IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

AIMEE MADDONNA, *Plaintiff*, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., *Defendants*.	Case No. 6:19-cv-03551-TMC

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS

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NATURE OF THE CASE

Aimee Maddonna and her family hope to provide a loving foster home to a child in the care and custody of the State of South Carolina. Yet she has been deemed ineligible and turned away based on her religious beliefs. When she reached out to the largest and best-known child-placement agency in the Greenville area—an agency licensed by the State and funded with federal and state dollars to administer foster-care services on the State's behalf—she was rejected because her family is Catholic. For the agency, Miracle Hill Ministries, refuses to allow prospective foster parents to participate in the governmental program that it operates if they do not share and attest to the agency's evangelical-Christian beliefs.

The U.S. Department of Health and Human Services, Secretary Azar, HHS's Administration for Children and Families, and the Assistant Secretary in charge of ACF acknowledge that Miracle Hill imposes a religious test for participation in the federally funded foster-care program. And HHS acknowledges that it nonetheless knowingly permits federal funds to flow to Miracle Hill to pay for the foster-care services. It argues that its decision to fund the religious discrimination is not reviewable by this Court, and that even if its actions were reviewable, it is not legally responsible for the discrimination. HHS is wrong on both counts.

HHS's actions are reviewable because agencies do not have unfettered discretion to violate the Constitution or to abdicate their enforcement responsibilities. And HHS has violated, and continues to violate, the straightforward mandates of the Establishment and Equal Protection Clauses by funding religious discrimination in the provision of governmental services. The constitutional violations are only compounded by HHS's express authorization and ratification of that discrimination—first by exempting all faith-based child-placement agencies in South Carolina from generally applicable antidiscrimination requirements, and then by issuing a global notice of nonenforcement of those requirements despite the fact that they are not just regulatory but

constitutionally mandated. HHS thus expressly tells recipients and subrecipients of federal funds that they are free to operate government programs that provide government services using government funds, and to do so in a religiously discriminatory fashion. HHS's motion to dismiss (ECF No. 34) should be denied.

CONCISE STATEMENT OF FACTS

In the Complaint, Mrs. Maddonna describes in detail the foster-care crisis in South Carolina; the Maddonna family's desire to help children in foster care with the hope that they might welcome a child into their home; the State's licensing and underwriting, with both state and federal funds, of child-placement agencies like Miracle Hill that discriminate against potential foster parents and volunteers on the basis of religion; and the express discrimination that Mrs. Maddonna and her family experienced twice and continue to experience because they fail Miracle Hill's religious test. She describes all of that in her opposition to the State's motions to dismiss. *See* ECF No. 24, at 2–7. Accordingly, we now focus on the additional facts alleged in the Complaint that demonstrate HHS's knowing, willing, even enthusiastic complicity in the unconstitutional federal funding of the religious discrimination.

Under Title IV-E of the Social Security Act, HHS provides federal funding to South Carolina to support its foster-care system. Compl. ¶ 40. The federal funding goes to the State and then to the agencies with which the State contracts to provide its foster-care services. *Id.*

Receipt and therefore also disbursement of the federal funds is contingent on the State's and its subgrantee child-placement agencies' compliance with federal law. *Id.* ¶ 41. HHS regulations prohibit recipients of federal funds from discriminating on the basis of religion (among other protected characteristics) in the provision of federally funded services, requiring that "no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-

merit factors such as . . . religion." *Id.* ¶ 42 (quoting 45 C.F.R. § 75.300(c)). And subrecipients of federal funds, like the child-placement agencies with which South Carolina contracts to provide services on its behalf, are bound by HHS's antidiscrimination requirements just as the State itself is. *Id.* ¶ 43 (quoting 45 C.F.R. § 75.101(b)(1)). Religious organizations are eligible to receive HHS funding as long as they adhere to all applicable laws and requirements, including that they refrain from "support[ing] or engag[ing] in any explicitly religious activities," such as proselytization, "as part of the programs or services funded with direct financial assistance" from HHS. *Id.* ¶¶ 44–45 (quoting 45 C.F.R. § 87.3(b)). Moreover, whatever other federal and state laws govern the funding and administration of foster-care services, HHS and the State—and therefore their subgrantee child-placement agencies—are always bound by the Constitution, which prohibits the government from funding religious discrimination. See *id.* ¶ 46.

