IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

STATE OF TENNESSEE, et al.	)	
	)	
Plaintiffs,	)	**No. 1:17-cv-01040-STA-egb**
	)	
v.	)	
	)	
U.S. DEPARTMENT OF STATE, et al.,	)	
	)	
Defendants,	)	
	)	
v.	)	
	)	
TENNESSEE IMMIGRANT AND REFUGEE RIGHTS COALITION, et al.,	)	
	)	
Intervenor-Defendants.	)	
	)	

INTERVENOR-DEFENDANTS' MEMORANDUM OF FACTS AND LAW IN SUPPORT OF MOTION TO DISMISS

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This case is an attempt to establish a state veto over the resettlement of refugees in Tennessee. But the plaintiffs that are properly before the Court have no standing to assert the sole claim, and in any event the constitutional theory they present is meritless. Intervenor-Defendants therefore respectfully move that the complaint be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(6).

FACTUAL AND LEGAL BACKGROUND

I. Refugee Resettlement and Medicaid in Tennessee

The Refugee Act of 1980 reflects "one of the oldest themes in America's history—welcoming homeless refugees to our shores," and "gives statutory meaning to our national commitment to human rights and humanitarian concerns." Sen. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979), *reprinted in* U.S. Code Cong. and Admin. News 141, 141. Building on prior programs, it seeks to ensure a "systematic scheme for admission and resettlement of refugees." *INS v. Stevic*, 467 U.S. 407, 425 (1984). Under the Act, refugees—individuals who cannot return to their countries because of persecution on the basis of religion, political opinion, or another protected ground—may be admitted to the United States after a lengthy screening process. *See* 8 U.S.C. §§ 1101(1)(42), 1157(c)(1). States are not entitled to decide where in the country refugees will be resettled, but they are consulted in the process. *See* 8 U.S.C. § 1522(a)(2)(A).

The federal government has established a variety of programs that help newly arrived refugees acclimate to our country and successfully establish their self-sufficiency. Tennessee has no involvement in nearly all of those programs. A newly arrived refugee is eligible for initial assistance. *See* 8 U.S.C. § 1522(b). The federal government contracts with nonprofit agencies to provide initial housing, clothing, and food; orientation and assistance in obtaining health, education, and other services; and case management. 8 U.S.C. § 1522(b). The federal

government also funds certain nonprofit social service programs for refugees, such as employment assistance and English classes. 8 U.S.C. § 1522(c). Tennessee does not administer any of these funds or programs.

Tennessee also does not administer or contribute funds to the Refugee Act's medical insurance program, known as Refugee Medical Assistance (RMA). *See* 8 U.S.C. § 1522(e). Congress established RMA against the backdrop of existing federal medical insurance programs, recognizing that some refugees already were entitled to health insurance through Medicaid. 8 U.S.C. § 1522(e)(4), (e)(5). Thus, refugees who are eligible for Medicaid obtain health insurance through that pre-existing program; refugees who are not eligible for Medicaid are generally able to obtain RMA instead. *See id.*; 45 C.F.R. § 400.94, 45 C.F.R. § 400.100.[1]

Tennessee is not required to, and does not, participate in the RMA program, having withdrawn from it in 2007. *See* 45 C.F.R. § 400.301; Compl. ¶ 32. When a state chooses to opt out of RMA, the federal government generally enters into an agreement with a nonprofit organization to administer the program. *See* 8 U.S.C. §§ 1522(e)(1), (e)(7)(A). In Tennessee, this alternative—known as a "Wilson-Fish" program—is administered by the Tennessee Office of Refugees, a department of Catholic Charities of Tennessee, Inc. Compl. ¶¶ 33, 38-39.

Tennessee does administer its Medicaid program, known as TennCare. Compl. ¶ 34. Medicaid, a federal-state cooperative program which provides medical services to certain categories of low-income individuals, has existed since 1965. *See Bruns v. Mayhew*, 750 F.3d 61, 63 (1st Cir. 2014). The State of Tennessee has participated since well before the Refugee Act was signed in 1980. *See, e.g., Berrios v. Mem'l Hosp., Inc.*, 403 F. Supp. 1222 (E.D. Tenn.

[1] Congress authorized, but did not mandate, federal reimbursement of states' portion of the costs associated with providing Medicaid to eligible refugees. 8 U.S.C. § 1522(e)(4); (e)(5). The implementing regulations provide for such extra Medicaid reimbursement only "[t]o the extent that sufficient funds are appropriated." 45 C.F.R. § 400.204.

