No. 14-5879

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALICIA M. PEDREIRA, et al.,
Plaintiffs-Appellees,

v.

SUNRISE CHILDREN'S SERVICES, INC., et al.,
Defendant-Appellant,

On Appeal from the United States District Court
for the Western District of Kentucky
No. 3:00-cv-00210 (Hon. Charles R. Simpson)

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

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

Plaintiffs-Appellees 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.

Defendants-Appellees Audrey Tayse Haynes, Secretary of the Cabinet for Health and Family Services, and J. Michael Brown, Secretary of the Justice and Public Safety Cabinet (together, the "Commonwealth Defendants") are Kentucky state officials sued in their official capacities. Neither of the Comonwealth Defendants 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: December 19, 2014

/s/ David B. Bergman
David B. Bergman

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STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully submit that oral argument is unnecessary. Appellant Sunrise's first argument—that Plaintiffs lack standing—asks this Court to overrule its 2009 decision in this case, which the Court's precedent and rules prohibit. *See Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 579 F.3d 722 (6th Cir. 2009); 6 Cir. R. 32.1(b). Sunrise's second argument—that the district court erred in dismissing this long-running case with prejudice pursuant to a settlement agreement—presents no complex issues of fact or law.

STATEMENT OF JURISDICTION

Plaintiffs-Appellees asserted a claim under 42 U.S.C. § 1983 against Defendants-Appellees Audrey Tayse Haynes, Secretary of the Cabinet for Health and Family Services, and J. Michael Brown, Secretary of the Justice and Public Safety Cabinet (together, the "Commonwealth Defendants"). Plaintiffs alleged that the Commonwealth Defendants violated the Establishment Clause by funding Appellant Sunrise Children's Services, Inc. ("Sunrise"), formerly known as Kentucky Baptist Homes for Children, Inc. ("Baptist Homes"). The district court had jurisdiction under 28 U.S.C. § 1331. On June 30, 2014, the court granted Plaintiffs' motion to voluntarily dismiss this action with prejudice pursuant to the Settlement Agreement between Plaintiffs and the Commonwealth Defendants.

This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court correctly rejected Sunrise's argument that Plaintiffs lack standing to assert their Establishment Clause claim, when this Court held in 2009 that Plaintiffs have standing as state taxpayers to assert that claim.

2. Whether the district court abused its discretion by granting Plaintiffs' motion to voluntarily dismiss this action with prejudice and incorporate the Settlement Agreement between Plaintiffs and the Commonwealth Defendants into the order of dismissal in order to retain jurisdiction to enforce the Agreement.

STATEMENT OF THE CASE

A. Plaintiffs' Establishment Clause Funding Claim

Plaintiffs are four Kentucky taxpayers. Sunrise 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 also facilitates foster-care placements. Since 2000, Sunrise has received more than $100 million in state funds. *See Pedreira v. Kentucky Baptist Homes for Children, Inc.*, 579 F.3d 722, 725 (6th Cir. 2009).

Plaintiffs commenced this action in 2000, asserting that (1) the Commonwealth Defendants 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. Compl., R.1.[1] On July 23, 2001, the district court dismissed the employment-discrimination claims. Order, R.54. On April 16, 2003, the court denied Sunrise's and the Commonwealth Defendants' Rule 12(c) motion challenging Plaintiffs' standing as taxpayers to assert their Establishment Clause funding claim. Mem. Order & Op. 1-3, R.543-2, PageID#6190-92.

The parties continued litigating Plaintiffs' constitutional claim. Then, on March 31, 2008, the district court reversed course and dismissed the claim for lack of standing. Order, R.309, PageID#2361. The district court held that the Supreme Court's then-recent opinion in *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), narrowed the scope of taxpayer standing in a manner that barred Plaintiffs' standing in this case. Mem. & Op. 13, R.308, PageID#2360.

B. This Court's 2009 Decision Holding That Plaintiffs Have Standing

On August 31, 2009, a panel of this Court unanimously affirmed the dismissal of the employment claims, but reversed the dismissal of Plaintiffs' Establishment Clause funding claim, holding that Plaintiffs have standing as state taxpayers. *Pedreira*, 579 F.3d at 725, 733. The Court explained that federal taxpayers must meet a two-part test set out in *Flast v. Cohen*, 392 U.S. 83 (1968).

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[1] PageID numbers are not available for docket entries before R.124, which is dated August 15, 2003. For earlier entries, we provide the document name and docket number.

First, they must show a nexus between legislative action and the challenged funding. *Pedreira*, 579 F.2d at 729-30 (citing *Flast*, 392 U.S. at 102-03; *Hein*, 551 U.S. at 615). Second, they must allege a violation of a constitutional limitation on the taxing and spending power, such as the Establishment Clause. *Id.* (citing *Flast*, 392 U.S. at 102-03, 105-06). The Court held that Plaintiffs lacked standing as *federal* taxpayers, concluding that the connection between any federal legislative action and Kentucky's funding of Sunrise was too remote. *Id.* at 730-31.

The Court next held that Plaintiffs had standing as *state* taxpayers, for two independent reasons. First, the Court held that state taxpayers need not satisfy the "legislative nexus" requirement of *Flast*, but instead must only demonstrate "a good-faith pocketbook" injury, which Plaintiffs did. *Id.* at 732. Second, the Court held that even if the legislative-nexus requirement applies to state taxpayers, Plaintiffs satisfied it. *Id.* at 732-33. In particular, the Court held that Plaintiffs "sufficiently demonstrated a link between the challenged legislative actions and the alleged constitutional violations, namely that Kentucky's statutory funding for neglected children in private childcare facilities knowingly and impermissibly funds a religious organization." *Id*. at 732.

On April 18, 2011, the United States Supreme Court denied Sunrise's and the Commonwealth Defendants' petition for a writ of certiorari, which involved only the Establishment Clause funding claim. 131 S. Ct. 2091 (2011).

C. 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 (Parts 1 & 2), R.274-3 & 274-4, PageID#1226-310. Over the five-year period for which Plaintiffs received these interview results, at least 85 different 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 '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 'forced to go to church [or] would be dropped to level 1 and sit in chair.'"
- Child "was not allowed to practice own religion. Child state[s] you had to go 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 states made to go to specific church, restrictions if you resist."
- Child reported that "if you did not go to church you had sat 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, PageID#5847; *see also id.* ("In 2008, Sunrise placed a special focus on our foster families as 'in-home missionaries.'"); *id.* at 5849 ("Individuals and families across Kentucky have the opportunity to become foster parents, or 'in-home missionaries.'"); *id.* at 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 5852 (Sunrise places children "in our foster or 'In-Home Missionaries' homes."); *id.* at 5854 ("These 'in-home missionaries' are willing to care for the kids … ."); *id.* at 5855 ("Consider joining this group of in-home missionaries.").

D. The Settlement Agreement

On March 12, 2013, after more than a year of extensive negotiations with the assistance of the Magistrate Judge, and thirteen years after this case was filed, Plaintiffs and the Commonwealth Defendants agreed upon and executed the Settlement Agreement, which consensually resolved all claims between them. *See* Settlement Agr., R.502-2, PageID#5317-37. Sunrise was involved in some of the negotiations, but it is not a party to the Agreement.

The Settlement Agreement seeks to prevent Sunrise and every other publicly funded private residential facility and private foster-care placement agency statewide (herein, "private childcare providers" or "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, the Agreement requires the Commonwealth Defendants to make various modifications to their procedures for providing care to children through these private providers, including Sunrise. *Id.* § 2, PageID#5319-26. Among other modifications, the Commonwealth Defendants must make certain changes to their standard two-year agreements with private providers, referred to as the "PCC Agreements." The Commonwealth Defendants included the agreed-upon changes in the PCC Agreements that they entered into with private providers—including Sunrise—in mid-2014. *Id.*

The Settlement Agreement forbids private childcare providers from:

- "discriminat[ing] in any manner against any child based on the child's religious faith or lack of religious faith or the child's failure to conform to any religious tenet or practice";
- "requir[ing], coerc[ing], or pressur[ing] any child in any manner to attend religious services or instruction or to otherwise engage in or be present at any activity or programming that has religious content";
- "impos[ing] any form of punishment or benefit based on a child's voluntary decision as to whether to participate in or attend any religious service or instruction or any other activity or programming that has religious content";
- "proselytiz[ing] any child in any religious beliefs"; and
- "requir[ing] any child to pray or to participate in any form of prayer, or to attend any form of prayer that is organized, led, or otherwise sponsored or promoted, by the Agency."

Id. § 2(f), PageID#5324.

Providers also are barred from placing religious items in children's rooms without their consent, and religious materials are to be given only to children who request such materials. *Id.* § 2(e), PageID#5323-24. And providers must offer comparably attractive non-religious activities to children who do not wish to attend any religious services that are made available to children who desire such services. *Id.* § 2(d)(ii), PageID#5322.