Miracle Hill, the largest and most prominent agency providing government-funded foster-care services in South Carolina (*see id.* ¶¶ 47–50), imposes a religious test on prospective foster parents: It refuses its services to those whom it deems not to be followers of Christ, and those who are not active members of certain Christian churches of which it approves, and those who do not or cannot agree "in belief and practice" with Miracle Hill's evangelical-Christian doctrinal statement. *Id.* ¶¶ 54–59. Hence, when Mrs. Maddonna contacted Miracle Hill to see whether her family could participate in the state foster-care program—first in 2014, and then again in 2019—she was rejected because she does not and cannot satisfy Miracle Hill's religious requirements, which are inconsistent with her beliefs and her understanding of her Catholic faith. *Id.* ¶¶ 82–95. Because those requirements remain in place, Mrs. Maddonna is excluded on an ongoing basis.

Miracle Hill thus discriminates on the basis of religion in carrying out a federally funded program, thereby violating HHS's regulatory prohibition (and the constitutional mandate) against religious discrimination. But rather than require Miracle Hill to come into compliance with the

law—and thereby ensure that HHS itself satisfies its *own* constitutional obligations not to underwrite religious discrimination—HHS has expressly enabled Miracle Hill's ongoing discriminatory provision of governmental services.

In 2018, at South Carolina Governor Henry McMaster's request, HHS categorically exempted the State's faith-based child-placement agencies from federal antidiscrimination requirements and the penalties for noncompliance—namely, the withholding or clawback of federal dollars. *Id.* ¶¶ 68–71. The letter granting the exemption specifically mentions Miracle Hill but is also a class-wide exemption from the religious-antidiscrimination requirements of 45 C.F.R. § 75.300(c) that explicitly permits *all* faith-based child-placement agencies in South Carolina that receive federal funds to employ "religious criteria in selecting among prospective foster care parents." *Id.* ¶ 71. HHS issued this class-wide exemption despite the fact that its own regulations authorize exceptions, if at all, only "on a case-by-case basis for individual non-Federal entities." *Id.* ¶ 69. And a year later, HHS proposed rulemaking to do away with the operative language of § 75.300(c) altogether. *Id.* ¶ 73 (citing 84 Fed. Reg. 63,832 (proposed Nov. 19, 2019)). Moreover, rather than wait for the completion of notice-and-comment rulemaking to give effect to its proposed rule change, HHS issued a notice of nationwide nonenforcement of § 75.300(c), refusing immediately and categorically to enforce the existing rule and thereby effectively nullifying it. *Id.* ¶ 76 (citing 84 Fed. Reg. 63,809 (Nov. 19, 2019)).

When Mrs. Maddonna and her family were rejected initially, and when they were rejected again in 2019, and at all times between and since, Miracle Hill has been receiving federal (and state) funds to carry out governmental foster-care services. *Id.* ¶ 90. More broadly, HHS continues to direct federal dollars to child-placement agencies in South Carolina that impose religious tests on prospective participants in the foster-care program. And HHS does not just fund the religious discrimination but expressly authorizes it: HHS informs recipients of federal funds (such as South

Carolina) and their subgrantees (such as Miracle Hill) that they no longer need fear federal regulations that would bar the religious discrimination, despite the fact that the conduct still contravenes federal constitutional mandates.

As a direct result of HHS's categorical, prospective exemption, families like the Maddonnas will continue to be turned away from federally funded governmental services solely because they hold disfavored religious beliefs or practice a disfavored faith. That HHS allows many otherwise-qualified persons to be wholly removed from consideration as foster parents exacerbates the critical shortage of homes and families available to needy foster children, depriving those children of loving homes (*id.* ¶¶ 28–29, 97). And it denies many children the opportunity to be raised in accordance with their own religious beliefs or with the religious requests of their birth parents. *See id.* ¶¶ 103–106.

ARGUMENT

On a motion to dismiss for failure to state a claim, the Court accepts as true the well-pleaded facts in the Complaint and views the facts in the light most favorable to Mrs. Maddonna, drawing all reasonable inferences in her favor. *See Lucero v. Early*, 873 F.3d 466, 469 (4th Cir. 2017). The Complaint need only contain sufficient factual matter to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And a 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction may be granted "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). At the pleading stage, general factual allegations of injury resulting from defendants' conduct suffice, for the Court presumes that general allegations embrace the specific facts necessary to support the claim. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The Complaint meets these standards.