1975). "[P]articipating states must provide full Medicaid services under the approved state plan to [those] who meet the eligibility criteria . . . ." *Bruns*, 750 F.3d at 63. "For years, federal Medicaid extended medical assistance to eligible individuals without regard to citizenship status or durational residency." *Id.*; *see also Coye v. U.S. Dep't of Health & Human Servs.*, 973 F.2d 786, 787-88 (9th Cir. 1992). In 1996, Congress enacted legislation excluding some noncitizens from Medicaid, but maintained the eligibility of other noncitizens—including refugees. *Bruns*, 750 F.3d at 63; 8 U.S.C. § 1612(a)(2)(A)(i).

II. The History of this Litigation

In the past several years, a number of state officers and governments have unsuccessfully claimed authority to dictate whether refugees will be resettled within their states. Those assertions have ben categorically rejected by the courts. *See Exodus Refugee Immigration, Inc. v. Pence*, 838 F.3d 902, 903 (7th Cir. 2016); *Texas Health & Human Servs. Comm'n v. United States*, 193 F. Supp. 3d 733, 736 (N.D. Tex. 2016), *appeal dismissed* (Oct. 11, 2016); *Alabama v. United States*, 198 F. Supp. 3d 1263 (N.D. Ala. 2016), *appeal dismissed* (May 12, 2017).

In the wake of those decisions, the Tennessee General Assembly passed Senate Joint Resolution 467 (SJR 467) on April 19, 2016. *See* Compl. ¶ 6; Ex. A (SJR 467).[2] SJR 467 directed the Attorney General and Reporter (the "Attorney General") to bring suit (or intervene in a suit) regarding various asserted legal problems associated with refugee resettlement, including the claim advanced in this case. It also provided that, if the Attorney General "chooses not to initiate or intervene in a civil action pursuant to this resolution . . . the Speaker of the

[2] Exhibits A, B, and C are public documents, represent the legislative history of SJR 467, and are therefore properly considered on a motion to dismiss. *See Blackburn v. Fisk Univ.*, 443 F.2d 121, 123 (6th Cir. 1971); *Wang v. Pataki*, 396 F. Supp. 2d 446, 453 n.1 (S.D.N.Y. 2005). Moreover SJR 467 is incorporated into the complaint by reference. Compl. ¶ 6; *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 648 (E.D. Tenn. 2015).

Senate and the Speaker of the House of Representatives are authorized to employ outside counsel to commence a civil action effectuating the purposes of this resolution." *Id*.

The resolution was delivered to the Governor, and he returned it to the Legislature unsigned. Ex. B (Legislative Record Excerpts and Website). The Governor "question[ed] whether seeking to dismantle the Refugee Act of 1980 is the proper course for our state." Ex. C (Governor Statement). He also expressed "constitutional concerns about one branch of government telling another what to do," and requested "that the Attorney General clarify whether the legislative branch actually has the authority to hire outside counsel to represent the state." *Id*.

After "an extensive review of the legal issues raised by SJR 467," the Attorney General declined to advance the "untested, novel theories of coerced spending or commandeering of the budget process[]" laid out in the resolution, concluding that the proffered Tenth Amendment and Spending Clause theories were "unlikely to provide a viable basis for legal action." Ex. D (Attorney General Letter).[3] The Attorney General did not address the Governor's request to "clarify whether the legislative branch actually has the authority to hire outside counsel to represent the state." Ex. C (Governor Statement). Instead, the Attorney General concluded:

> Should the steps we have outlined above fail to resolve the General Assembly's concerns, this Office by this letter *to the extent allowed by Tennessee law* delegates its constitutional (Tennessee Constitution Art. VI, § 5) and statutory (Tenn. Code Ann. § 8-6-109) authority to commence litigation on behalf of the State of Tennessee *to staff counsel* for the General Assembly for the limited purpose of pursuing litigation to address the issues raised in SJR 467 in the manner provided for by SJR 467. *See* Tenn. Code Ann. § 8-6-302.

Ex. D (Attorney General Letter) (emphasis added).

[3] The Attorney General also "found little evidence" that the federal government had refused to consult with Tennessee as required by statute, and instead offered concrete recommendations of steps the State could take to increase coordination. *Id*. The Attorney General's letter is incorporated into the complaint by reference. Compl. ¶ 6; *Verble*, 148 F. Supp. 3d at 648.