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, except in special circumstances. *Id.* § 2(a), PageID#5319-20. During intake and placement, the Commonwealth Defendants also must prepare records, to be given to providers, concerning children's religious preferences. *Id.* §§ 2(a), (c), PageID#5319-21. Further, the Commonwealth Defendants and private providers are required to inform children, parents, and guardians of the protections created by the Settlement Agreement, and of contact information for a state official to contact if a child, parent, or guardian believes these provisions have been violated. *Id.* § 2(b), PageID#5320-21. The Commonwealth Defendants must also provide employees of private childcare providers with written training materials relating to the Agreement's provisions, and the providers are required to ensure that all their employees read these materials. *Id.* § 2(g), PageID#5324.

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 Agreement. *Id.* § 3, PageID#5326-27. Each child, before leaving a placement, is to complete an exit survey relating to the child's religious experiences at that placement. *Id.* § 2(h), PageID#5324-25. State employees also must interview children about the same

issues at least annually. *Id.* § 2(i), PageID#5325. The Commonwealth Defendants' monitoring also includes review of religious-activity logs that private providers must maintain. *Id.* § 2(d)(iii), PageID#5322-23.

The Settlement Agreement requires the Commonwealth Defendants, in certain circumstances, to notify the Office of Inspector General ("OIG") within the Cabinet for Health and Family Services of reports—obtained through the settlement-mandated monitoring—concerning religious coercion, discrimination, or proselytization by private providers. *Id.* §§ 2(h), (i), PageID#5324-25. The Commonwealth Defendants must then notify Plaintiffs' counsel of the results of any OIG investigation into such reports. *Id.* § 3(b), PageID#5326. With respect to any provider subject to an OIG investigation, the Commonwealth Defendants must provide the monitoring materials for the relevant children to Plaintiffs' counsel. *Id.* Also, for a period of seven years, all of the monitoring materials concerning children placed at Sunrise will be made available to Plaintiffs' counsel annually. *Id.* § 3(a), PageID#5326.

Plaintiffs and the Commonwealth Defendants agreed to enforce the Settlement Agreement exclusively in the district court below. *Id.* § 9, PageID#5330. To ensure access to the federal forum, the Agreement provided for Plaintiffs to seek voluntary dismissal of this action with prejudice through an order incorporating the Agreement and retaining jurisdiction to enforce it. *Id.* § 6,

PageID#5327-28. Plaintiffs also released any claims based on conduct before the effective date of the Agreement (*id*. § 7, PageID#5328-29), and agreed to mandatory informal dispute resolution with respect to any claims based on future conduct for a period of seven years (*id*. § 10, PageID#5330-31).

E. The District Court's Decision Granting Voluntary Dismissal

On September 20, 2013, after the Settlement Agreement was finalized, Plaintiffs moved to voluntarily dismiss this action with prejudice pursuant to the Agreement. Mot. to Dismiss, R.512, PageID#5389-96. Sunrise opposed Plaintiffs' motion. Response, R.514, PageID#5490-531. Sunrise also simultaneously filed its own motion to dismiss, arguing that Plaintiffs lacked state-taxpayer standing. Mot. to Dismiss, R.513, PageID#5441-43. On June 30, 2014, this Court denied Sunrise's motion to dismiss and granted Plaintiffs' motion to voluntarily dismiss. Mem. Op., R.527, PageID#6066-80; Order, R.528, PageID#6081. The Court's order of dismissal incorporates the Settlement Agreement and retains jurisdiction to enforce it. Order, R.529, PageID#6082-83.

Sunrise's appeal followed.

SUMMARY OF ARGUMENT

The district court's decision should be affirmed.

First, the district court correctly rejected Sunrise's argument that Plaintiffs lack standing to assert their Establishment Clause funding claim. In 2009, this

Court in *Pedreira* resolved the exact same issue, holding that these Plaintiffs have state-taxpayer standing to assert that claim in this case. The law-of-the-case and law-of-the-circuit doctrines accordingly foreclose Sunrise's renewed argument. Contrary to Sunrise's contention, the Supreme Court's decision in *Winn* did not abrogate this Court's judgment in *Pedreira* that Plaintiffs satisfied the legislative-nexus test for purposes of establishing state-taxpayer standing. And the later-in-time panel decision in *Murray* could not and did not abrogate *Pedreira*'s holding.

Second, the district court did not abuse its discretion in granting Plaintiffs' motion to voluntarily dismiss with prejudice, incorporating the Settlement Agreement in its dismissal order, and retaining jurisdiction to enforce the Agreement. Because the dismissal was *with* prejudice, the *Grover* factors that govern requests for dismissal *without* prejudice are inapplicable. Additionally, while the district court correctly held that the court-enforceable Settlement Agreement was not a consent decree or even tantamount to a consent decree, the issue is academic. As the district court found, the Agreement readily satisfies the standards for court approval of a consent decree. Moreover, contrary to Sunrise's arguments, the Agreement is not unconstitutional. Far from it: the Agreement is designed to ensure compliance with the Constitution. The Agreement effectuates meaningful statewide reforms to Kentucky's public childcare program by ensuring that state-financed providers like Sunrise cannot use state funds to religiously

proselytize, coerce, or discriminate against children in their care. Sunrise's attempts to undo the Agreement fail, and the Court should affirm the judgment of the district court.

STANDARD OF REVIEW

While the Court reviews *de novo* the district court's decision regarding standing, *Pedreira*, 579 F.3d at 728, the Court is bound by the law of the case and the law of the circuit established by its previous decision in this case, *see infra* pp. 14-16. The Court reviews for abuse of discretion the district court's dismissal of this case through an order incorporating the Settlement Agreement and retaining jurisdiction to enforce it. *See United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 491 (6th Cir. 2010).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY REJECTED SUNRISE'S ARGUMENT THAT PLAINTIFFS LACK STANDING

Sunrise dedicates nearly twenty pages of its brief to arguing that Plaintiffs lack state-taxpayer standing. Sunrise Br. 11-29. But, as the district court correctly recognized, this Court definitively resolved the standing issue in 2009, holding that Plaintiffs have standing because they "sufficiently demonstrated a link between the challenged legislative actions and the alleged constitutional violations, namely that Kentucky's statutory funding for neglected children in private childcare facilities

knowingly and impermissibly funds a religious organization." *Pedreira*, 579 F.3d at 732. Sunrise's attempt to re-litigate this issue fails for numerous reasons.

A. This Court's 2009 Decision That Plaintiffs Have Standing Is Law of the Case and Law of the Circuit

"Perpetual litigation of any issue—jurisdictional or non-jurisdictional—delays, and therefore threatens to deny, justice." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 n.5 (1988). In *Pedreira*, this Court addressed the same standing issue that Sunrise now raises again, and held these Plaintiffs have state-taxpayer standing in this case. 579 F.3d at 731-33. Sunrise's renewed standing argument is therefore foreclosed by two related doctrines designed to prevent this very kind of perpetual litigation: law of the case and law of the circuit.

The law-of-the-case doctrine provides that "the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996). As such, "[w]hen there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Id.* (citation and internal quotation marks omitted). A subsequent panel may reconsider a prior ruling in the same case only where one of three "extraordinary conditions" are met: "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or

(3) where a decision is clearly erroneous and would work a manifest injustice." *Craft v. United States*, 233 F.3d 358, 364 (6th Cir. 2000) (citation and internal quotation marks omitted), *rev'd on other grounds*, 535 U.S. 274 (2002). Such extraordinary conditions should be found "very sparingly." *Id*. at 363 (citation and internal quotation marks omitted).

The law-of-the-circuit doctrine is even "stronger" and "more exacting" than law of the case. *Id*. at 378 (Gilman, J., concurring) (citation and internal quotation marks omitted). It provides that "[one] panel may not overrule the decision of another panel; the earlier determination is binding authority unless a decision of the United States Supreme Court mandates modification or this Court sitting en banc overrules the prior decision." *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000). This Court's rules likewise provide: "Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc." 6 Cir. R. 32.1(b).

Sunrise pays lip service to these doctrines, but nevertheless asks this Court to "revisit" the standing issue and to conclude—contrary to the Court's decision in *Pedreira*—that Plaintiffs lack state-taxpayer standing. Sunrise Br. 22-24. Sunrise's only basis for seeking such reconsideration is a purported intervening change in law based on *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011), and another panel's decision in *Murray v. U.S. Dep't of*

Treasury, 681 F.3d 744 (6th Cir. 2012). As explained below, neither *Winn* nor *Murray* disturbs *Pedreira*'s holding that Plaintiffs have state-taxpayer standing.

