, Page ID 5420–40). Sunrise was involved in some of the negotiations, but it is not a party to the Settlement.

The Settlement Agreement seeks to prevent publicly funded private childcare providers from engaging in religious indoctrination, proselytization, and coercion of—as well as religious discrimination against—children in Kentucky's public childcare system. To do so, Section 2 of the Settlement Agreement requires the Commonwealth Defendants to modify various procedures for providing care to children through these private providers, including Sunrise. Among other modifications, the Commonwealth Defendants must make certain changes to their standard two-year agreements with private providers, referred to as "PCC Agreements," to ensure that providers, such as Sunrise, do not:

- "discriminate" on the basis of a child's religious adherence, nonadherence, or practice;
- "require, coerce, or pressure" any child to participate in religious activities or practices;
- "impose any form of punishment or benefit" based on a child's religious participation;
- "proselytize any child in any religious beliefs"; or
- "require any child to pray" or attend prayer.

§ 2(f) (Page ID 5427).

Additionally, before placing a child with a religiously affiliated private provider, the Commonwealth Defendants must inform children and parents of the

proposed provider's religious affiliation, and if the child or parent objects, the Commonwealth Defendants must endeavor to provide an alternative placement. § 2(a) (Page ID 5422–23). The Commonwealth Defendants must inform children, parents, and guardians of the protections created by the Settlement Agreement, and of contact information for a state official to complain to if a child, parent, or guardian believes these provisions have been violated. § 2(b) (Page ID 5423–24).

The Settlement Agreement requires the Commonwealth Defendants to monitor all private childcare providers, including Sunrise, to ensure that they are not religiously proselytizing or coercing the children in their care, and are otherwise complying with the terms mandated by the Settlement. § 3 (Page ID 5429–30). The Settlement Agreement requires the Commonwealth Defendants, in certain circumstances, to notify the Office of Inspector General within the Cabinet for Health and Family Services of reports—obtained through the settlement-mandated monitoring—concerning religious coercion, discrimination, or proselytization by providers. § 2(h), (i) (Page ID 5427–28). The Commonwealth Defendants must then notify Plaintiffs' counsel of the results of any Inspector General investigation into such reports and provide monitoring materials to Plaintiffs' counsel. § 3(b) (Page ID 5429). Under the Settlement Agreement as originally executed, the Commonwealth Defendants also agreed to provide to

Plaintiffs' counsel all monitoring materials concerning children placed at Sunrise for seven years. § 3(a) (Page ID 5429).

In addition, the original Settlement Agreement contemplated the possibility that new regulations could be enacted to implement some of its provisions. Specifically, in the event that new or modified administrative regulations "must be enacted to comply with the terms of th[e] Settlement Agreement," the Commonwealth Defendants agreed to "initiate the process of modifying any [such] administrative regulations." § 6(b) (Page ID 5431). The parties further agreed that "the Commonwealth Defendants cannot guarantee the promulgation of any regulation, and that the failure to promulgate any regulation shall not be considered a violation of th[e] Settlement Agreement." *Id.* The parties also agreed that "if the Commonwealth Defendants fail to promulgate any regulation that must be enacted to comply with the terms of this Agreement, Plaintiffs shall have the right, in their sole discretion, to declare this entire Agreement null and void." *Id.* The Settlement Agreement did not specify that any regulation was necessary to comply with any of its provisions, however; indeed, the only specific reference in the Settlement to potential new regulations appeared in two sections, both governing when children could be placed with religiously affiliated providers. *See* §§ 2(a)(i), (ii) (Page ID 5422–23).

Finally, Plaintiffs and the Commonwealth Defendants agreed to seek voluntary dismissal of this action with prejudice through an order incorporating the Settlement Agreement and retaining jurisdiction to enforce it. § 6(a) (Page ID 5430–31).

D. Voluntary Dismissal and Appeal

On September 20, 2013, after the Settlement Agreement was finalized and executed, Plaintiffs moved to voluntarily dismiss this action with prejudice pursuant to the Settlement. Mot. for Vol. Dismissal (R. 512, Page ID 5389–96). Sunrise opposed Plaintiffs' motion. Sunrise Opp. (R. 514, Page ID 5490–5531). Among other contentions, Sunrise argued that the Commonwealth Defendants were violating state law and the Settlement Agreement itself by not enacting new regulations to implement it. *Id.* at 29–33, 35–36 (Page ID 5522–26, 5528–29).

The Commonwealth Defendants filed a separate response in support of Plaintiffs' motion in which they rebutted each of Sunrise's arguments. Comm. Resp. (R. 521, Page ID 5666–83). The Commonwealth Defendants urged the district court to grant dismissal and incorporate the Settlement Agreement into the dismissal order, describing the Settlement as an

> attempt to remedy the alleged constitutional violations identified in Plaintiffs' Complaints by strengthening *already existing provisions* ensuring that children's religious rights are being protected and reasonably accommodated, without proselytization or coercion.

Id. at 9 (Page ID 5674) (emphasis added). The Commonwealth Defendants also emphasized that "neither the Settlement Agreement nor any law required it to promulgate regulations to affect the changes mandated by the settlement," and that "the implementation of any term of the Settlement Agreement was not conditioned upon the successful promulgation of any regulation." *Id.* at 13 (Page ID 5678). The Commonwealth Defendants' brief explained in detail, with citations to Kentucky statutes and regulations, that "there are already existing statutes and regulations in place which encompass the terms of the settlement." *Id.* at 14 (Page ID 5679). The Commonwealth Defendants further stated that "[t]he new provisions implemented through the modified PCC agreement do not 'modify or expand' the Commonwealth's already existing law or policy." *Id.* at 17 (Page ID 5682) (quoting KRS § 13A.130). Rather, "[t]he Settlement Agreement merely sets forth more specific mechanisms to ensure that these already existing standards are being met by the child caring facilities and child placing agencies." *Id.* The Commonwealth Defendants concluded: "[N]othing in the Settlement Agreement . . . violates the law." *Id.* at 18 (Page ID 5683).

On June 30, 2014, the district court granted Plaintiffs' motion to voluntarily dismiss. Mem. Op. (R. 527, Page ID 6066, 6080). Importantly, the district court expressly considered and rejected Sunrise's argument that "the Commonwealth must engage in notice and rulemaking prior to enacting these changes." *Id.* at 7 n.6

(Page ID 6072). As the district court explained, "[t]he Commonwealth has identified regulations already in place which render additional administrative procedures unnecessary." *Id.* The court's order of dismissal also incorporated the Settlement Agreement and retained jurisdiction to enforce it. Order (R. 528, Page ID 6081).