Invoking the delegation from the Attorney General and SJR 467, the General Assembly, on behalf of itself and putatively on behalf of the State, along with state Senator John Stevens and state Representative Terri Lynn Weaver, brought this action, represented by outside counsel, against the federal agencies and officers (collectively, the "federal government"). The plaintiffs assert a single cause of action for a violation of the Spending Clause and the Tenth Amendment.

The gravamen of the plaintiffs' complaint is that the State's agreement to participate in Medicaid means it is required to provide Medicaid to otherwise eligible individuals in refugee status. Compl. ¶¶ 36-37. The federal government pays most of the costs of doing so, but the State also pays a portion. *Id*. ¶ 37. A refusal by the State to provide Medicaid to refugees, like a refusal to provide Medicaid to any other eligible individuals, could endanger its federal Medicaid funding. *See id*. ¶¶ 35-36. The plaintiffs allege that the requirement that the State provide Medicaid to eligible refugees creates an unconstitutional choice between giving up Medicaid funds and "continu[ing] to support the federal refugee resettlement program by funding healthcare for refugees enrolled in" Medicaid. *Id*. ¶ 54; *see also id*. ¶¶ 36, 41.

ARGUMENT

Under Rule 12(b)(1) and (b)(6), a complaint is subject to dismissal where the Court lacks subject matter jurisdiction or the plaintiffs fail to state a claim upon which relief can be granted. To survive a motion under Rule 12(b)(6), "a litigant must allege enough facts to make it plausible," not "merely possible[,] that the defendant is liable." *Agema v. City of Allegan*, 826 F.3d 326, 331 (6th Cir. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "In assessing whether the complaint states plausible claims," "conclusory statements" and "[b]are assertions of legal liability" are "insufficient." *Id.* at 331-33. Under Rule 12(b)(1), the plaintiffs bear the burden to establish the sufficiency of the complaint, taken as true, to establish subject matter jurisdiction. *Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 816-17 (6th Cir. 2017).

As a threshold matter, no plaintiff can properly assert this claim. Most of the plaintiffs, including the General Assembly, lack standing. The party that could have standing to assert this claim, the State of Tennessee, has not joined this suit on its own behalf. Rather, the General Assembly seeks to speak for the State. But capacity to sue on behalf of another is governed by state law, and the General Assembly has no such authority here under Tennessee law.

In any event, the plaintiffs' legal theory does not hold water. Setting aside the rhetoric in the complaint, they allege that the ordinary requirement that the State provide Medicaid benefits to those who are eligible for such benefits under federal law, without picking and choosing, amounts to unconstitutional coercion. That is simply not so.

I. The Plaintiffs Lack Standing.

As part of the "bedrock" case-or-controversy requirement of Article III, plaintiffs "must establish that they have standing to sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). "The standing inquiry focuses on whether the plaintiff is the proper party to bring this suit," and requires that the "plaintiff's complaint . . . establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Id* at 818-19. "[T]he alleged injury," moreover, "must be legally and judicially cognizable." *Id*. at 819. Setting aside the State of Tennessee, which as discussed below is not properly before this Court, none of the actual plaintiffs—the General Assembly, Senator Stevens, and Representative Weaver—has "met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Id*. at 820.

Individual legislators like Senator Stevens and Representative Weaver generally lack standing absent a claim that "they have been deprived of something to which they *personally* are entitled—such as their seats" in the legislature. *Id*. at 821. There is no such allegation here. Rather, both individual plaintiffs offer only conclusory allegations that the challenged federal

actions "impede and interfere with" their "ability to fully discharge [their] duties." Compl. ¶¶ 8-9. The D.C. Circuit has rejected nearly identical purported injuries. *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1337 (D.C. Cir. 1999). There, state legislators similarly asserted that a federal statute "interfered with their state duties, and . . . nullified their legislative prerogatives . . . ." *Id*. at 1337. The Court held that the legislators lacked standing because "[t]heir supposed injury is nothing more than an 'abstract dilution of institutional legislative power' . . . , and we are not sure it amounts to even this much." *Id*. at 1338 (quoting *Raines*, 521 U.S. at 826); *see also Raines*, 521 U.S. at 825 (legislators lacked standing despite allegation that line-item veto would render their votes "less 'effective' than before"). The same is true here.