B. *Winn* Did Not Disturb *Pedreira*'s Holding That Plaintiffs Satisfy the Legislative-Nexus Test

Sunrise first argues that the Supreme Court's decision in *Winn* abrogated this Court's holding in *Pedreira* that state taxpayers need not satisfy the "legislative nexus" test. Sunrise Br. 20-21. This Court need not decide that issue. Even assuming *Winn* establishes that state taxpayers must show a legislative nexus, nothing in *Winn* disturbs this Court's holding in *Pedreira* that Plaintiffs satisfy the legislative-nexus test in this case.

In *Winn*, the Supreme Court did not address or alter the substance of the *Flast* legislative-nexus test, which this Court applied in *Pedreira*. Instead, *Winn* held only that taxpayer standing cannot be based on the government's use of tax credits and deductions—as opposed to actual government expenditures—that have the effect of supporting religious programs. 131 S. Ct. at 1447-48. Because *Winn* held that the absence of any government expenditure foreclosed taxpayer standing, the Court had no need to address what is required to satisfy the nexus test.

That *Winn* did not affect the substance of the legislative-nexus test is confirmed most clearly by *Murray*, which this Court decided more than a year after *Winn*. *Murray* discussed the nexus test at length but nowhere mentioned *Winn*. 681 F.3d at 748-53. Instead, *Murray* applied the Supreme Court's earlier decisions

in *Flast*, *Hein*, and *Bowen v. Kendrick*, 487 U.S. 589 (1988)—the same authorities this Court applied in *Pedreira*. *Murray*, 681 F.3d at 748-52; *compare Pedreira*, 579 F.3d at 729-33. Accordingly, *Winn* changed nothing with respect to *Pedreira*'s holding that Plaintiffs satisfied the legislative-nexus test for purposes of establishing state-taxpayer standing.

The Supreme Court's denial of certiorari in *Pedreira*—shortly after the Court decided *Winn*—further confirms this conclusion. Sunrise filed its petition for certiorari in *Pedreira* on March 16, 2010. Soon thereafter, the Supreme Court granted certiorari in *Winn*. The Court took no action on Sunrise's petition for nearly a year while *Winn* was being briefed and argued on the merits. On April 4, 2011, the Court decided *Winn*. One week later, the briefing on Sunrise's petition in *Pedreira* was re-distributed to the Justices, who denied certiorari a week later. Significantly, the Court did not grant Sunrise's petition, vacate this Court's decision, and remand for reconsideration in light of *Winn*—"an order known within the Court as a 'GVR.'" Eugene Gressman et al., *Supreme Court Practice* 345 (9th ed. 2008). A GVR typically "remands the case to the lower court for reconsideration in light of an intervening Supreme Court ruling." *Id.*

If the Supreme Court believed that *Winn* affected this Court's judgment upholding state-taxpayer standing in *Pedreira*, it easily could have GVR'd, but the Court did not do so. While the denial of certiorari ordinarily provides no

indication about the Court's view of a case, the Court's failure to GVR in *Pedreira* strongly indicates that *Winn* did not disturb this Court's judgment in *Pedreira*. *See Wells v. Meyer's Bakery*, 561 F.2d 1268, 1275 (8th Cir. 1977) (fact that certiorari was denied four weeks after an asserted contrary ruling on the merits by the Court "cannot be overlooked"); *accord* Gressman et al., *supra*, at 337 (discussing *Wells*).

Winn therefore provides no basis to depart from the controlling law of the case and law of the circuit established by *Pedreira*.

C. *Murray* Could Not and Did Not Overrule *Pedreira*'s Holding That Plaintiffs Satisfy the Legislative-Nexus Test

Sunrise next argues that the subsequent panel decision in *Murray* alters the legislative-nexus test so dramatically that this Court must "revisit" and reverse its holding in *Pedreira*. Sunrise Br. 22-29. According to Sunrise, *Murray* "clarified *Hein*'s application in the Sixth Circuit," such that taxpayer standing can now be found only where "the statute facially contemplates the disbursement of funds for religious purposes." *Id.* at 27, 29. Sunrise thus argues that there must be "express contemplation of disbursements for religious purposes in the statutory text" to satisfy the legislative nexus test. *Id*. at 22. If a funding statute does not mention "religious organizations or activities in the statutory text," there can be no taxpayer standing. *Id*. at 26. Sunrise is wrong: *Murray* could not overrule the earlier panel decision in *Pedreira*; and anyway *Murray* is fully consistent with *Pedreira*.

Even if the panel's decision in *Murray* could be read to conflict with the panel's decision in *Pedreira*—and it cannot—*Pedreira* would control here, because *Pedreira* pre-dates *Murray*. "[W]hen a later decision of this court conflicts with one of our published decisions, we are still bound by the holding of the earlier case." *Ward v. Holder*, 733 F.3d 601, 608 (6th Cir. 2013) (citation and internal quotation marks omitted). A panel decision can be modified only if "[1] a decision of the United States Supreme Court mandates modification or [2] this Court sitting *en banc* overrules the prior decision." *Moody*, 206 F.3d at 615. As explained above, the Supreme Court's decision in *Winn* did not affect the substance of the legislative-nexus test. Nor has there been any *en banc* decision overruling *Pedreira*. To the contrary, the *en banc* Sixth Circuit has cited with approval *Pedreira*'s ruling that Plaintiffs have state-taxpayer standing. *See Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 214 (6th Cir. 2011) (en banc).

In any event, *Murray* is fully consistent with *Pedreira* and did not purport to alter the legislative-nexus test as applied in *Pedreira*. Contrary to Sunrise's theory (Sunrise Br. 22-30), *Murray* does not hold that the nexus test can be satisfied only if a statute's text specifically mentions religious activities or organizations.

To debunk Sunrise's theory, the Court need only look to *Murray*'s discussion of *Flast*, 392 U.S. 83, the bedrock case establishing the legislative-

nexus test. In *Flast*, taxpayer plaintiffs challenged government expenditures made pursuant to a statute providing funds to private schools for the education of low-income students. *Murray* noted that "[t]he legislation at issue in *Flast* expressly permitted disbursements to private schools but *made no specific reference to disbursement to religious schools*." 681 F.3d at 750 (emphasis added). As *Murray* explained, "Congress surely understood that much of the aid mandated by the statute would find its way to religious schools," since "the great majority of nonpublic elementary and secondary schools in the United States were associated with a church." *Id.* (quoting *Hein*, 551 U.S. at 604 n.3).[2]

In fact, *Murray* held that taxpayer plaintiffs can meet the legislative-nexus test by showing a "congressional *intention* that the funds would be disbursed to religious groups." *Id.* at 750 (emphasis added); *see also id*. at 752 (standing available where there is a legislative "*understanding* that the money might be used for a religious purpose" (emphasis added)). Such an intention or understanding

[2] At least two district courts accordingly have held that the legislative-nexus test does not require that the statute at issue specifically reference religion. *See ACLU v. Sebelius*, 697 F. Supp. 2d 200, 209 (D. Mass. 2010) (finding standing where the funding statute neither endorsed nor prohibited the provision of funds to religious organizations, and rejecting "Defendants' argument that … the challenged appropriation must directly mandate the turnover of funds to religious organizations" as "not supported by the text of the *Hein* plurality decision"); *ACLU of Minnesota v. Tarek Ibn Ziyad Acad.*, No. CIV. 09-138, 2009 WL 2215072, at *6 (D. Minn. July 21, 2009) ("To the extent that Defendants suggest that a statute must mention religion on its face, the Court disagrees.").

can be found either within or outside the words of a statute. *Id*. at 751-52. Accordingly, the nexus test is met when there is a "reasonable inference from [the] historical context" that the legislature intended or understood that the funds it was appropriating would support religious activities or organizations. *Id*. at 752.

Murray exemplifies this approach. A taxpayer plaintiff challenged the federal government's expenditure of funds under the Troubled Assed Relief Program ("TARP"), which Congress created by statute in 2008. Specifically, plaintiff alleged that the government used TARP funds to invest in AIG, and certain AIG subsidiaries used those funds to invest in financial products compliant with Sharia law, in violation of the Establishment Clause. This Court held that plaintiff failed to show a sufficient legislative nexus.

While the Court in *Murray* observed that the text of the 2008 statute made no reference to a religious activity or organization, *id*. at 751, the Court did not end its inquiry there. Instead, the Court assessed whether there was any *other* evidence, *outside* of the statutory text, that could support "a reasonable inference of congressional intention that a portion" of the money would "find its way" to religious activities or organizations. *Id*. at 752. The Court held that the plaintiff "failed to demonstrate that Congress 'understood that much of the aid mandated by the [statute] would find its way' to fund [Sharia-compliant] products" *Id*. (quoting *Hein*, 551 U.S. at 604 n.3). The plaintiff's evidence—"a few scattered

bureaucratic activities" that referenced Sharia law—fell short of showing a legislative nexus. *Id*. Because "[n]either the [the statute] *nor any reasonable inference from its historical context* suggest[ed] that Congress knew, or much less intended, that [taxpayer] funds might support the marketing and sale of [Sharia-compliant] products," the plaintiff lacked taxpayer standing. *Id*. (emphasis added).