The Commonwealth Defendants thereafter implemented the modifications required under the Settlement Agreement, including the agreed-upon changes to the Commonwealth's PCC Agreements with Sunrise and other private childcare providers, without enacting new regulations. *See* Brief of Appellees, jointly filed by Plaintiffs and Commonwealth Defendants, at 7, 43, 44, *Pedreira v. Sunrise Children's Servs., Inc.*, No. 14-5879 (6th Cir. Dec. 19, 2014); Settlement Implementing Documents (R. 523-1 to 523-5, Page ID 5900–93). Sunrise did not challenge the Commonwealth Defendants' implementation of those changes, and it in fact agreed to the terms of the new PCC Agreements. *See* Brief of Appellees, jointly filed by Plaintiffs and Commonwealth Defendants, at 7, 43, 44, *Pedreira v. Sunrise Children's Servs., Inc.*, No. 14-5879 (6th Cir. Dec. 19, 2014).

Sunrise did appeal the district court's dismissal order, arguing that the Settlement Agreement was improper. But Sunrise did not argue in its appeal that Kentucky law required enactment of any regulations to implement the Settlement. Rather, Sunrise argued, in just one paragraph, that the Settlement itself

contemplated new regulations, that the Commonwealth Defendants had not timely enacted any such regulations, and that these circumstances gave Plaintiffs the right to void the Settlement and thereby restart this litigation at their discretion. Brief of Appellant at 32, *Pedreira v. Sunrise Children's Servs., Inc.*, No. 14-5879 (6th Cir. Oct. 2, 2014), ECF No. 30. Plaintiffs and the Commonwealth Defendants filed a joint brief to this Court, in which they represented that "no new regulations are necessary" and argued that the Settlement Agreement "is eminently fair, adequate, reasonable, and consistent with the public interest." Brief of Appellees at 32, 42, *Pedreira v. Sunrise Children's Servs., Inc.*, No. 14-5879 (6th Cir. Dec. 19, 2014), ECF No. 36.

In October 2015, this Court held that the district court's dismissal order incorporating the Settlement Agreement is, in fact, a consent decree. *Pedreira v. Sunrise Children's Servs., Inc.*, 802 F.3d 865, 871–72 (6th Cir. 2015) ("*Pedreira II*"). And because the district court had thought to the contrary, and therefore had discussed but had not considered in sufficient depth or held a hearing on whether the consent decree was "'fair, adequate, and reasonable, as well as consistent with the public interest,'" the Court vacated the district court's opinion and remanded the case to the district court to "first address these questions in earnest." *Id.* at 872 (quoting *United States v. Lexington–Fayette Urban Cty. Gov't*, 591 F.3d 484, 489 (6th Cir. 2010)). The Court did not "express any opinion as to the matters

discussed by the [district] court in its dicta concerning the decree's fairness to Sunrise"; however, the Court did "flag one concern"—and only one—for the district court to consider on remand: whether the Settlement Agreement "singles out Sunrise by name for special monitoring" and thus "subjects Sunrise to unique reputational harm." *Id.*

E. The Amended Settlement Agreement

On November 18, 2015, shortly after this Court's decision, Plaintiffs and the Commonwealth Defendants executed an amendment to the Settlement Agreement for the express purpose of alleviating the potential "concern" identified by this Court of "singling out" Sunrise for "special monitoring." *See* First Am. to Settlement Agreement, Recitals B, C (R. 552-2, Page ID 6276). In the Amendment, Plaintiffs and the Commonwealth Defendants agreed to eliminate all monitoring provisions that applied to Sunrise alone. The parties agreed that the Commonwealth Defendants will now provide monitoring materials only for those child care providers who are the subject of a state investigation concerning the providers' religious practices. § 1 (Page ID 6276–77). In so doing, the parties deleted the section of the original Settlement Agreement concerning monitoring and replaced it with a new section. *Id.*

"Further, in light of objections raised by Sunrise during briefing concerning the Settlement Agreement, the Parties desire[d] to clarify that no new or modified

administrative regulations need to be enacted to comply with the Settlement Agreement." Recital D (Page ID 6276). Therefore, the Amendment provided, "Notwithstanding any references in the Settlement Agreement to possible enactment of new or modified administrative regulations, the Parties agree that the Commonwealth Defendants do not need to enact or modify any administrative regulations to comply with the Settlement Agreement." § 3 (Page ID 6278). Unlike the section of the Amendment concerning monitoring, this section of the Amendment did not remove or modify the language of the section of the original Settlement Agreement relating to potential new regulations. *Id.* Instead, the Amendment provided, "[e]xcept as explicitly stated in this Amendment, all terms of the Settlement Agreement shall remain in full force and effect, and the Parties shall continue to comply with the Settlement Agreement, as amended herein." § 4 (Page ID 6278).

Plaintiffs and the Commonwealth Defendants also "agree[d] to file a joint motion" in the district court requesting approval of the Settlement Agreement as amended, dismissal of the suit with prejudice, incorporation of the Settlement Agreement into the Court's order of dismissal, and retention by the Court of jurisdiction to enforce that order. § 2 (Page ID 6278). The Parties further "agree[d] to cooperate and take any additional actions as may be reasonably necessary to obtain such relief." *Id.*

F. The Commonwealth Defendants' Attempt to Renege on Their Obligations

On December 8, 2015, Governor Matt Bevin assumed the office of Kentucky Governor. On April 11, 2016, Plaintiffs' counsel received a letter from the Governor's Office, which stated that, in light of the change in administration, the Governor's Office had undertaken a "fresh appraisal of pending litigation, including this case." Letter from M.S. Pitt 1 (R. 552-3, Page ID 6283). Specifically, the Governor's Office had concluded that the Settlement Agreement was no longer binding on the Commonwealth, and that the Settlement Agreement was not fair, reasonable, or consistent with the public interest. *Id.* at 2 (Page ID 6284). The Governor's Office added that it did not believe that the Settlement Agreement "can or should be pursued on remand to the district court." *Id.* at 4 (Page ID 6286). The Commonwealth Defendants subsequently sought to resume the district-court litigation, filing a motion (joined by Sunrise) that requested a briefing schedule for a summary-judgment motion that had been stayed due to the Settlement Agreement. Joint Mot. to Set Briefing Schedule (R. 561, Page ID 6343–46).