The General Assembly likewise lacks standing to assert the claim it has advanced. A legislature cannot litigate as though it were the State. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013) (explaining that "typically the State's attorney general," not the legislature, is designated by state law to "represent [the State] in federal court") (discussing *Karcher v. May*, 484 U.S. 72, 81-82 (1987)). It also cannot claim the State's standing. The D.C. Circuit, recognizing this principle, rejected legislative standing under similar circumstances:

> The [legislature, through its representative,] complains about federal limitations on State prerogatives . . . . This is the same complaint the individual legislators make in their official capacity. The resulting injury is not to the Legislature and it is not to the individual legislators. It is to the State itself . . . . If the [statute] diminishes the State's authority, it injures state sovereignty, not legislative sovereignty . . . . [T]he Legislature suffers no separate, identifiable, judicially cognizable injury that entitles it to sue on its own behalf.

Alaska Legislative Council, 181 F.3d at 1338-39 (footnotes omitted). The General Assembly lacks standing for the same reason.

To be sure, under limited circumstances a legislative body may have standing to vindicate its own interests as a legislature. *See, e.g., Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2659, 2663-65 (2015)2652, 2659, 2663, 2665 (2015)

(legislature alleged a cognizable "institutional injury" where it challenged, as a violation of the Constitution's requirement that voting regulations "be prescribed in each State by the *Legislature* thereof," a ballot proposition "strip[ing] the *Legislature* of its alleged prerogative to initiate redistricting") (emphases added, internal quotation marks omitted). But here the General Assembly complains about alleged federal coercion of the *State*, not about an institutional injury to the General Assembly itself. Compl. ¶ 7 ("Defendants threaten to deprive the *state* of unrelated federal funding and are thereby unconstitutionally coercing the *state* into subsidizing the federal government's refugee resettlement program.") (emphasis added).

The General Assembly does vaguely assert limitations on its "ability to spend state funds in the manner the people of Tennessee may—through their elected legislators—deem most appropriate." Compl. ¶ 7. But, as with the individual legislators, such "abstract dilution of institutional legislative power," absent some concrete institutional injury, cannot establish standing. *Alaska Legislative Council*, 181 F.3d at 1338 (quoting *Raines*, 521 U.S. at 826) (internal quotation marks omitted). Indeed, *every* federal law, by virtue of the Supremacy Clause, may in some way constrain a state legislature's ability to enact some state statutes. *See id*. The General Assembly's flawed theory would thus grant it standing to challenge any federal statute at any time—an outcome irreconcilable with the principles of Article III. *Cf. DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (rejecting a standing rule that "would interpose the federal courts as virtually continuing monitors of the wisdom and soundness" of statutes) (internal quotation marks omitted).

II. The General Assembly Lacks Capacity to Sue on Behalf of the State.

At core, the purported controversy here is between the State of Tennessee and the federal government. But the State of Tennessee is not properly before the Court. Rather, the General Assembly seeks to litigate in the State's name. Its capacity to do so is a matter of Tennessee law.

Fed. R. Civ. P. 17(b)(3); *Hollingsworth*, 133 S. Ct. at 2664; *Firestone v. Galbreath*, 976 F.2d 279, 283 (6th Cir. 1992), *certified question answered*, 67 Ohio St. 3d 87 (1993). Here, the General Assembly lacks the authority to sue on behalf of the State under Tennessee law. The complaint on behalf of the State must therefore be dismissed. *See Firestone*, 976 F.2d at 283-84.

The initiation of civil litigation lies within the duties and powers of the Tennessee Attorney General—not the General Assembly. *See* Tenn. Code Ann. § 8-6-301(b) (no state entities "shall institute any civil proceeding except through the Attorney General and reporter"); *id.* § 8-6-109(b)(1) (Attorney General is responsible for "trial and direction of all civil litigated matters . . . in which the state . . . may be interested"); *id*. § 8-6-110 (federal litigation).[4] Here, the Attorney General has not delegated his authority to institute this suit; there is no statutory authority for this suit; and the pursuit of this action raises serious state constitutional questions.

A. The Attorney General has not delegated his authority to institute this suit.

The plaintiffs assert that the Attorney General, in his July 5, 2016, letter, "specifically delegate[ed] his constitutional and statutory authority to the General Assembly to commence litigation." Compl. ¶ 6. While the Attorney General's letter does provide for a limited delegation of litigation authority, *this* litigation is not encompassed within it—nor could it be, consistent with Tennessee law.

The Attorney General has limited statutory authority to delegate his litigation powers. The statutory basis for delegation which he invoked provides:

> The attorney general and reporter, exercising discretion and with the concurrence of the head of the *executive agency involved*, may permit, by express written authorization, *staff attorneys* employed by the various departments, agencies, boards, commissions or instrumentalities of the state to *appear and represent the*

[4] *See also* Tenn. Op. Att'y Gen. No. 82-41 (Feb. 2, 1982); Tenn. Op. Att'y Gen. No. 81-677 (Dec. 29, 1981).