I. MRS. MADDONNA HAS PROPERLY PLEADED STANDING TO CHALLENGE HHS'S FUNDING AND AUTHORIZATION OF RELIGIOUS DISCRIMINATION.

To establish standing, Mrs. Maddonna must allege (1) an "injury in fact" that is (2) "fairly . . . trace[able]" to defendants' actions and is (3) "redress[able] by a favorable decision" of the Court. *Lujan*, 504 U.S. at 560–61. HHS does not contest that Mrs. Maddonna has suffered a legally cognizable injury. *See* ECF No. 34-1, at 10. Nor could it: She has been denied equal participation in South Carolina's foster-care program, administered by Miracle Hill using federal and state dollars, because she and her family are the wrong religion. *See* Compl. ¶¶ 17–18, 82–89. Instead, HHS argues that Mrs. Maddonna's injuries are not fairly traceable to it or redressable by this Court because, it says, the harm to Mrs. Maddonna begins and ends with Miracle Hill. ECF No. 34-1, at 10–14. But HHS's insistence that it has no role in the religious discrimination and ongoing exclusion perpetrated against Mrs. Maddonna cannot be squared with HHS's own acts to permit, preserve, and further that discrimination. HHS is responsible, and culpable, for its own conduct, which an injunction against it would redress.

A. Fair Traceability.

Fair traceability requires a "but for" causal connection between the religious discrimination that Mrs. Maddonna experienced and HHS's actions. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 74–75 (1978). It is not difficult to connect the dots here. HHS funds the child-placement activities of entities acting on behalf of the State through grants disbursed to the State. Compl. ¶¶ 30, 40. But for HHS's ongoing funding and failure to ensure that the foster-care services are nondiscriminatory, Mrs. Maddonna would not and could not suffer religious discrimination in a federally funded program. HHS's affirmative steps to ensure that the federally funded discrimination could continue unabated—its 2018 exemption for all faith-based child-placement agencies in South Carolina, and its 2019 nationwide notice of nonenforcement—underscore its legal responsibility for Mrs. Maddonna's injuries. South Carolina lobbied HHS for

an exemption precisely because HHS otherwise prohibited Miracle Hill from discriminating against Mrs. Maddonna and others like her on religious grounds. But for that exemption, federally funded religious discrimination in South Carolina's foster-care program would necessarily have ended.

HHS insists that because Miracle Hill set the religious test that bars Mrs. Maddonna and her family, and because Miracle Hill turned them away, the causal connection to federal action is broken. ECF No. 34-1, at 12–13. But fair traceability does not require that a challenged official action "be the sole or even immediate cause of the injury." *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 284 (4th Cir. 2018) (citing *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997)) (rejecting government's argument that it was not directly responsible for path of privately built pipeline because, but for agency's grant of right-of-way, pipeline "could not have been authorized in its currently proposed form"). "To establish traceability, [the plaintiff] must show that the challenged action is 'in part responsible for frustrating'" a plaintiff's exercise of her rights. *Id*. at 283 (quoting *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013)). A defendant's actions need not be "the very last step in the chain of causation." *Bennett*, 520 U.S. at 168–69.

Mrs. Maddonna's injuries flow from the religious discrimination that she has suffered, and continues to suffer, in being refused access to a *government* program by a *government*-funded child-placement agency. Miracle Hill delivers foster-care services on behalf of the State by dint of HHS's (and the State's) ongoing, uninterrupted funding of it. Indeed, foster-care services are an inherently governmental function, for only the government may interfere with family autonomy and restrict the liberty of children by placing them in state custody. In other words, Miracle Hill can act as a foster-care child-placement agency that performs public functions using public money solely because governmental authorities contract with and fund it. If HHS enforces religious nondiscrimination as a condition of federal funding (or terminates the funding to entities that insist

on discriminating), the constitutional violation of federal funding of religious discrimination necessarily ends, whatever entities like Miracle Hill may or may not choose to do in their private activities. HHS has thus "enabled and virtually ensured" the harm that Mrs. Maddonna experienced. *Dep't of Interior*, 899 F.3d at 283.