G. Decision Under Review

In compliance with the Amended Settlement Agreement, Plaintiffs moved the district court to enter the Agreement as a consent decree and to dismiss the suit. Mot. for Vol. Dismissal (R. 552, Page ID 6227–53). The Commonwealth

Defendants, now fully repudiating their obligations under the Settlement Agreement, opposed Plaintiffs' motion, citing "a change in administration and, in every respect, philosophy, following Governor Matthew G. Bevin's election in November 2015." Comm. Resp. 1 (R. 557, Page ID 6299). Sunrise also opposed the motion. Sunrise Obj. (R. 560, Page ID 6309–40). Defendants argued, *inter alia*, that the Amended Settlement Agreement is unenforceable for lack of consent and that the district court lacked authority to enter the Settlement as a consent decree. *See, e.g.*, Comm. Resp. 3, 5–6 (R. 557, Page ID 6301, 6303–04); Sunrise Obj. 8–13 (R. 560, Page ID 6319–24). But neither the Commonwealth nor Sunrise contended that the Settlement was unlawful due to a need to enact regulations. The district court rejected Defendants' arguments, determining that the Settlement Agreement remained a viable proposed consent decree, and intended to set the matter for a fairness hearing. Mem. Op. & Order 8–11 (R. 572, Page ID 6444–47).

Sunrise filed a motion for reconsideration. Sunrise Mot. to Reconsider (R. 573, Page ID 6448–50). For the first time on remand, Sunrise suggested that the Settlement could not be lawfully implemented without new regulations, though it devoted only three paragraphs out of its eight-page brief to this point. *See* Sunrise Mem. in Support of Mot. to Reconsider 6–7 (R. 573-1, Page ID 6456–57). The Commonwealth Defendants did not file their own motion for reconsideration, but instead supported Sunrise's motion—including, for the first time for them on

remand, the argument concerning regulations—in a "Response" to the motion. Comm. Resp. 2–3 (R. 577, Page ID 6479–80). The district court rejected all the arguments in Sunrise's motion for reconsideration, with one exception: it ordered supplemental briefing on the regulations issue. Mem. Op. & Order 11–12 (R. 579, Page ID 6509–10).

After receiving that briefing, the district court granted the reconsideration motion and refused to approve the consent decree. Mem. Op. 22–23 (R. 588, Page ID 6705–06). The district court concluded that Kentucky law requires enactment of new or modified administrative regulations to implement the Settlement Agreement, and that the Settlement violates Kentucky law because—in the district court's view—it does not, as amended, require the Commonwealth Defendants to enact such regulations. *Id.* at 11–22 (Page ID 6694–6705) (citing KRS § 13A.130(1)).

Specifically, the district court determined that six paragraphs of the Settlement Agreement would require rulemaking to implement:

- Sections 2(a)(i) and 2(a)(ii) require that, before placing a child with a religiously affiliated private childcare provider, the Commonwealth Defendants must inform the child and parent of the proposed provider's religious affiliation, and must endeavor to provide an alternative placement if either the child or the parent objects;
- Sections 2(b)(i) and 2(b)(ii) require the Commonwealth Defendants to inform children, parents, and guardians of the protections created by the Settlement Agreement, and of contact information for a state

official to complain to if a child, parent, or guardian believes these provisions have been violated;

- Sections 2(h) and 2(i) require that each child, before leaving a placement, be given an opportunity to complete an anonymous exit survey relating to the child's religious experiences at that placement, and that case workers must ask children about their religious experiences during annual "home visits"; these sections also provide that, in certain circumstances, the Commonwealth Defendants must notify the Office of Inspector General within the Cabinet for Health and Family Services of reports of religious coercion, discrimination, or proselytization by providers.

See id. at 12–20 (Page ID 6695–6703).

The district court, however, also concluded that the Amendment did not "nullify the mandate for regulatory action contained in the terms of the original agreement and remaining in the Settlement Agreement, as amended." *Id.* at 10 (Page ID 6693); *accord* Mem. Op. & Order 8 (R. 579, Page ID 6506). The district court explained that "[t]he amendment did not alter or remove the language requiring the enactment of administrative regulations, despite the fact that it struck and rewrote another section of the Settlement Agreement." Mem. Op. 21 (R. 588, Page ID 7304). Yet, just a few sentences later, the district court took a contrary position and misread the Amendment as excusing the Commonwealth from enacting new regulations even if they were legally necessary. *Id.* The district court therefore concluded that the Amended Settlement Agreement is illegal. *Id.* at 22 (Page ID 7305).

The district court reached this conclusion even though it did not dispute Plaintiffs' point "that the Settlement Agreement, as amended, does not preclude the Commonwealth Defendants from engaging in rulemaking." *See id.* at 22 (Page ID 6705). The court determined that this made no difference, because it did not expect the Commonwealth Defendants to actually engage in rulemaking, and it did not wish to order the Commonwealth to do so. *See id.* The court therefore refused to approve the Amended Settlement Agreement as a consent decree. Order (R. 589, Page ID 6707).

Plaintiffs appealed, and Defendants moved to dismiss the appeal, arguing that Plaintiffs had no right to take an interlocutory appeal from the district court's order. Notice of Appeal (R. 592, Page ID 6712); Joint Motion to Dismiss (ECF No. 16). On October 24, 2018, a three-judge panel of this Court unanimously denied Defendants' motion. Order (ECF No. 32-2).

STANDARD OF REVIEW

A district court's refusal to enter a consent decree is reviewed for abuse of discretion. *See United States v. Lexington-Fayette Urban Cty. Gov't*, 591 F.3d 484, 491 (6th Cir. 2010). "A district court abuses its discretion when . . . it improperly applies the law or uses an erroneous legal standard." *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1017 (6th Cir. 1994) (quoting *Lorain NAACP v. Lorain Bd. of Educ.*, 979 F.2d 1141, 1148 (6th Cir. 1992)). Moreover,

in reviewing a rejection of a consent decree, this Court considers the "public policy [that] generally supports 'a presumption in favor of voluntary settlement' of litigation"—a "presumption [that] is particularly strong" when one of the parties that negotiated the decree is a governmental agency. *See Lexington-Fayette*, 591 F.3d at 490 (quoting *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991)).

SUMMARY OF ARGUMENT

The district court's order denying approval of the Amended Settlement Agreement as a consent decree should be reversed on two independent bases:

First, Kentucky law permits the Commonwealth Defendants to implement every term of the Settlement Agreement law without enacting any new or modified administrative regulations. A host of existing Kentucky statutes and regulations authorize each term of the Settlement Agreement, including numerous statutes and regulations forbidding religious discrimination, requiring the Commonwealth to accommodate children's religious preferences, and mandating agency oversight of private childcare providers to protect children's rights. The Settlement Agreement's terms are fully consistent with and encompassed by these existing statutory and regulatory provisions. The Commonwealth Defendants' own conduct, together with their repeated statements to the district court and this Court,

show that no new regulations are necessary to implement the Settlement Agreement under Kentucky law.