> *state* of Tennessee in a certain case or certain classes of cases *under the direction and control of the attorney general and reporter*.

Tenn. Code Ann. § 8-6-302 (emphasis added); *see* Ex. D (Attorney General Letter).

This suit falls outside the scope of section 8-6-302 in three distinct ways. First, the statute authorizes only delegation to "staff attorneys" of state entities "to appear and represent the state." Tenn. Code Ann. § 8-6-302. And, accordingly, the Attorney General's delegation was limited to "staff counsel" for the General Assembly. Ex. D (Attorney General Letter). Yet no staff attorney or staff counsel is representing the General Assembly (or, putatively, the State) in this suit. The non-government lawyers who have brought this suit cannot be delegated any of the Attorney General's power under section 8-6-302.[5] Second, section 8-6-302 does not permit the Attorney General to entirely hand off litigation to another Tennessee entity. Instead, it requires that the litigation remain "under the direction and control" of the Attorney General. That is manifestly not the case here; indeed, the Attorney General has described the sole legal claim in this case as "unlikely to provide a viable basis for legal action." Ex. D (Attorney General Letter). Third, section 8-6-302 does not authorize delegation to the *legislature* or its staff. The statute provides for delegation to attorneys employed by "the various departments, agencies, boards, commissions or instrumentalities" of the State. Tenn. Code Ann. § 8-6-302. And it requires the concurrence of the head of the "*executive agency* involved." *Id*. (emphasis added). Thus the entire section, read together, authorizes only delegation to entities in the executive branch. Moreover, there is no indication of the "concurrence" of the head of *any*

[5] To be sure, the Attorney General's letter recognized the availability of outside counsel in this case. Ex. D (Attorney General Letter). But it noted only the availability of such counsel to "assist." *Id*. Even if outside counsel may *assist*, section 8-6-302 permits *delegation* only to State-employed attorneys under the direction and control of the Attorney General.

executive agency with the filing of this suit. *Id*. For all these reasons, this suit is outside the delegation authority and therefore not authorized pursuant to the Attorney General's powers.

The history of the letter bears out the limited delegation involved. The Governor asked "that the Attorney General clarify whether the legislative branch actually has the authority to hire outside counsel to represent the state." Ex. C (Governor Statement). The Attorney General notably did not opine on that question. Likewise, the Governor raised "constitutional concerns" about the resolution. Ex. C (Governor Statement). Again, the Attorney General did not opine one way or the other on the lawfulness of SJR 467 or the suit—instead, he pointedly delegated his power to bring suit *only* "to the extent allowed by Tennessee law." Ex. D (Attorney General Letter). As explained, Tennessee law does not permit this suit as an exercise of delegated power.

B. SJR 467 does not authorize this suit.

Plaintiffs also invoke SJR 467 as a source of authority to bring suit. Compl. ¶ 6. But the resolution is not effective because the Governor vetoed it. It therefore cannot authorize this suit.

When the Governor is presented with a joint resolution, either the Governor may sign it, or the resolution, "on being disapproved by him shall in like manner [to a bill], be returned with his objections; and the same before it shall take effect shall be repassed by a majority of all the members elected to both houses . . . ." Tenn. Const. art. III, § 18; *see also id*. (establishing the veto procedure for a bill: "if he refuse to sign it, he shall return it with his objections thereto"). The Governor refused to sign SJR 467, instead returning it to the Legislature unsigned within the allotted time. Neither house of the General Assembly repassed SJR 467 after this veto.

The Governor's statement reflects his veto. The statement twice makes clear that the Governor "returned SJR 467 without his signature"—the constitutional procedure for a veto—

without suggesting it would go into effect. Ex. C (Governor Statement).[6] While the General Assembly could have overridden this veto, *see* Tenn. Const. art. III, § 18, it did not do so. The resolution accordingly never took effect and cannot authorize this suit. *Cf. Gilbreath v. Willett*, 148 Tenn. 92, 251 S.W. 910, 914 (1923) (unsigned joint resolution was "unconstitutional, null, and void, and affords no authority to those attempting to act under it").

C. The purported authority for this suit raises serious state constitutional questions.

Thus neither the Attorney General's letter nor SJR 467 has authorized the General Assembly to pursue this action on behalf of the State. But to the extent any doubt remains, the Court should construe both the letter and the resolution narrowly to avoid the serious state constitutional questions presented by this case. *Cf. State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014) ("it is our duty to adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution"); *Firestone*, 976 F.2d at 286.