Murray's analysis is thus squarely in line with *Pedreira*'s, although the outcomes of the two cases differed based on the different evidence presented. In both cases, this Court looked to both the statute and evidence outside the statute to discern the legislative intent or understanding. In *Pedreira*, unlike in *Murray*, the Court found ample evidence that the Kentucky legislature intended and understood that taxpayer funds would be provided to the religiously affiliated Sunrise (then Baptist Homes). Relying on "Kentucky statutory authority, legislative citations acknowledging KBHC's participation, and specific legislative appropriations to KBHC," the Court held that "plaintiffs have sufficiently demonstrated a link between the challenged legislative actions and the alleged constitutional violations, namely that Kentucky's statutory funding for neglected children in private childcare facilities knowingly and impermissibly funds a religious organization." 579 F.3d at 732-33.

To be sure, *Murray* states that taxpayer standing is available "only if the appropriating statute expressly contemplates the disbursement of [government]

funds to support religious groups or activities." 681 F.3d at 751. Sunrise latches onto the "expressly contemplates" phrase. Sunrise Br. 15, 16, 19. But, as explained above, this Court in *Murray* looked to both the statutory text *and* evidence outside of the text to determine whether the legislature "expressly contemplate[d]" funding of religious activities or organizations. *See supra* pp. 20-22. Moreover, when the Court used the phrase "expressly contemplates," it was quoting *Hein*, 551 U.S. at 607, and thus not applying any new twist on the legislative-nexus test that would justify revisiting *Pedreira*, which held that Plaintiffs have standing after *Hein*.

Sunrise also relies on a statement in *Murray* interpreting *Hein* as holding that that taxpayer standing "'does not extend to suits challenging executive-branch expenditures of unearmarked funds.'" 681 F.3d at 751 (quoting *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 286 (6th Cir. 2009)). But as *Murray* acknowledged, the *Hein* plaintiffs challenged expenditures that were "unearmarked" for *any* purpose—not just "unearmarked" to religious organizations. *See Murray*, 681 F.3d at 749-50; *Hein*, 551 U.S. at 595, 607-08. *Murray* also noted that in *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Supreme Court held that taxpayers had standing to challenge the provision to religious organizations of grants legislatively designated for particular purposes, notwithstanding that the recipients of the grants were determined by discretionary

decisions of federal executive-branch officials. *See Murray*, 681 F.2d at 749. *Murray*'s discussion of *Hein* and *Bowen* is thus consistent with *Pedreira*, which interpreted those cases as holding that although taxpayers lack standing to challenge "'a *purely* discretionary Executive Branch expenditure'" (*Pedreira*, 579 F.3d at 730 (quoting *Hein*, 551 U.S. at 615) (emphasis added)), "taxpayers still have standing to challenge legislative disbursements over which agencies have executive discretion" (*id.* (citing *Bowen*, 487 U.S. at 618-19)). Here, unlike the expenditures challenged in *Hein*, but like the grants challenged in *Bowen*, Kentucky's payments to Sunrise come from funds statutorily authorized and appropriated for specific purposes. *See Pedreira*, 579 F.3d at 731; *see also infra* pp. 24-28.

Murray therefore changes nothing with respect to Plaintiffs' standing.

D. The Stage of the Litigation Has No Impact on Plaintiffs' Standing

Sunrise also urges the Court to "revisit" the standing issue on the theory that *Pedreira* supposedly held only that Plaintiffs "sufficiently pleaded" standing in their Complaint, and that Plaintiffs are now "required to prove, not simply allege, that standing exists." Sunrise Br. 23-24. This argument fails.

Plaintiffs have proven, and not simply alleged, that they have standing. This Court in *Pedreira* did not rely on Plaintiffs' bare allegations in the Complaint, but rather acknowledged that "[i]n reviewing a determination of standing, we consider

the complaint *and the materials submitted in connection with the issue of standing*." 579 F.3d at 729 (citation omitted) (emphasis added). The Court found: "Pointing to material submitted by KBHC, the plaintiffs show that the Kentucky legislature itself was aware that it was funding KBHC when it issued a legislative citation thanking KBHC for its work with children." *Id.* at 731. The Court further found that "the Kentucky legislature also appropriated sums of money specifically to KBHC." *Id.* The Court accordingly held that "Kentucky's statutory funding for neglected children in private childcare facilities knowingly and impermissibly funds a religious organization." *Id.* at 732. The Court rooted this holding not in Plaintiffs' bare complaint allegations, but in "Kentucky statutory authority, legislative citations acknowledging KBHC's participation, and specific legislative appropriations to KBHC." *Id.* The Court held: "Through these specifications, the plaintiffs have demonstrated a nexus between Kentucky and its allegedly impermissible funding of a pervasively sectarian institution." *Id.*

In addition to the materials emphasized by the Court, Plaintiffs in *Pedreira* pointed out that, like the fact that many private schools are religious (*see Hein*, 551 U.S. at 604 n.3 (discussing *Flast*, 392 U.S. 83); *Murray*, 681 F.3d at 750 (same)), it is common knowledge that many private childcare providers are religiously affiliated. In fact, 21 of the 55 private childcare providers funded by Kentucky in

2006 had religious affiliations. 2009 Pls.' Br. at 17 (citing A550-57).[3] Plaintiffs also submitted a 1998 report by the Kentucky Legislative Research Commission to the legislature that identified Sunrise (then Baptist Homes) as one of multiple private childcare providers receiving state funds. *Id.* at 16-17 (citing A479, 481). And Plaintiffs submitted numerous newspaper articles that discussed the extensive receipt of state funds by Sunrise (then Baptist Homes), including front-page articles in the Louisville Courier-Journal that reported Sunrise is Kentucky's largest provider of private childcare services, a fact that Baptist Homes confirmed on its website. *Id.* at 18 (citing A499, 501, 505, 594-629).

Furthermore, to demonstrate that this case is more like *Bowen*, 487 U.S. at 593-94, 596, 620 (where the funding at issue was designated for particular legislative purposes), than *Hein*, 551 U.S. at 595, 607-08 (where the funding could be used for any purpose at all), Plaintiffs cited numerous statutes that authorize Kentucky to contract with private childcare providers, authorize Kentucky to pay services for such contracts, and comprehensively regulate such providers. *See* 2009 Pls.' Br. at 12-14, 31 (collecting statutes). Plaintiffs also cited a series of appropriation acts through which the Kentucky legislature appropriated funding

[3] *See also* 2009 Pls.' Reply Br. at 9 (citing Baltimore Sun / Los Angeles Times, *Veto By Bush Looms Over $27 Billion Child-Care Bill*, Seattle Times, Mar. 30, 1990 (reporting that approximately thirty percent of private childcare is provided by religious organizations)); Deborah Yetter, *Agency funding challenge allowed*, Louisville Courier-Journal, Sept. 1, 2009, 2009 WLNR 17204465.

specifically for private childcare placements. *See* 2009 Pls.' Br. at 15-16 (citing A372-75, 377-84, 566). And Plaintiffs cited biennial budget recommendations and submissions to the legislature by the governor and state agencies explaining that funds were being requested for the financing of private childcare. *See* 2009 Pls.' Br. at 17-18 (citing A493, 495, 558-61, 563-66, 582-86, 588-93).

On the basis of the materials submitted by the parties, this Court in *Pedreira* concluded that "[t]his case thus falls squarely within the line of cases where the Supreme Court and our sister circuits have upheld taxpayer standing when grants, contracts, or other tax-funded aid are provided to private religious organizations pursuant to explicit legislative authorization." 579 F.3d at 733.

Since *Pedreira*, even more evidence of the legislative nexus has become available, based on events subsequent to the appeal and greater availability of past legislative records. The Kentucky legislature has continued to appropriate funds specifically for state contracts with private childcare providers,[4] and even appropriated $150,000 for each of the 2006-07 and 2007-08 fiscal years directly to Sunrise's Youth Support Center.[5] A legislative committee regularly approved state

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[4] 2014 Kentucky Laws Ch. 117 (HB 235), Part I, § G(9); 2008 Kentucky Laws Ch. 127 (HB 406), Part I, § H(10); *see* 2012 Kentucky Laws Ch. 144 (HB 265), Part I, § G(9); 2010 Kentucky Laws 1st Ex. Sess. Ch. 1 (HB 1), Part I, § G(9).