Second, even if new regulations were necessary to implement the Settlement Agreement, the Commonwealth Defendants agreed to initiate the process of enacting such regulations, and they should be held to that agreement. The district court misread the Amendment as relieving the Commonwealth from its obligation to commence a rulemaking to enact any legally necessary regulations. The Amendment, on its face, did no such thing. Moreover, no provision of federal or state law prohibits the Commonwealth Defendants from engaging in rulemaking in order to implement the negotiated terms of a duly executed settlement agreement.

ARGUMENT

I. The Commonwealth Defendants Can Lawfully Implement the Amended Settlement Agreement Without Enacting Any New Regulations.

The district court concluded that, under Kentucky law, new regulations are necessary to implement six paragraphs of the Settlement Agreement. *See* Mem. Op. 12–20 (R. 588, Page ID 6695–6703). That conclusion is both wrong as a matter of Kentucky law and directly contrary to the Commonwealth Defendants' longstanding prior position and practice. As the Commonwealth Defendants previously told this Court and the district court, they can lawfully implement the terms of the Settlement without enacting any new regulations. *See* Brief of Appellees at 32, *Pedreira v. Sunrise Children's Servs., Inc.*, No. 14-5879 (6th Cir.

Dec. 19, 2014), ECF No. 36; Comm. Resp. 9, 14, 17 (R. 521, Page ID 5674, 5679, 5682). Consistently with this conclusion, the Commonwealth Defendants implemented the Settlement for at least three years, from March 2013 through April 2016, on the basis of existing statutes and regulations. *See* Settlement (R. 512-2, Page ID 5421); Brief of Appellees, jointly filed by Plaintiffs and Commonwealth Defendants, at 7, 43, 44, *Pedreira v. Sunrise Children's Servs., Inc.*, No. 14-5879 (6th Cir. Dec. 19, 2014); Settlement Implementing Documents (R. 523-1 to 523-5, Page ID 5900–93); Letter from M.S. Pitt 4 (R. 552-3, Page ID 6286); Letter from D. Bergman 1 (R. 552-4, Page ID 6288). They did not violate Kentucky law in doing so.

A. Each Term of the Amended Settlement Agreement Is Encompassed by Existing Provisions of Kentucky Law.

Under Kentucky law, a state agency "shall not by internal policy, memorandum, or other form of action" "[m]odify," "[e]xpand upon," or "limit" a statute or administrative regulation. KRS § 13A.130(1). As shown below, the terms of the Amended Settlement Agreement do not modify, expand upon, or limit any existing Kentucky statute or regulation. To the contrary, every term of the Amended Settlement Agreement is encompassed by—and fully consistent with—existing provisions of Kentucky law. As the Commonwealth Defendants themselves previously explained, "[t]he Settlement Agreement merely sets forth more specific mechanisms to ensure that these already existing standards are being

met by the child caring facilities and child placing agencies with whom the Cabinet contracts." Comm. Resp. 17 (R. 521, Page ID 5682).

The district court's broad holding to the contrary is wrong as a matter of Kentucky law. It would require formal notice-and-comment rulemaking procedures for virtually any action the Commonwealth Defendants—or, for that matter, any other Kentucky officials—wish to take, regardless of how minute or obvious. But state law says otherwise. Kentucky administrative agencies are empowered to adopt policies that "guide the [agencies'] discretionary authority" without engaging in notice-and-comment rulemaking. *Kordenbrock v. Kentucky Dep't of Corr.*, No. 2017-CA-000059-MR, 2018 WL 1769316, at *2 (Ky. Ct. App. Apr. 13, 2018) (unpublished), *review denied* (Sept. 19, 2018); *see also Seymour v. Colebank*, 179 S.W.3d 886, 890 (Ky. Ct. App. 2005) (holding that agency action "fully consistent" with existing laws did not require a new regulation); *Flaget Fuels, Inc. v. Com., Envtl. & Pub. Prot. Cabinet*, No. 2004-CA-002364, 2005 WL 2574148, at *7 (Ky. Ct. App. Oct. 14, 2005) (unpublished) (holding that agency did not need to enact a new regulation to consider certain "factors" in the agency's exercise of "discretion"). The court's holding to the contrary—that regulations are necessary to specify every detail of a state agency's policies and procedures—would impose enormous administrative burdens on the state government that are not called for by state law.

All told, the district court held that six paragraphs of the Settlement Agreement—2(a)(i), 2(a)(ii), 2(b)(i), 2(b)(ii), 2(h), and 2(i)—would require rulemaking to implement. None of them does.

1. Sections 2(a)(i) and 2(a)(ii) require that, before placing a child with a religiously affiliated private childcare provider or foster home, the Commonwealth Defendants and child-placing agencies must inform the child and the child's parent of the proposed provider's religious affiliation, and must endeavor to provide an alternative placement if either the child or the parent objects. (R. 512-2, Page ID 5422–23).

A host of statutes and regulations authorize the Commonwealth Defendants to implement these common-sense provisions. One statute directs the Cabinet of Health and Family Services ("the Family Cabinet") to select "the type of placement that best suits the child's needs" and is "the best alternative for the child." KRS § 199.801. Another statute provides that, upon the issuance of a temporary custody order, "[t]he child may also be placed in a facility or program operated or approved by [the Family Cabinet], including a foster home, or any other appropriate available placement" that is the "least restrictive." KRS § 620.090(2). And another statute provides that, in choosing a placement for a removed child, the Family Cabinet must "consider[] the wishes of the parent or other person exercising custodial control or supervision." KRS § 620.140(1)(c).

In accordance with these statutes, existing Family Cabinet regulations already provide that placement for a child removed from his or her home "shall be . . . selected according to the least restrictive appropriate placement available." 922 KAR § 1:140(3)(3)(a). In determining the "least restrictive appropriate placement" for a child, the Family Cabinet obtains information concerning the child's history and needs, including a child's "[r]eligious background and practices." § 1:360(2)(2)(k).