The Attorney General is a constitutional officer in Tennessee. Tenn. Const., Art. VI, Sec. 5. Prior to 1853, the Attorney General's powers and duties derived from common law and statute. Tenn. Op. Att'y Gen. No. 06-097 (May 22, 2006). A constitutional amendment in 1853 "constitutionalized" those pre-existing powers, meaning that they could no longer be removed from the office absent another constitutional amendment. *Id.*

[6] Perhaps because the Governor did not use the word "veto," some observers initially assumed that he had allowed the resolution to go into effect without his signature. But in fact he timely executed the constitutional procedure for a veto under section 18. Moreover, under the Tennessee Constitution, a *resolution* cannot be enacted without the governor's signature or a veto-override vote. *See* Tenn. Const. art. III, § 18; *cf. id.* (allowing for *bills* that are not signed to become law if not returned to the legislature).

The General Assembly here seeks to wield a core constitutional power and duty of the Attorney General: The power to initiate civil litigation on behalf of the State. *See* Tenn. Op. Att'y Gen. No. 06-097 (May 22, 2006). It asserts that the Attorney General has empowered it to do so. But the Tennessee Constitution prohibits constitutional officers from signing their powers over to other branches of government. *See* Tenn. Const. art. II, § 2; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151, 36 S.W. 1041, 1047 (1896) ("No department of the government can resign or abdicate any of its distinctive and essential powers to another department . . . ."), *overruled on other grounds by Arnold v. City of Knoxville*, 115 Tenn. 195, 90 S.W. 469, 477 (1905). The narrow statutory authorization for Attorney General delegation reflects this respect for his constitutional role: The Attorney General may empower staff attorneys at other executive agencies to initiate suits, but only under his "direction and control." Tenn. Code Ann. § 8-6-302. Any ambiguity in the Attorney General's letter should thus be construed to avoid the possibility that he abdicated his duty in violation of the separation of powers.

Reading SJR 467 to authorize this suit would raise even more serious constitutional concerns, because it would allow the General Assembly to unilaterally claim the Attorney General's constitutional powers. The Tennessee Constitution does not permit such infringement on the powers of other branches. *See* Tenn. Const. art. II, § 2. The Attorney General has previously warned of the "separation of powers concerns" presented by "[l]egislation aimed at regulating the Attorney General's discretion concerning which actions to prosecute . . . on behalf of the State." Tenn. Op. Att'y Gen. No. 10-43 (Apr. 6, 2010). But the General Assembly cannot avoid those concerns by saying to the Attorney General, as SJR 467 does, that he must bring a lawsuit or the legislature will arrogate to itself the power to do so. *See* Tenn. Op. Att'y Gen. No. 06-097 (May 22, 2006) (explaining an attempt by the General Assembly to strip and reallocate the Attorney General's litigation duties to another officer would violate the separation of

powers). While this resolution authorizes only limited litigation, the principle it represents—the General Assembly's asserted power to strip the Attorney General of his power and responsibility to decide whether to initiate litigation—raises profound constitutional questions.[7] These grave concerns provide another reason to give full effect to the Governor's veto.[8]

In sum, the General Assembly lacks capacity to bring this action on behalf of the State. The Governor vetoed the resolution at issue here, and the Attorney General both declined to initiate suit and offered only a narrow and conditional delegation of his authority under which this case cannot qualify. The claim asserted on behalf of the State must therefore be dismissed.

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[7] Those questions are reflected in the Governor's expressed "constitutional concerns about one branch of government telling another what to do," Ex. C (Governor Statement), and the Attorney General's decision to frame his response in terms of a specific delegation to General Assembly staff counsel pursuant to Tenn. Code Ann. § 8-6-302—and only "to the extent allowed by Tennessee law"—without endorsing the General Assembly's assertion of the power to authorize itself to initiate litigation, Ex. D (Attorney General Letter).

[8] At an absolute minimum, these concerns require a narrow reading of SJR 467, should the Court conclude it is effective. SJR 467 directs the Attorney General to initiate litigation "on behalf of the State of Tennessee," but also refers to a possible suit "on behalf of the state *or the General Assembly*." Ex. A (SJR 467) (emphasis added). If the Attorney General declines, SJR 467 authorizes the Speakers of the Senate and House to "retain outside counsel to commence a civil action effectuating the purposes of this resolution." *Id.* That authorization does not explicitly mention litigation on behalf of the State, and could refer only to litigation on behalf of the General Assembly or some of its members. In light of the constitutional questions raised by the broader reading, the Court should construe it to mean only the latter. This understanding of SJR 467 is consistent with Tennessee law, which authorizes the General Assembly to hire counsel to assert its *own* interests under narrow circumstances. *See* Tenn. Code Ann. § 8-6-109(b)(9), (c) (if Attorney General concludes a statute is unconstitutional, the General Assembly "may employ legal counsel to defend the constitutionality of such law"); *cf., e.g., United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013) (acknowledging legislature's interest in defending constitutionality of a statute it enacted).