[5] *See* http://www.lrc.ky.gov/budget/06RS/Final/volumeIV.pdf, at 1108, 1112; http://www.lrc.ky.gov/budget/06rs/50h.pdf, at H-84, H-93.

contracts with Sunrise.[6] Major Kentucky newspapers have continued to discuss Sunrise's extensive receipt of state funds, noting that Sunrise is primarily funded by state dollars, is the largest publicly funded childcare provider in the state, and now receives approximately $20 to $25 million per year from the state.[7] And the governor and state agencies have continued to submit budget requests seeking appropriations of state funds to finance private childcare.[8]

II. THE DISTRICT COURT CORRECTLY GRANTED VOLUNTARY DISMISSAL WITH PREJUDICE AND RETAINED JURISDICTION TO ENFORCE THE SETTLEMENT AGREEMENT

Pursuant to the Settlement Agreement, Plaintiffs moved to voluntarily dismiss this action with prejudice. In so doing, Plaintiffs asked the district court to

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[6] The Government Contract Review Committee approved state childcare contracts (or amendments thereto) with Sunrise (or Baptist Homes) on July 12, 2011, August 10, 2010, November 16, 2006, December 10 and March 12, 2002, December 11 and September 11, 2001, and November 14 and October 10, 2000. All the relevant minutes are available at http://www.lrc.ky.gov/Committee_Prior_Interim/statutory/GovContr/minutes_old.

[7] *See, e.g.*, *Gay hiring fears hurt Baptist agency*, Louisville Courier-Journal, Mar. 10, 2014, 2014 WLNR 6501332; Tom Loftus, *Children's agency won't hire gays*, Louisville Courier-Journal, Nov. 9, 2013, 2013 WLNR 28464462; *Baptist children's agency's leader urges considering hiring of gays*, Louisville Courier-Journal, Nov. 1, 2013, 2013 WLNR 27490736; Deborah Yetter, *Stimulus aid rescues child services: Ky. gives $1.4 million to private agencies*, Louisville Courier-Journal, May 23, 2009, 2009 WLNR 15653604.

[8] *See* http://tinyurl.com/lvumou8, Preface; http://tinyurl.com/qhntgtq, at 188, 197-99; http://tinyurl.com/lwjq6ux, Preface; http://tinyurl.com/llbece9, at 196, 202-04; http://tinyurl.com/ycsad4h, Preface; http://tinyurl.com/n8lvvyj, at 228-29, 236-38; http://tinyurl.com/lureesx, Preface; http://tinyurl.com/k8hfn4f, Health and Family Services, at 50-51, 60-63.

incorporate the terms of the Settlement Agreement into its order of dismissal for the sole purpose of retaining jurisdiction to enforce the Agreement. Indeed, Plaintiffs' motion for voluntary dismissal—and the Settlement Agreement itself—were contingent on the district court retaining jurisdiction to enforce the Agreement. This is because the Settlement Agreement on its face may be enforced "exclusively" in the district court. Agr. § 9, R.502-2, PageID#5330. And, in order for a federal court to have jurisdiction to enforce a private settlement, the court must incorporate the settlement into its order of dismissal and expressly retain jurisdiction. *Buckhannon Bd. & Care Home Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 604 n.7 (2001) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994)).

The district court did not abuse its discretion in granting Plaintiffs' motion. Indeed, under Rule 41(a)(2), courts lack discretion to deny voluntary dismissal with prejudice. Additionally, the district court properly exercised its discretion to incorporate the Settlement Agreement into the order of dismissal for the purpose of retaining jurisdiction to enforce the Agreement.

A. The District Court Correctly Granted Voluntary Dismissal With Prejudice

Under Federal Rule of Civil Procedure 41(a)(2), after an answer or a motion for summary judgment has been filed, and absent a stipulation by all parties who have appeared, "an action may be dismissed at the plaintiff's request only by court

order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). This Court for decades has held that district courts lack discretion to force a plaintiff to continue litigating when the plaintiff seeks voluntary dismissal *with* prejudice under Rule 41(a)(2). *Smoot v. Fox*, 340 F.2d 301, 302-03 (6th Cir. 1964). By contrast, district courts may deny a request for voluntary dismissal *without* prejudice if it would cause "plain legal prejudice" to the defendant. *Grover by Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718 (6th Cir. 1994). In *Grover*, this Court identified several factors for evaluating whether a voluntary dismissal without prejudice would be improper. *Id.*

Here, the district court made crystal clear that its dismissal was with prejudice. The court "granted the motion of the plaintiffs to voluntarily dismiss the Second Amended Complaint with prejudice." Mem. Op. 15, R.527, PageID#6080. The court entered a separate order granting Plaintiffs' motion "to voluntarily dismiss with prejudice." Order, R.529, PageID#6083. And the court's order of dismissal states that "[t]he above-captioned lawsuit is dismissed with prejudice." *Id*. The district court thus correctly concluded that the *Grover* factors do not apply to the voluntary dismissal here. Mem. Op. 1, R.527, PageID#6066.

Sunrise nonetheless contends that the *Grover* factors apply on the theory that the dismissal was "in effect a dismissal *without* prejudice." Sunrise Br. 30. According to Sunrise, the dismissal would permit Plaintiffs to "file the same claim

again or even reopen this case." *Id.* at 32. Not so. As Sunrise acknowledges, "'[d]ismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties.'" *Id.* at 30 (quoting *Smoot*, 340 F.2d at 303). Stated differently, "'a voluntary dismissal with prejudice operates as a final adjudication on the merits and has a res judicata effect.'" *Id.* (quoting *Warfield v. AlliedSignal TBS Holdings, Inc.*, 267 F.3d 538, 542 (6th Cir. 2001)). If Plaintiffs were to file the same claim again (or any claim that could have been brought in this case), it would be barred by *res judicata*. Indeed, dismissal with prejudice is the same relief Sunrise requested in its motions for summary judgment and to dismiss for lack of standing. For purposes of *res judicata*, it makes no difference whether dismissal with prejudice is granted pursuant to Rule 41(a)(2), Rule 56, or Rule 12(b)(1). Sunrise is no longer exposed to a claim after the claim has been dismissed with prejudice.[9]

Sunrise complains that "Plaintiffs retain the right to sue based on future conduct that violates the [Settlement Agreement]," or based on allegations that "Sunrise is still doing these things"—*i.e.*, using state funds to proselytize children in its care. Sunrise Br. 33. But the same is true of any dismissal with prejudice,

[9] In addition to the *res judicata* effect of the dismissal with prejudice, the Settlement Agreement released the Commonwealth Defendants from any claims "which in any way arise out of the Commonwealth Defendants' and/or Sunrise's acts or omissions giving rise to the Lawsuit that have occurred or will occur before the Effective Date of this Agreement … ." Agr. § 7, R.502-2, PageID#5328.

which does not immunize a defendant from claims based on future conduct, even future conduct that mirrors the conduct that gave rise to the dismissed action. *See Cellar Door Prods., Inc. of Mich. v. Kay*, 897 F.2d 1375, 1378 (6th Cir. 1990) (holding that "causes of action that arose subsequent to the [stipulated] dismissal [with prejudice] are not barred by *res judicata*," even when based on an ongoing course of conduct that began before the dismissal).[10] Moreover, Sunrise argues that Plaintiffs can void the Settlement Agreement because the Commonwealth did not promulgate regulations to implement the Agreement. Sunrise Br. 40. But Plaintiffs and the Commonwealth Defendants long ago agreed that no new regulations are necessary. Response 13-14, R.521, PageID#5678-79; Reply 22-23, R.522, PageID#5711-12.

Sunrise also complains that the district court's dismissal may not supply Sunrise with a collateral estoppel defense in a hypothetical future lawsuit brought by different taxpayer plaintiffs. Sunrise Br. 31-32. This is irrelevant. Contrary to Sunrise's suggestions, Plaintiffs were not obligated to bring their case as a class

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[10] *See also Pram Nguyen ex rel. United States v. City of Cleveland*, 534 F. App'x 445, 453 (6th Cir. 2013) ("If individuals like Plaintiff were forever barred from asserting claims based on conduct that occurs after a prior suit is decided, defendants could continue a course of unlawful conduct undeterred."); *TechnoMarine, SA v. Giftports, Inc.*, 758 F.3d 493, 499 (2d Cir. 2014) (applying the "unremarkable principle" that "a claim arising subsequent to a prior action … [is] not barred by *res judicata* even if the new claim is premised on facts representing a continuance of the same course of conduct").

action, or to continue litigating after they settled their claim against the Commonwealth, solely for Sunrise's potential benefit in a possible future lawsuit.

Accordingly, Sunrise's discussion of the *Grover* factors is inapposite.