Similarly, child-placing agencies must obtain "[a] social history of the biological or legal parent, to include . . . [r]eligion or faith." § 1:310(19)(4)(b)(5). "A child-placing agency" must then "select a foster home for a child based upon the individual needs of the child, including . . . [a]ny information concerning the child's needs in placement." § 1:310(6)(2)(b). In addition, "[a] child shall participate in the intake process to the extent that the child's age, maturity, adjustment, family relationships, and the circumstance necessitating placement justify the child's participation." § 1:310(6)(3).

Further, private childcare providers are required to "demonstrate consideration for and sensitivity to . . . [the] religious background of a child in care." § 1:300(6)(7)(a)(1). Thus, during the intake process by the childcare provider, the provider takes a "social history" of the child. § 1:300(7)(1)(f)(4). A child's treatment team then creates a treatment plan based on a "[s]ocial

assessment" that includes information on the child's religion. § 1:300(7)(3)(a)(5)(b). Likewise, foster homes are required to "[p]rovide a child placed by [a] child-placing agency with a family life, including . . . [o]pportunities for development consistent with the child's religious, ethnic, and cultural heritage." § 1:310(12)(1)(h). And beyond those provisions, numerous statutes and regulations prohibit the Family Cabinet from discriminating against children on the basis of religion. *E.g.*, KRS § 344.020(1)(b); 505 KAR § 2:090(1)(1); 920 KAR § 1:090(2)(1).

The district court's principal objection to Section 2(a) was that it "limit[s] the discretion of the Commonwealth Defendants and child-placing agencies in determining appropriate placement of children." Mem. Op. 13 (R. 588, Page ID 6696). But Kentucky administrative agencies are empowered to adopt policies that "guide the [agency's] discretionary authority" without engaging in notice-and-comment rulemaking. *Kordenbrock*, 2018 WL 1769316, at *2. And that is precisely what occurred here: the Commonwealth Defendants agreed to implement specific procedures that are otherwise within their discretion to implement. Notably, the district court did not hold that any statutes or regulations prevent the Commonwealth Defendants from giving substantial weight to a child's or family's religious preferences. To the contrary, the court acknowledged that "[e]xisting regulations require sensitivity to the religious background of a child, protection

from religious discrimination, and provision of an opportunity for the practice of the child's or family's religion of choice." Mem. Op. 13 (R. 588, Page ID 6696). Section 2(a) merely implements those existing requirements.

The district court also objected that Section 2(a) "afford[s] the child, parent, or guardian near veto power on placement by objecting to [a private childcare provider's] religious affiliation." *Id.* at 13–14 (Page ID 6696–97). Not so. Sections 2(a)(i) and 2(a)(ii) require the Commonwealth Defendants only to "consider" any objection to a placement based on religion and to "make reasonable efforts to provide an alternative placement if an alternative exists." (R. 512-2, Page ID 5422–23). Importantly, these sections expressly preserve, above all else, the Commonwealth Defendants' "ability to exercise their reasonable and good faith discretion regarding the placement" to ensure "that it is in the best interests of the child." *Id.*

2. Sections 2(b)(i) and 2(b)(ii) of the Settlement Agreement require the Commonwealth Defendants to inform children, parents, and guardians of the protections created by the Settlement Agreement, and of contact information for a state official to complain to if a child, parent, or guardian believes these provisions have been violated. (R. 512-2, Page ID 5423–24).

Existing Kentucky regulations already authorize the Commonwealth Defendants to inform children of their rights and to seek redress for violations of

those rights. One Family Cabinet regulation provides that "[b]efore admission, the child and custodian shall be informed in writing of their rights and the child-caring facility's responsibilities, including policy pertaining to services offered to the child." 922 KAR § 1:300(7)(1)(h). Another provision states that "[a] child shall be informed upon admission of the right to file a grievance." § 1:300(7)(1)(i). Yet another regulation explains that the Family Cabinet provides people it serves with a "written statement describing appeal [grievance] rights," § 1:320(6)(7)(a), as well as a grievance form "at each case planning conference," § 1:320(6)(1)(a). Section 2(b) of the Settlement Agreement merely describes methods by which the Commonwealth Defendants have agreed to implement these existing regulatory mandates.

The district court held that Section 2(b) is inconsistent with 922 KAR §§ 1:300(7)(1)(h) and 1:300(7)(1)(i) because those regulations direct private childcare providers, not the Commonwealth Defendants, to inform children of their rights. Mem. Op. 15–16 (R. 588, Page ID 6698–99). But the district court ignored §§ 1:320(6)(1)(a) and (7)(a), which direct the Family Cabinet itself to inform its clients of their grievance rights. And, in any event, there is nothing in §§ 1:300(7)(1)(h) and (i) that requires any specific actor to provide children with information about their rights; nor is there anything to suggest that the Commonwealth Defendants would be prohibited from providing that information.

Unlike other regulations, which expressly direct action by private childcare providers, *e.g.*, 922 KAR § 1:300(7)(1)(e) ("The child-caring facility shall conduct a: Preadmission interview with the child . . . ."), these regulations are drafted in the passive voice, 922 KAR § 1:300(7)(1)(h) ("child and custodian shall be informed"); § 1:300(7)(1)(i) ("child shall be informed"). Moreover, there is nothing in the regulations that prohibits the Family Cabinet and private childcare providers from acting as one another's agent in providing information to children.

The district court also objected that Section 2(b) requires the Commonwealth Defendants to provide children with the "terms of internal operating documents of the Commonwealth agencies or the provisions of settlement documents." Mem. Op. 16 (R. 588, Page ID 6699). But Section 2(b) simply directs the Commonwealth Defendants to provide children with "information about" certain substantive rights set forth in the Settlement Agreement and incorporated in the Commonwealth's PCC Agreements. (R. 512-2, Page ID 5423–24). It does not require the Commonwealth to provide children with the underlying legal documents, or with the specific language or all the details of those documents. Thus, Section 2(b) is fully consistent with the above-cited regulations that require children to be informed of their rights.

As with Section 2(a), the district court also objected that Section 2(b) "limits the discretion of the Commonwealth Defendants in the methods and means by

which" they fulfill their statutory and regulatory obligations. Mem. Op. 17 (R. 588, Page ID 6700). But, again, the regulations cited by the district court do nothing to prevent the Commonwealth from agreeing to exercise its discretion in a particular manner. *See Kordenbrock*, 2018 WL 1769316, at *2.