III. The Plaintiffs' Claim is Meritless.

The plaintiffs' claim, should the Court reach it, lacks merit. Asserting a surface-deep similarity to *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), the plaintiffs charge the federal government with unconstitutionally coercing Tennessee. That is simply not so.

Sebelius, in relevant part, addressed a portion of the Affordable Care Act (ACA) which purported to expand Medicaid. The plaintiffs in that case alleged that this expansion was in fact a new program altogether, and that the ACA unconstitutionally threatened to deny states of the *original* Medicaid funds should they refuse to accept the new expanded Medicaid program. *Id.* at 2601. The Supreme Court agreed that the expansion was not a "mere alteration of existing Medicaid" but "a new health care program," representing "a shift in kind, not merely degree":

> The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. See 42 U.S.C. § 1396a(a)(10). Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level.

Id. at 2606–07 (controlling opinion).[9] This conclusion—that *Sebelius* involved two separate programs—was critical to the Court's holding. As *Sebelius* reaffirmed, Congress in general has "authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the 'general Welfare.'" *Id.* at 2603-04.[10] Only when "conditions take

[9] Chief Justice Roberts' plurality opinion is the controlling opinion for the Court. *Mississippi Comm'n on Envtl. Quality v. E.P.A.*, 790 F.3d 138, 184 & n.22 (D.C. Cir. 2015) (per curiam); *Mayhew v. Burwell*, 772 F.3d 80, 88 (1st Cir. 2014).

[10] This principle is well-settled even in the specific context of Medicaid and noncitizens. *See State of Cal. v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997) (rejecting state's 10th Amendment challenge to the conditioning of Medicaid funds on the provision of emergency

the form of threats to terminate *other* significant independent grants," do conditions raise the possibility of amounting to unconstitutional coercion. *Id*. at 2604 (emphasis added).

This case cannot survive even *Sebelius*'s initial hurdle. Any state that wishes to participate in Medicaid must provide services to those who are eligible, without picking and choosing. *Bruns*, 750 F.3d at 63; 42 U.S.C. § 1396a(a)(10)(A), (B). Refugees are eligible for Medicaid if they meet the income and other eligibility guidelines. Unlike *Sebelius*, this case does not involve a requirement that the State participate in one program on pain of losing funding for another. Instead, Tennessee must abide by Medicaid's own rules or risk losing funding for that very same program. That is not coercion but exactly the bargain Tennessee struck when it adopted Medicaid.

The First Circuit recently rejected at this threshold step a similar attempt to challenge an ordinary Medicaid condition. In *Mayhew v. Burwell*, Maine sought to eliminate 19- and 20-year-olds from Medicaid eligibility, but a provision of the ACA prevented that step. 772 F.3d at 81-82. Maine invoked *Sebelius*, arguing that it was unconstitutionally coercive for the government to require the State to provide coverage to a category of individuals "for whom Medicaid has never previously mandated coverage." *Id*. at 91-92 (internal quotation marks omitted). The court disagreed, observing that the ACA rule in question was "simply an unexceptional 'alter[ation] . . . [of] the boundaries' of the categories of individuals covered under the old Medicaid program, completely analogous to the many past alterations of the program that *NFIB* expressly found to be constitutional." *Id*. at 89 (quoting *Sebelius*, 132 S.Ct. at 2606).

As in *Mayhew*, and unlike *Sebelius*, the requirement to provide Medicaid to eligible refugees "does not 'expand' Medicaid eligibility at all." *Mayhew*, 772 F.3d at 89. Refugees

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services to undocumented individuals); *State of Tex. v. United States*, 106 F.3d 661, 666 (5th Cir. 1997) (same); *Padavan v. United States*, 82 F.3d 23, 29 (2d Cir. 1996) (same).

have *always* been eligible for Medicaid. *Bruns*, 750 F.3d at 63; *Coye*, 973 F.2d at 787-88; 8 U.S.C. § 1612(a)(2)(A)(i). Moreover, there is no requirement that all refugees be granted Medicaid. Instead, Tennessee is required only to provide Medicaid to refugees, like citizens and lawful permanent residents, if they otherwise satisfy the eligibility requirements. The contrast with the ACA expansion to the "entire nonelderly population" below a certain income is stark. *Sebelius*, 132 S. Ct. at 2605–06.