B. The District Court Correctly Incorporated the Settlement Agreement into the Order of Dismissal for the Purpose of Retaining Jurisdiction to Enforce the Agreement

As described above, Plaintiffs and the Commonwealth Defendants agreed to enforce the Settlement Agreement exclusively in the district court. In *Kokkonen*, the Supreme Court held that "[i]f the parties wish to provide for the court's enforcement of a dismissal producing settlement agreement, they can seek to do so." 511 U.S. at 381 (emphasis omitted). "When the dismissal is pursuant to Federal Rule of Civil Procedure 41(a)(2), … the parties' compliance with the terms of the settlement contract (or the court's 'retention of jurisdiction' over the settlement contract) may, in the court's discretion, be one of the terms set forth in the order [of dismissal]." *Id.* Relying on *Kokkonen*, the district court exercised its discretion to incorporate the Settlement Agreement into its order of dismissal and expressly retain jurisdiction to enforce the Agreement.

1. The Settlement Agreement Is Not a Consent Decree

Sunrise argues that the district court's order of dismissal is a "*de facto* consent decree" and that the standard for court approval of such a decree has not been met. Sunrise Br. 36-44. To begin with, the question of whether the

Settlement Agreement constitutes a "*de facto* consent decree" is academic. As described below, even if it were, the district court considered the standards for court approval of a consent decree and correctly found that they were satisfied. Mem. Op. 6-9, 14, R.527, PageID#6071-74, 6079; *see infra* pp. 35-46.

In any event, as the district court held, the Settlement Agreement "is not a consent decree nor is it 'tantamount to a consent decree,' as urged by Sunrise, either as written, or incorporated into an order of dismissal with the retention of jurisdiction by this court." Mem. Op. 6-7, R.527, PageID#6071-72. The Settlement Agreement lacks the hallmarks of a consent decree. First, while "noncompliance with a consent decree is enforceable by citation for contempt of court" (*Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 518 (1986)), the Agreement provides that the Commonwealth Defendants "shall not be subject to any civil contempt fines or criminal contempt sanctions for any violation of this Settlement Agreement." Agr. § 9, R.502-2, PageID#5330. Second, while consent decrees typically involve ongoing court monitoring or supervision, the Settlement Agreement does not. Instead, the Agreement provides for monitoring by the Commonwealth Defendants and, with respect to Sunrise, by Plaintiffs' counsel—not the district court. The district court's role is limited to enforcing a breach of the Settlement Agreement by an order of specific performance and, even then, only after the parties exhaust a

mandatory dispute resolution process. *Id.* §§ 9, 10, PageID#5330. Third, a heading in the Agreement reflects the parties' intent and understanding that the Agreement is "Not [a] Consent Decree." *Id.* § 9, PageID#5330.

Roberson v. Giuliani, 346 F.3d 75 (2d Cir. 2003), relied upon heavily by Sunrise, is inapposite. Sunrise Br. 40-43. In that case, the Second Circuit held only that where, as here, a district court retains jurisdiction to enforce a private settlement agreement, the plaintiff is the "prevailing party" for purposes of recovering its attorneys' fees. *Roberson* did not address whether or when a court-enforceable settlement agreement should be considered a consent decree. In fact, the Second Circuit assumed the agreement at issue was *not* a consent decree. 346 F.3d at 81 (concluding that "judicial action *other than* a judgment on the merits *or a consent decree* can support an award of attorney's fees so long as such action carries with it sufficient judicial imprimatur") (emphases added).

2. The Settlement Agreement Was a Proper Resolution of Plaintiffs' Establishment Clause Funding Claim

Sunrise asserts that the district court "lacked jurisdiction" to incorporate the Settlement Agreement in its order of dismissal because the Agreement purportedly confers different relief than Plaintiffs sought in their complaint or could have obtained at trial. Sunrise Br. 44-51. Sunrise is wrong.

As an initial matter, it is well established that parties may agree to a court-enforceable settlement that "exceed[s] the requirements of federal law." *Suter v.*

Artist M., 503 U.S. 347, 354 n.6 (1992). Indeed, the Supreme Court has held that federal courts are not barred from entering a court-enforceable settlement merely because it "provides broader relief than the Court could have awarded after a trial." *Local No. 93*, 478 U.S. at 525. Rather, as Sunrise acknowledges, the scope of relief in a court-enforceable settlement is proper if it "spring[s] from or serve[s] to resolve a dispute within the court's subject-matter jurisdiction," "come[s] within the general scope of the case made by the pleadings," and "further[s] the objectives of the law upon which the complaint was based." *Id.* at 525; *see* Sunrise Br. 44. The district court applied this test and did not abuse its discretion by finding that the Settlement Agreement satisfied it. Mem. Op. 14, R.527, PageID#6079 (citing *Local No. 93*, 478 U.S. at 525).

First, as explained above, the district court had jurisdiction based on Plaintiffs' standing as state taxpayers. *See supra* pp. 13-28.

Second, the Settlement Agreement provides relief that remedies the Establishment Clause violation and injury to Plaintiffs that are alleged in Plaintiffs' Complaint. The Supreme Court has held that "the 'injury' alleged in Establishment Clause challenges to [governmental] spending [is] the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348 (2006). The

Complaint alleges in detail how and why Kentucky's funding of Sunrise resulted in the spending of tax money in aid of religion.

Plaintiffs' Complaint alleges that Sunrise uses public funds to support religious indoctrination, proselytization, and coercion of children that the Commonwealth Defendants place in Sunrise's care.[11] Governmental provision of funds that are so used violates the Establishment Clause. *See Mitchell v. Helms*, 530 U.S. 793, 847-48 (2000) (O'Connor, J., concurring); *Agostini v. Felton*, 521 U.S. 203, 223, 228 (1997); *Am. Atheists, Inc. v. City Of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 291, 296 (6th Cir. 2009); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 412 (2d Cir. 2001).[12] For instance, in *Teen Ranch, Inc.*

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[11] *See, e.g.*, Second Am. Compl. p. 1, R.439, PageID#4457 ("KBHC uses Commonwealth funds … to pay for services that seek to teach youth the institution's version of Christian values."); *id.* ¶ 23 ("KBHC seeks to instill its version of Christian values and teachings to the youth in its care … ."); *id.* ¶ 53 ("The Commonwealth of Kentucky's practice of providing government funds to finance KBHC services that seek to instill Christian values and teachings to the youth in its care constitutes a violation of the Establishment Clause."); *id.* ¶¶ 46, 48 (describing how Sunrise religiously indoctrinates, proselytizes, and coerces children in its care).

[12] Because no opinion in *Mitchell* garnered a majority and Justice O'Connor's concurring opinion rested on narrower grounds than the plurality's, Justice O'Connor's opinion is the governing precedent. *See Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 426 (6th Cir. 2002). That opinion also rejected the proposition—suggested by the plurality in the case and argued by Sunrise throughout this litigation—that public funding may be used for religious activities if the funding is allocated among religious and secular entities through religion-neutral criteria. *See Mitchell*, 530 U.S. at 837-41, 857, 867 (O'Connor, J., concurring); *accord Am. Atheists*, 567 F.3d at 289-91, 293.

v. Udow, 479 F.3d 403, 409, 411-12 (6th Cir. 2007), this Court held that the Establishment Clause prohibited a state from funding a religious childcare facility that incorporated religious programming into its services. The Settlement Agreement, in turn, prevents state funds from supporting religious indoctrination, proselytization, or coercion, as described above.

The Complaint also alleges that the Commonwealth provided no adequate safeguards or monitoring to prevent the unconstitutional use of public funds to advance religion.[13] The Establishment Clause prohibits governmental aid to religious institutions unless it is accompanied by "an effective means of guaranteeing that the state aid … will be used exclusively for secular, neutral, and nonideological purposes." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973). Thus, state "monitoring of [public] grants" to religious institutions "is necessary if the [government] is to ensure that public money is to be spent … in a way that comports with the Establishment Clause." *Bowen*, 487 U.S. at 615; *accord Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973). The Settlement Agreement establishes strict safeguards and

[13] *See, e.g.*, Second Am. Compl. ¶ 47 (explaining that the Commonwealth's agreements with Sunrise lack adequate safeguards or monitoring); *id.* ¶ 55 (explaining that the statutes and appropriation acts that enable state funding of Sunrise "lack any restrictions or safeguards against religious use of the funds or provision of the funds to pervasively religious entities").

monitoring to ensure that state-financed private childcare providers do not improperly advance religion.

The Complaint further alleges that Sunrise operates as a pervasively sectarian institution.[14] The Establishment Clause prohibits government funding of pervasively sectarian organizations or programs, unless the government can rebut a presumption that such organizations or programs will use the funds to support religious indoctrination and proselytization. *See Am. Atheists*, 567 F.3d at 295-96; *Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 407-09 (6th Cir. 2002); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001). The Settlement Agreement prevents Kentucky from funding private childcare providers that operate in a pervasively sectarian manner.