3. Finally, the district court held that Sections 2(h) and 2(i) of the Settlement Agreement "also raise some concern." Mem. Op. 17 (R. 588, Page ID 6700). Those provisions require that each child, before leaving a placement, be given an opportunity to complete an anonymous exit survey relating to the child's religious experiences at that placement. § 2(h) (R. 512-2, Page ID 5427–28). Likewise, case workers must ask children about their religious experiences during annual "home visits." § 2(i) (Page ID 5428). And in certain circumstances, the Commonwealth Defendants must notify the Office of Inspector General within the Family Cabinet of reports of religious coercion, discrimination, or proselytization by providers. §§ 2(h), 2(i) (Page ID 5427–28).

These provisions, too, do not modify or expand existing laws. One regulation provides that "[u]pon discharge" a child's educational, medical, vocational, psychological, legal, and social needs "shall be assessed." 922 KAR § 1:300(7)(6)(g). Private childcare providers are also required to maintain confidential records, including a "[d]ischarge summary." § 1:300(7)(7)(a)(11). Another regulation provides that "when a child is leaving a facility as a planned

discharge, a predischarge conference shall be held to ensure that the child and family are prepared for successful transition into placement." § 1:300(7)(6)(d). The parent, guardian or custodian, the child, and the treatment team are required to attend this conference. *Id.* And a separate provision requires at least one "preplacement visit prior to [a] planned discharge." § 1:300(7)(6)(e).

Beyond these discharge procedures, many other statutory and regulatory provisions require monitoring throughout the duration of a child's placement. One statute provides that "[e]ach licensed facility or agency shall be visited and inspected at least one (1) time each year by a person authorized by [the Family Cabinet]" and that "[a] complete report of the visit and inspection shall be filed with [the Family Cabinet]." KRS § 199.640(3). A Family Cabinet regulation entitled "Inspection" provides that "[a] human services surveyor or other representative of [the Family Cabinet] shall have access to the child-caring facility or child-placing agency at any time." 922 KAR § 1:305(6)(2). And another Family Cabinet regulation provides that, after placing a child with a private childcare provider, a Family Cabinet staff member must:

> (3) Conduct a utilization review for a child:
>
> > (a) Six (6) months from the initial placement or reassignment and placement in a child-caring facility and child-placing agency; and
> >
> > (b)1. Every three (3) months thereafter if the child is in a private child care residential placement; . . . .

> (4) Reassign a child's level of care after the previous level has expired;
>
> (5) Monitor each child-caring facility and child-placing agency;
>
> (6) Maintain a confidential information system for each child served that shall include:
>
> (a) Placement history;
>
> (b) Level of care assignments;
>
> (c) Length of treatment; and
>
> (d) Discharge outcomes[.]

922 KAR § 1:360(3). Because making any changes to a child's level of care or placement requires current information about the child's "[r]eligious background and practices," § 1:360(2)(2)(k); *see also* § 1:300(7)(3)(a)(5), asking questions about religious issues in interviews with children at child-caring facilities is already called for by the existing regulations.

The foregoing litany of regulations are more than sufficient to encompass the modest exit interviews and surveys required under Sections 2(h) and 2(i) of the Settlement Agreement. In fact, pursuant to these existing regulations, the Commonwealth Defendants have long included interviews with children as part of the inspections authorized by these statutes and regulations. As the Settlement Agreement itself reflects, Family Cabinet case workers had already been conducting semi-annual "home visits" to inquire about children's experiences and documenting children's responses in the Family Cabinet's "TWIST" database.

§ 2(i) (R. 512-2, Page ID 5428). The Settlement merely clarifies that, during these home visits, case workers should also ask about the child's religious experiences and document the responses in TWIST. *Id.* Likewise, even before the Settlement, the Commonwealth Defendants for years had conducted exit interviews with children leaving child-caring facilities or foster homes, and those exit interviews included questions about children's religious experiences. Resp. to Objections, Ex. B (R. 274-3 & 274-4, Page ID 1226–1310). The Commonwealth Defendants did not—and still do not—need new regulations to conduct those interviews.

While the district court acknowledged that "exit interviews" of children discharged from the Family Cabinet's care are already "common practice," the court concluded that Section 2(h) would require rulemaking because "the requirements of [Section] 2(h) are more in the nature of a 'debriefing,' addressed to compliance by the child-caring facility with the provisions of the Settlement Agreement, as amended, rather than gathering discharge planning information about the child." Mem. Op. 19 (R. 588, Page ID 6702). Putting the semantic difference between an "interview" and a "debriefing" aside, discharge planning necessarily takes into account a child's experiences while in a private childcare provider's custody, including whether the child experienced religious coercion, discrimination, or proselytization. The only way for the Family Cabinet to obtain that information is to ask the child—be that in an "exit interview" or a

"debriefing." Under the district court's cramped reading of Kentucky law, the Commonwealth can prohibit childcare providers from engaging in unlawful religious coercion and discrimination, *see id.* at 20 (Page ID 6703), but it cannot ask children in the Commonwealth's care whether they suffered unlawful religious coercion and discrimination. The numerous statutes and regulations cited above, however, do not mandate such an absurd result—as proven by the Commonwealth's years-long prior practice.

The district court also objected to requirements that the Family Cabinet investigate any unlawful religious coercion, discrimination, or proselytization and refer certain complaints to its Office of Inspector General. Mem. Op. 19 (R. 588, Page ID 6702). But as noted above, the Family Cabinet is given broad authority to monitor child-caring agencies by several statutes and regulations. *See* KRS § 199.640(3); 922 KAR § 1:305(6)(1); 922 KAR § 1:360(3)(3)–(5). Moreover, by statute, the Office of Inspector General is broadly empowered to conduct any "special investigations requested by the secretary, commissioners, or office heads of the [Family Cabinet] into matters related to the cabinet or its programs," KRS § 194A.030(1)(c)(1), and to ensure that licensed childcare providers comply with "the administrative regulations, standards, or requirements of [the Family Cabinet]," KRS § 199.896(5), including those prohibiting religious discrimination, *e.g.*, KRS § 344.020(1)(b); 505 KAR § 2:090(1)(1); 920 KAR § 1:090(2)(1); *see*

also 922 KAR § 1:300(6)(7)(a)(1) (requiring childcare providers to "demonstrate consideration for and sensitivity to . . . [the] religious background of a child in care"). Likewise, the Family Cabinet is authorized "to obtain necessary information to complete an investigation in a report of child abuse, neglect, or dependency" that occurs in a licensed child-caring facility such as Sunrise, 922 KAR § 1:330(6)(1), and if a report of alleged abuse or neglect is accepted, the Family Cabinet shall "[n]otify the Office of the Inspector General," "[c]onduct an investigation," § 1:330(6)(4), and "share written findings of an investigation with the Office of Inspector General," § 1:330(6)(6). These statutory and regulatory provisions plainly authorize the kind of oversight contemplated in the Settlement Agreement.