Even if there were an expansion of Medicaid, it would be one of degree, not of kind—and a relatively small degree at that—and therefore would not satisfy the threshold *Sebelius* requirement of conditioning funding on participation in a different program. *Sebelius* made clear that a prior amendment expanding Medicaid to cover pregnant women did not "come close to working the transformation the [Medicaid] expansion accomplishes." 132 S. Ct. at 2606. The number of such women in the United States who satisfy the Medicaid eligibility requirements dwarfs the number of refugees who do, yet the Court concluded that expansion could "hardly be described as a major change." *Id*.; *see also id*. at 2631 (Ginsberg, J., dissenting in relevant part) (the addition of pregnant women and children to eligibility added "millions" to Medicaid). And other factors *Sebelius* emphasized are also lacking here: Unlike the ACA expansion, Medicaid for refugees relies on "the same pre-existing funding mechanism as pre-ACA Medicaid, whereas the expansion uses a new, more generous federal funding mechanism," and refugees are entitled to ordinary Medicaid benefits "whereas the Medicaid expansion required states to provide a 'new '[e]ssential health benefits' package . . . to all new Medicaid recipients.'" *Mayhew*, 772 F.3d at 90 (quoting *Sebelius*, 132 S. Ct. at 2601). "In short," the provision of Medicaid to refugees "falls comfortably within Congress's express reservation of power to 'alter' or 'amend' the terms of the Medicaid statute in its coverage of previously covered groups," and so does not trigger the *Sebelius* coercion analysis at all. *Id*. at 91; *see* 42 U.S.C. § 1304.

The various possible alternative theories suggested by the complaint's scattershot allegations are likewise meritless. The plaintiffs object to the administration of RMA by Catholic Charities. Compl. ¶ 33 (asserting this arrangement is a "direct violation of . . . state sovereignty"); *id*. ¶ 38. But the continuing availability of RMA benefits administered without cost to the State in no way coerces Tennessee, which was free to opt out of the RMA program and did so. *See Mississippi Comm'n*, 790 F.3d at 175 (no coercion where the federal government steps in after a state opts out); *In re FCC 11-161*, 753 F.3d 1015, 1141 (10th Cir. 2014) (no coercion where "the federal government has assumed responsibility for financial support to third parties"). The plaintiffs cite legislative history to assert that Congress intended states to be fully reimbursed for Medicaid care for refugees. Compl. ¶¶ 21-25. The Refugee Act itself, though, makes no such promise. 8 U.S.C. § 1522. And in any event, were the plaintiffs correct, they would establish only that the State was owed additional reimbursement as a statutory matter, not the constitutional claim they advance. Finally, the plaintiffs' conclusory allegations that the State is somehow commandeered by the requirement that public schools "take appropriate action to overcome language barriers," 20 U.S.C. § 1703(f), or by unnamed other "health and welfare programs," Compl. ¶ 47, are insufficient to establish any plausible claim for relief, *see Agema*, 826 F.3d at 331.

Ultimately, the goal of this suit is clear from the plaintiffs' prayer for relief. The only concrete relief plaintiffs request is an end to refugee resettlement in the State of Tennessee (absent an agreement by the federal government to pay the State's Medicaid and other costs). That relief would not follow from any of the theories one can glean from the complaint, even if they had merit. It lays bare, however, that this suit is not at bottom about the federal government coercing the State, but rather about the plaintiffs' pursuit of a state veto over the decision whether to resettle refugees in Tennessee. There is no such veto. *See Exodus Refugee*

Immigration, Inc., 838 F.3d at 903, 05. The plaintiffs fail to state a claim, and the case should be dismissed.

CONCLUSION

The plaintiffs lack standing and capacity to sue, and have failed to state a claim. The Court should dismiss this complaint under Federal Rule of Civil Procedure 12(b)(1) and (b)(6).[11]

Dated: June 2, 2017

Respectfully submitted,

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[11] Pursuant to L.R. 7.2(d), Intervenor-Defendants request that this motion be set for argument in light of the importance of this case and its potential statewide effect.

Attorneys for Intervenor-Defendants
*Application for admission *pro hac vice* forthcoming

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2017, a true and correct copy of the foregoing document and the above-described exhibits has been served via ECF to:

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