Sunrise argues that, despite the Settlement Agreement, it "will remain every bit as 'sectarian' (or not) after the implementation of the [Agreement]'s reforms as it was (or was not) before." Sunrise Br. 46. Not so. An entity or program is considered "pervasively sectarian" if "secular activities cannot be separated from sectarian ones," *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976), or "a substantial portion of its functions are subsumed in the religious mission," *Bowen*

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[14] *See, e.g.*, Second Am. Compl. ¶ 45 ("As state taxpayers, Plaintiffs object to the receipt and use of taxpayer funds by KBHC in light of the fact that it is pervasively sectarian and the fact that it uses taxpayer dollars for religious indoctrination."); *id.* ¶¶ 21-23, 46 (describing Sunrise's pervasively sectarian nature).

v. Kendrick, 487 U.S. 589, 610 (1988) (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)) . Here, the Agreement requires any religious activities made available to children by a childcare provider to be wholly voluntary, and to take place separately and apart from children who do not wish to participate—the exact *opposite* of what occurs in a pervasively sectarian institution. Further, the Agreement is designed to separate a provider's proselytizing "missionary" work from its work on behalf of the Commonwealth.

Third, for the reasons described above, the Settlement Agreement furthers the objectives of the Establishment Clause in every way. *See supra* pp. 36-40.

Sunrise errs in arguing that the Settlement Agreement is improper because it has the incidental effect of protecting the rights of children who are not parties to the case. *See* Sunrise Br. 46 & n.20. The Settlement Agreement protects Plaintiffs' right under the Establishment Clause not to have their tax dollars used to advance religion. That the Settlement Agreement may also have the effect of protecting Free Exercise Clause (as well as Establishment Clause) rights of children in the care of state-funded private providers does not somehow render it unlawful. *See Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 419-20 (8th Cir. 2007) (taxpayers had standing to challenge state funding of religious prison program even though injunction against program also protected rights of prison inmates).

3. The Settlement Agreement Is Fair, Adequate, Reasonable, and Consistent With the Public Interest

A court can and should enter a court-enforceable settlement if it is "fair, adequate, and reasonable, as well as consistent with the public interest." *United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484, 489 (6th Cir. 2010) (citation and internal quotation marks omitted). This Court has emphasized that "public policy generally supports a presumption in favor of voluntary settlement of litigation." *Id*. at 490. This presumption is "particularly strong" when, as here, one of the parties that negotiated and entered into the court-enforceable settlement is a government entity. *Id*.

The district court did not abuse its discretion in finding that the Settlement Agreement satisfies the criteria for adoption of a court-enforceable settlement. Mem. Op. 6-9, R.527, PageID#6071-74. The Agreement delivers important reforms to prevent the use of public funds to support religious indoctrination, coercion, and proselytization of—as well as religious discrimination against—children in Kentucky's public childcare system. The Agreement mandates that all private childcare providers statewide must agree—through their contract with Kentucky—not to engage in such conduct. The Agreement requires the Commonwealth Defendants to monitor providers' compliance, and it establishes mechanisms for the Commonwealth Defendants to do so. The Agreement establishes an additional layer of monitoring for Sunrise and any other provider

found to have engaged in prohibited conduct. *See supra* p. 10. In sum, the Settlement Agreement ensures that taxpayer dollars are not used to support religious indoctrination or proselytization of children, and prevents public funding of private childcare providers that operate in a pervasively sectarian manner. This is eminently fair, adequate, reasonable, and consistent with the public interest.

a. Sunrise's Fairness Arguments Are Meritless

First, the Settlement Agreement does not impose any new requirements on Sunrise or put Sunrise to any "Hobson's Choice." Sunrise Br. 53. As the district court explained, "[t]he Agreement imposes no obligations on Sunrise whatsoever. Sunrise and all other child-caring and child-placing entities who choose to enter into PCC contracts with the Commonwealth in the future will be subject to various new terms in these contracts. These contracts may be accepted or not, at the discretion of each entity. Sunrise does not suggest that the Commonwealth does not have the right to add to or alter the terms of its future PCC contract offerings, with or without this settlement." Mem. Op. 7, R.527, PageID#6072; *accord* Order 3, R.505, PageID#5368.

Sunrise had the same choice that it and every other private childcare provider have *every* two years—*i.e.*, whether to enter into PCC Agreements with the Commonwealth to provide services to children, or not. The Commonwealth regularly makes changes to its standard PCC Agreement that all private providers

must take or leave. The modifications required by the Settlement Agreement are no different. Sunrise has no right to demand and receive any particular provisions in its PCC Agreement with the Commonwealth. *See Johnson v. Lodge No. 93 of Fraternal Order of Police*, 393 F.3d 1096, 1105 (10th Cir. 2004) (union's objection that settlement of employment-discrimination action would negatively impact what government could agree to in future collective bargaining did not justify disapproving a settlement, as union had no "right to insist on particular terms and conditions of employment"); *Foto USA, Inc. v. Bd. of Regents*, 141 F.3d 1032, 1037 (11th Cir. 1998) ("the state, as a purchaser of services, enjoys a broad freedom to deal with whom it chooses on such terms as it chooses"). In fact, Sunrise has already signed the PCC Agreement as modified pursuant to the Settlement Agreement.

Nor does Sunrise have any legal right to receive public funding or childcare placements from the Commonwealth. Indeed, the Commonwealth could choose at any time to begin providing all childcare services on its own, instead of entering into agreements with Sunrise and other private providers for those services. And Sunrise certainly has no right to be paid by the Commonwealth to engage in religious indoctrination, coercion, or discrimination. The prohibitions in the Settlement Agreement and the modified PCC Agreements against such conduct by publicly funded childcare providers are designed to ensure the Commonwealth

Defendants' compliance with the Establishment Clause. If Sunrise wishes to engage in practices that would run afoul of the modified PCC Agreement, it may do so, but not while being funded by taxpayer dollars.

Second, the Settlement Agreement does not unfairly "single[] out" or "stigmatize[]" Sunrise. Sunrise Br. 54. All of the substantive terms of the Settlement Agreement apply equally to Sunrise and every other publicly funded private childcare provider statewide. Every private provider statewide executes the same modified PCC Agreement. Indeed, Sunrise already did so. Additionally, every private provider, including Sunrise, is subject to the same monitoring by the Commonwealth Defendants. The only distinction is that, for seven years, Plaintiffs' counsel will receive greater access to monitoring materials relating to Sunrise. Agr. § 3(a), R.502-2, PageID#5326. That imposes no burden on Sunrise, since "[n]o additional documentation must be generated with respect to children placed in Sunrise facilities that is not also required to be maintained for all PCC-contracting facilities." Mem. Op. 8, R.527, PageID#6073.

In any case, Sunrise's past actions justify the Commonwealth Defendants giving Plaintiffs' counsel access to Sunrise-related monitoring materials for a limited period. Discovery revealed, among other things, particularized complaints from dozens of children describing religious proselytization and coercion at Sunrise facilities and in Sunrise foster-care placements, obtained through one-on-

one interviews as children were leaving Sunrise's care. *See supra* pp. 5-6. Sunrise also 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." *See supra* p. 6. Using public funds to "force me to become a Christian," or to require children to attend Baptist church services or else "sit in a chair" or "in the van" obviously runs afoul of the Establishment Clause. *See supra* pp. 5-6. So, too, does using public funds to facilitate Sunrise's proselytizing "missionary" work through foster-care placements.

Third, Sunrise's claim that the Settlement Agreement places it at a "competitive disadvantage" is both speculative and inaccurate. Sunrise Br. 54-55. There is no basis to believe that the professional judgment of any Commonwealth employee will be affected by the additional access of Plaintiffs' counsel to Sunrise-related monitoring materials. Sunrise's suggestion that "already burdened" Commonwealth employees with "heavy caseloads" (*id.* at 54) would alter their placement decisions based on such access impugns the integrity of those employees, who are responsible for placing children at facilities that are in the best interests of each child. Also, Sunrise's contention that the Agreement imposes "additional reporting requirements for children placed at Sunrise" (*id.* at 55) is flatly wrong. As explained above, the reporting requirements are the same for all private childcare providers. Agr. §§ 2(d)(iii), (h), R. 502-2, PageID#5322-24. The

only difference is that Plaintiffs' counsel will automatically receive Sunrise-related materials. There will be no "competitive disadvantage."