It is understandable that Sunrise would resist any inquiry into the religious experiences of children in its care. Over the five-year period for which Plaintiffs received exit-interview results through discovery in this litigation, at least 85 children—including children at every Sunrise residential facility and in every foster-care region statewide—complained of religious misconduct. *See* Resp. to Objections, Ex. B (R. 274-3 & 274-4, Page ID 1226–1310). For example, children complained that Sunrise "tried to more or less force me to become a Christian"; that children "have to do some type of Bible study . . . or get consequences"; that children were "forced to go to church [or] would be dropped to level 1 and sit in a

chair"; and that children "got in trouble" or "had sat out in the van" if they refused to attend church services. *Id.* The Commonwealth Defendants do not need new regulations to reinstitute monitoring of children's religion-related experiences at child-caring facilities as a critical check against impermissible religious discrimination, proselytization, and coercion.

B. The Commonwealth Defendants' Prior Practices and Representations Show that No New Regulations Are Necessary to Comply with the Settlement Agreement.

If there is any doubt that no new regulations are necessary to implement the Settlement Agreement, the Court need only look to the Commonwealth Defendants' prior practice and repeated representations. To our knowledge, the Commonwealth Defendants complied with each and every one of the Settlement Agreement's terms for more than three years without engaging in any rulemaking. *See* Settlement (R. 512-2, Page ID 5421); Brief of Appellees, jointly filed by Plaintiffs and Commonwealth Defendants, at 7, 43, 44, *Pedreira v. Sunrise Children's Servs., Inc.*, No. 14-5879 (6th Cir. Dec. 19, 2014); Settlement Implementing Documents (R. 523-1 to 523-5, Page ID 5900–93); Letter from M.S. Pitt 4 (R. 552-3, Page ID 6286); Letter from D. Bergman 1 (R. 552-4, Page ID 6288). Among other actions, the Commonwealth Defendants revised their PCC Agreements to incorporate and reflect all the terms of the Settlement. Modified PCC Agreement (R. 580-2, Page ID 6531–6614). The Commonwealth Defendants

also engaged in the monitoring required by the Settlement and provided Plaintiffs' counsel with the records of that monitoring that the Settlement required them to share.

Consistent with their actions, the Commonwealth Defendants represented repeatedly—in filings both in this Court and the district court—that "the Commonwealth is not required to enact additional regulations to implement the terms adopted by the settlement because there are already existing statutes and regulations in place which encompass the terms of the settlement." Comm. Resp. 14 (R. 521, Page ID 5679). The Commonwealth Defendants explained that the Settlement Agreement simply "strengthen[s] already existing provisions" to "ensur[e] that children's religious rights are being protected and reasonably accommodated, without proselytization or coercion." *Id.* at 9 (Page ID 5674). The Commonwealth Defendants maintained that "[t]he new provisions implemented through the modified PCC agreement do not 'modify or expand' the Commonwealth's already existing law or policy." *Id.* at 17 (Page ID 5682) (quoting KRS § 13A.130). Instead, the Commonwealth Defendants repeatedly represented that "[t]he Settlement Agreement merely sets forth more specific mechanisms to ensure that these already existing standards are being met." *Id.*; *see also* Brief of Appellees at 32, *Pedreira v. Sunrise Children's Servs., Inc.*, No. 14-5879 (6th Cir. Dec. 19, 2014), ECF No. 36 ("no new regulations are necessary").

Based on these and similar representations, Plaintiffs agreed to Section 3 of the Amended Settlement Agreement, which provides that "the Commonwealth Defendants do not need to enact or modify any administrative regulations to comply with the Settlement Agreement." (R. 552-2, Page ID 6278).

The Commonwealth Defendants' repeated representations that no new regulations are necessary to implement the Settlement Agreement are also consistent with their broader practices. The Commonwealth Defendants' most recently available PCC Agreement is a very detailed, single-spaced 83-page document. Modified PCC Agreement (R. 580-2, Page ID 6531–6614). It governs the relationship between the Commonwealth Defendants and private childcare providers at a greater level of detail than do the applicable statutes and regulations. *Compare id. with* 922 KAR §§ 1:300–310, 360, 390. But under the district court's apparent view of Kentucky law, each and every provision of the PCC Agreements must be codified in a regulation. As noted above, upholding the district court's views would impose a crushing administrative burden not only on the Commonwealth Defendants but also on all other departments of Kentucky's executive branch.

II. Alternatively, if New Regulations Are Necessary to Implement the Settlement Agreement, the Commonwealth Defendants Must Initiate the Process of Enacting Such Regulations.

For the reasons described above, the Commonwealth Defendants can lawfully implement the terms of the amended Settlement Agreement without engaging in notice-and-comment rulemaking. But even if that were not the case, the Settlement Agreement requires the Commonwealth Defendants to initiate the process of enacting any new regulations that are legally necessary to implement it. As noted, the Settlement Agreement requires the Commonwealth Defendants to "initiate the process of modifying any administrative regulations currently governing child-caring facilities and child-placing agencies that must be enacted to comply with the terms of th[e] Settlement Agreement." § 6(b) (R. 512-2, Page ID 5431). Thus, if this Court concludes that new or modified administrative regulations are needed for the Commonwealth Defendants to lawfully implement the Settlement Agreement's terms, then the Commonwealth Defendants are contractually obligated to initiate the process of adopting or modifying such regulations. They should be held to their agreement.

Federal courts unquestionably have the power to order a governmental agency to enact regulations to implement the terms of a consent decree. And it is far from uncommon for governmental agencies to enact new regulations to implement the terms of a consent decree. Sometimes consent decrees approved by

federal courts specifically require the government to engage in a rulemaking, without specifying the substance of resulting regulations. *See, e.g.*, *In re Idaho Conservation League*, 811 F.3d 502, 514 (D.C. Cir. 2016); *Fla. Wildlife Fed'n Inc. v. Adm'r, U.S. EPA*, 620 F. App'x 705, 707 (11th Cir. 2015) (unpublished); *Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1324 (D.C. Cir. 2013); *Taylor v. St. Clair*, 685 F.2d 982, 986 (5th Cir. 1982). In other cases, consent decrees expressly require governmental bodies to enact regulations that have content consistent with the decrees' substantive terms. *See, e.g.*, *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 549 (1986), *supplemented*, 483 U.S. 711 (1987); *Klein v. Zavaras*, 80 F.3d 432, 434 (10th Cir. 1996); *Nisius v. Lewis*, 103 F.3d 139 (9th Cir. 1996) (mem.); *Allen v. Alabama State Bd. of Educ.*, 190 F.R.D. 602, 616 (M.D. Ala. 2000).