Sunrise's various other attacks on the Settlement Agreement are meritless. Sunrise argues that the settlement was based on a weak case (Sunrise Br. 53), but Plaintiffs uncovered extensive evidence of religious proselytization and coercion by Sunrise (*see supra* pp. 5-6). Sunrise notes that it did not consent to the settlement (Sunrise Br. 53), but where, as here, a party asserts no claims and has no claims asserted against it, the party has no right to block a settlement among other parties. *See Local No. 93*, 478 U.S. at 528-29 ("It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation."). Sunrise is entitled to present its objections to a court-enforceable settlement between other parties, but Sunrise cannot force a court to try the case or make adjudications on the merits. *See id.*[15]

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[15] *See also Geier v. Alexander*, 801 F.2d 799, 808 (6th Cir. 1986) (United States, a party to the case, had no right to block a court-enforceable settlement between other parties where it "impose[d] no obligations on the United States" and the government could not show that the settlement was illegal); *United States v. Nozik*, 149 F.3d 1185, 1998 WL 381345, at *2 (6th Cir. June 25, 1998) (unpublished table decision) (one defendant lacked standing to object to a court-enforceable settlement between other parties where the claims against the objecting defendant had been dismissed); *Lodge No. 93*, 393 F.3d at 1108-09 (union, which asserted no substantive claims and had none asserted against it, had no ability to block court-enforceable settlement that imposed no "legal duties or obligations" on the union).

b. Sunrise's Constitutional Arguments Are Meritless

First, Sunrise argues that the Settlement Agreement discriminates against Sunrise on the basis of its religious identity and therefore violates the Equal Protection, Free Exercise, and Establishment Clauses. *See* Sunrise Br. 55-58.

Nothing supports Sunrise's allegation that the Settlement Agreement constitutes religiously-motivated discrimination. As described above, the Agreement imposes the same substantive requirements on Sunrise as on every other private childcare provider across the Commonwealth. The only distinction is that Plaintiffs' counsel will automatically receive access to Sunrise-related monitoring materials for a limited period of time. That distinction was based not on Sunrise's religious identity, but rather on Sunrise's past misconduct that this lawsuit revealed, some of which is described above. *See supra* pp. 5-6. That misconduct amply justifies the additional access to Sunrise-related materials under the Agreement. Indeed, the Commonwealth could have constitutionally entirely terminated funding Sunrise due to Sunrise's use of state funds to support religious indoctrination. *See Locke v. Davey*, 540 U.S. 712, 719, 725 (2004); *Bowman v. United States*, 564 F.3d 765, 775-77 (6th Cir. 2008); *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 408-10 (6th Cir. 2007). The Commonwealth Defendants also were justified in agreeing to give Plaintiffs' counsel automatic access only to Sunrise-related materials because this lawsuit arose as a result of Sunrise's conduct.

The Settlement Agreement thus easily passes rational-basis review, which is the level of scrutiny applicable here. A claim of religious discrimination in violation of the U.S. Constitution receives no more than rational-basis scrutiny unless the claimant demonstrates (i) an invidious religiously discriminatory motive on the part of the government, (ii) substantial governmental interference with the claimant's religious practice, or (iii) that a challenged statute or regulation expressly and facially discriminates among different religious denominations. *See Locke*, 540 U.S. at 720-21 & n.3, 724-25; *Larson v. Valente*, 456 U.S. 228, 244-47 & n.23 (1982); *Bowman*, 564 F.3d at 774-75; *Teen Ranch*, 479 F.3d at 409-10. There is no evidence to support any of this.

Second, Sunrise contends that the Settlement Agreement violates its procedural due process rights because the Agreement "imposes new obligations on Sunrise with no opportunity to be heard." Sunrise Br. 56. But Sunrise has received an extraordinary amount of process here. Over the course of more than a year, Sunrise participated in multiple in-person and telephonic settlement conferences with the Magistrate Judge. Sunrise received multiple drafts of the Agreement throughout the negotiations and provided input on some of those drafts. Sunrise also received drafts of the modified PCC Agreement and other settlement-related documents and had the opportunity to provide input on those materials.

In addition to its participation in the negotiations, Sunrise repeatedly expressed its objections to the Settlement Agreement to the district court. Sunrise first filed lengthy objections in challenging an order by the Magistrate Judge staying the case pending finalization of the Settlement Agreement. Obj., R.502-1, PageID#5273. The district court conducted a "fulsome review of Sunrise's objections" to the Agreement and found they have "no merit." Order 3, R.505, PageID#5368. Sunrise again expressed its objections to the Agreement in a 37-page opposition to voluntary dismissal with prejudice (R.514, PageID#5490), a 34-page motion to dismiss for lack of standing (R.513, PageID#5444), and a 15-page reply brief (R.525, PageID#6047). The district court carefully considered these objections before rejecting them. Mem. Op. 6-15, R.527, PageID#6071-80. All of this satisfied Sunrise's right to be heard. *See Lodge No. 93*, 393 F.3d at 1100, 1109 (union-intervenor that objected to settlement received "all the process it was due" where court heard its objections and it had been included in negotiations, but no agreement could be reached with union's consent).

Third, Sunrise argues that the Settlement Agreement "imposes unconstitutional conditions on Sunrise's receipt of government benefits." Sunrise Br. 58. As described above, however, there is no underlying constitutional violation or unlawful discrimination against Sunrise in connection with the Agreement. Because there is no underlying constitutional violation, Sunrise's

"unconstitutional conditions" argument fails. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60-68 (2006) (holding that statute conditioning federal funding to law schools on schools allowing military recruiters on campus was not an unconstitutional condition because Constitution would not prevent Congress from directly imposing requirement of military recruiters on campus); *R.S.W.W. v. City of Keego Harbor*, 397 F.3d 427, 434-36 (6th Cir. 2005) (analyzing whether applicant for zoning variance had a constitutional due process right to determine whether its unconstitutional conditions argument satisfied federal subject-matter jurisdiction).

Fourth, the district court's retention of jurisdiction to enforce the Settlement Agreement does not violate "federalism principles." Sunrise Br. 59-60. As an initial matter, there are no federalism concerns here because the Commonwealth *itself* supported the district court's entry of a court-enforceable settlement. Such a settlement is favored where, as here, one of the negotiating parties is a government entity, including a state government. *See Lexington-Fayette*, 591 F.3d at 490; *Lodge No. 93*, 393 F.3d at 1110-11.

Moreover, contrary to Sunrise's assertion, the district court's retention of jurisdiction over the Settlement Agreement does not constitute "federal judicial oversight over the PCC System in Kentucky." Sunrise Br. 60. As explained above, all monitoring under the Agreement will be conducted by the

Commonwealth Defendants and Plaintiffs' counsel—*e.g.*, by review of child exit surveys, religious activity reports, and other materials. *See* Agr. §§ 2(d)(iii), 2(h), 2(i), 3, R.502-2, PageID#5322, 5324-26. The Settlement Agreement does not provide for the district court to conduct any monitoring or "oversee[] the operations" of any state agency. The court's only role would be to resolve disputes, if any arise, concerning whether the parties are complying with the Settlement Agreement, and such disputes could reach the court only if a robust informal dispute resolution process fails to resolve them.

CONCLUSION

Sunrise's attempt to re-litigate Plaintiffs' standing is foreclosed by the law-of-the-case and law-of-the-circuit doctrines. And the district court acted well within its discretion in dismissing this case with prejudice through an order incorporating the Settlement Agreement and retaining jurisdiction to enforce it. For the foregoing reasons, the district court's judgment should be affirmed.

Dated: December 19, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains11,906 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Fed. R. App. P. 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.

/s/ David B. Bergman
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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2014, the foregoing *Brief of Appellees* was electronically filed with the Court via the Court's appellate CM/ECF system, and a copy of the brief was served on all counsel of record by operation of the CM/ECF system on the same date.

/s/ David B. Bergman
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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Description	PageID#	Date
1	Complaint	n/a[16]	04/17/2000
54	Order	n/a	07/23/2001
543-2[17]	Mem. Order & Op.	6189-92	04/16/2003
274-3 & 274-4	Resp. to Objections, Ex. B (Parts 1 & 2)	1226-310	08/08/2007
308	Mem. & Op,	2348-60	03/31/2008
309	Order	2361	03/31/2008
502-1	Mem. Objecting to Stay	5273-316	04/05/2013
502-2	Settlement Agr.	5317-37	03/12/2013
505	Mem. Op.	5366-69	05/03/2013
512	Mot. to Dismiss	5389-96	09/20/2013
513	Mot. to Dismiss	5441-43	09/20/2013
514	Response	5490-531	09/20/2013
521	Reply to Mot. to Dismiss	5666-83	11/15/2013

[16] As stated in footnote 1 of the brief, PageID numbers are not available for docket entries before R.124, which is dated August 15, 2003.

[17] The original version of this April 16, 2003 Memorandum Order and Opinion does not include PageID numbers. The Order and Opinion was later attached to a subsequent filing with PageID numbers, and we have cited to that version of it.

Record No.	Description	PageID#	Date
522	Reply to Mot. to Dismiss	5684-726	11/15/2013
522-8	Reply, Ex. H	5846-56	11/15/2013
525	Reply to Mot. to Dismiss	6047-63	01/13/2014
527	Mem. Op.	6066-80	06/30/2014
528	Order	6081	06/30/2014
529	Order	6082-83	06/30/2014