Governmental bodies have also issued regulations implementing the terms of a consent decree even when the decree did not expressly require them to do so, as another department of the Commonwealth did in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 456–57, 465 n.5 (1989). Indeed, in *Berger v. Heckler*, 771 F.2d 1556, 1560, 1579 (2d Cir. 1985), the court ordered a governmental agency to promulgate regulations implementing certain provisions of a consent decree even though the decree did not expressly require new

regulations.[2]

Likewise, nothing in Kentucky law would prevent the Commonwealth Defendants from enacting new regulations that memorialize all the Settlement Agreement's details. Importantly, the district court did not conclude—and the Defendants did not argue—that any of the Settlement's terms are prohibited by any state statute or regulation. Rather, the district court's conclusion and the Defendants' arguments were that the terms of the Settlement are more specific than the terms of the existing state statutes and regulations and therefore require additional regulatory authorization. *See* Mem. Op. 12–20 (R. 588, Page ID 6695–6703); Defs.' Joint Reply 7–14 (R. 581, Page ID 6621–28); Sunrise Reply 4–9 (R. 578, Page ID 6486–91); Comm. Resp. 2–4 (R. 577, Page ID 6479–81); Sunrise Mem. 6–7 (R. 573-1, Page ID 6456–57); Brief of Appellant at 32, *Pedreira v. Sunrise Children's Servs., Inc.*, No. 14-5879 (6th Cir. Oct. 2, 2014), ECF No. 30; Sunrise Opp. 29–33, 35–36 (R. 514, Page ID 5522–26, 5528–29). In similar circumstances, the court in *Gautreaux v. Pierce*, 690 F.2d 616, 626 (7th Cir. 1982), rejected an argument that a consent decree should be disapproved as illegal: "[A]ny illegality or unconstitutionality must appear as a legal certainty on the face

[2] The court in *Berger* concluded that the issuance of new regulations was implicitly authorized by a provision in the consent order requiring that the governmental agency "take all steps necessary to ensure that this order is carried out by [its] employees." *See* 771 F.2d at 1560, 1579.

of the agreement. . . . Simply because the statute and regulations do not contain the limitations set forth in the consent decree, that does not signify that they prohibit the limitations [i]n the consent decree thereby rendering the limitations illegal."

The district court correctly concluded that the Amendment did not "nullify" § 6(b)'s requirement that the Commonwealth Defendants initiate the process of modifying any administrative regulations to the extent doing so is necessary to lawfully implement the Settlement's terms. *See* Mem. Op. 10 (R. 588, Page ID 6693); *accord* Mem. Op. & Order 8 (R. 579, Page ID 6506). That this obligation to enact necessary regulations survived the Amendment is evidenced by how the parties treated a different provision of the original Agreement. As the district court noted, one section of the Amendment struck and replaced a section of the original Settlement Agreement (§ 1). Mem. Op. 22 (R. 588, Page ID 6704). By contrast, the section of the Amendment concerning regulations (§ 3) did *not* remove and replace the corresponding section of the original Settlement Agreement (§ 6(b)). *Id.* Moreover, the Amendment expressly stated that, "[e]xcept as explicitly stated in this Amendment, all terms of the Settlement Agreement shall remain in full force and effect, and the Parties shall continue to comply with the Settlement Agreement, as amended herein." *Id.* at 3 (Page ID 6686); First Am. to Settlement Agreement § 4 (R. 552-2, Page ID 6278).

Yet the district court ultimately and incorrectly construed the Amendment as overriding the original Settlement Agreement's requirement that the Commonwealth Defendants initiate a rulemaking to enact any legally necessary regulations. *See* Mem. Op. 21 (R. 588, Page ID 6704). Though the district court recognized "that the Settlement Agreement, as amended, does not preclude the Commonwealth Defendants from engaging in rulemaking"—the court "f[ound] no comfort" in that. Mem. Op. 22 (R. 588, Page ID 6705). The court thought that the Commonwealth Defendants would likely refuse to enact new regulations, and the court did not wish to order the Commonwealth to do so. *See id.* But that was not a valid basis for disapproving the consent decree. For one, as explained above, courts have the power to order a governmental agency to enact regulations to implement the terms of a consent decree. *See Berger*, 771 F.2d at 1579; *accord Bridge v. U.S. Parole Comm'n*, 981 F.2d 97, 105 (3d Cir. 1992). Moreover, there are legal presumptions that government officials will comply with both court orders and substantive law. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452, 463–64 (2002); *FCC v. Schreiber*, 381 U.S. 279, 296 (1965); *Los Angeles Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 701 (9th Cir. 1992). The district court was therefore wrong in speculating that, if it approved the Settlement Agreement as a consent decree and Kentucky law did indeed require new regulations to be passed to implement it, the

Commonwealth Defendants would violate the Settlement or Kentucky law instead of complying with both.

The Commonwealth Defendants agreed to initiate the process of enacting new regulations, if legally necessary, to implement the terms of the Settlement Agreement. For all the reasons stated in Section I, *supra*, Plaintiffs and the Commonwealth believed that such regulations would not be necessary. But if this Court concludes that new regulations are, in fact, necessary to implement the Settlement's terms, that determination alone is no reason to disapprove entry of the Settlement as a consent decree. Instead, the Commonwealth should be held to its agreement.

CONCLUSION

For the foregoing reasons, the district court's May 29, 2018 order (R. 589, Page ID 6707) and accompanying opinion (R. 588, Page ID 6684–6706) should be reversed. Alternatively, if there is uncertainty as to whether Kentucky law requires new regulations to be enacted to implement the Amended Settlement Agreement, the Court should certify the question to the Supreme Court of Kentucky. *See* Ky. R. Civ. P. 76.37; *Kentucky Employees Ret. Sys. v. Seven Ctys. Servs., Inc.*, 901 F.3d 718, 731 (6th Cir. 2018).

Dated: January 17, 2019

Respectfully submitted,

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CIRCUIT RULE 30(g)(1) DESIGNATION OF RECORD MATERIALS

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of Appellants complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 10,002 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Sixth Circuit Rule 32(b). This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

Dated: January 17, 2019

/s/ R. Stanton Jones
R. Stanton Jones

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2019, I caused the foregoing document to be electronically filed using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 17, 2019

/s/ R. Stanton Jones
R. Stanton Jones