The cases on which HHS seeks to rely stand only for the proposition that an injury is not fairly traceable to the government when it was perpetrated by a third party and a change in the government's conduct would not have changed the injury-causing activity or it is purely speculative whether that activity would cease.[1] But here, HHS controls the disbursement, and therefore the use, of federal funds for foster-care services. Again, Miracle Hill simply could not continue to provide *federally funded* services in a discriminatory fashion if there were no federal funding, or if HHS enforced federal antidiscrimination requirements for that funding. While Miracle Hill could still apply religious criteria in its private activities, foster-care services categorically are not and cannot be private; and religious discrimination in a federally funded government program cannot occur here but for HHS's disbursement and authorization of the use of federal funds in that way.[2]

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[1] In *Doe v. Obama*, 631 F.3d 157, 160–61 (4th Cir. 2011), a putative class of frozen embryos lacked standing to challenge an executive order removing limitations on stem-cell research because it was the decisions of the embryos' biological parents to donate them, rather than the executive order, that caused the alleged injury. In *Frank Krasner Enterprises, Ltd. v. Montgomery County*, 401 F.3d 230, 236 (4th Cir. 2005), a gun-show promoter lacked standing to challenge a local ordinance blocking public funding to venues that sell guns because it was the independent decision of the local venue to cease hosting gun shows, not the ordinance, that caused the promoter's injury. And in *Allen v. Wright*, 468 U.S. 737, 757–58 (1984), the plaintiffs' reduced ability to attend an integrated school was not fairly traceable to the government's failure to withhold tax-exempt status from discriminatory private schools because it was purely speculative whether loss of tax-exempt status would have motivated the schools to change their enrollment policies or caused parents to send their children to integrated public schools instead.

[2] HHS also argues that Mrs. Maddonna lacks standing to challenge the 2019 notice of nonenforcement because that notice was not yet operative when she asked to volunteer through Miracle Hill. *See* ECF No. 34-1, at 15. But Mrs. Maddonna's injury is ongoing, because she remains barred based on her religion from partaking of a federally funded governmental service

B. Redressability.

Redressability is satisfied if "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable [judicial] decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Mrs. Maddonna need not establish that a favorable decision will remedy *every* injury. *See Massachusetts v. EPA*, 549 U.S. 497, 525–26 (2007); *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). It is enough that the relief sought would "abat[e] current violations and prevent[] future ones" (*Friends of the Earth*, 528 U.S. at 187), *or* that an injury would be "reduced to some extent" (*Massachusetts*, 549 U.S. at 526).

HHS argues that Mrs. Maddonna cannot satisfy that standard because the Court cannot require Miracle Hill to accept her as a volunteer or foster parent, and if the Court ordered HHS to cease funding States and subgrantee agencies that provide child-placement services in a discriminatory manner, Miracle Hill might then cease contracting to perform those services rather than provide the services on a nondiscriminatory basis. ECF No. 34-1, at 13–14. But Mrs. Maddonna is not seeking to compel Miracle Hill (or anyone else) to accept her as a volunteer or foster parent. The injury here is religious discrimination in government-funded, government-authorized foster-care services; and the remedy sought against HHS is to enjoin HHS from providing federal funding while also permitting recipients and subrecipients of that funding to discriminate in the conduct of the federally funded program. If the injunction is granted, HHS must either require South Carolina and its subgrantees to provide the federally funded services in a religiously nondiscriminatory fashion, or curtail the funding. Whether Miracle Hill or anyone else is or is not then willing to accept federal funds to perform the governmental services on those terms

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on the same terms as everyone else. Whether HHS and the State now rely on the 2018 exemption or the 2019 notice of nonenforcement or both is of no moment. For under both, HHS continues to fund, authorize, and enable the discrimination that still bars Mrs. Maddonna.

is beside the point; Mrs. Maddonna will no longer be turned away from a federally funded program solely because of her religious beliefs—thus redressing the injury that HHS is causing her.

HHS also argues that Mrs. Maddonna's injury is not redressable because an injunction against HHS will not necessarily cause South Carolina to cease funding and licensing Miracle Hill. *Id.* at 14. To be sure, *both* the State and HHS are violating Mrs. Maddonna's rights. And it is true that if South Carolina used only state and not federal funds for its foster-care program, HHS could not then control, and therefore would not be responsible for, what went on in that program. But enjoining the federal funding would fully remedy the harm caused by *that federal funding*—i.e., the harm inflicted by HHS. What is more, federal funds (along with state funds) pay for South Carolina's foster-care system, which includes the administrative infrastructure of the system, the operations of subgrantees, and the State's oversight of all of that. This funding arrangement makes the entire foster-care program subject to federal regulation (*see, e.g.*, 45 C.F.R. § 75.300(a))—and hence, HHS has the ability, and therefore also the responsibility, to ensure that the State operates the program in a nondiscriminatory fashion. Indeed, unless the State were to create two separate foster-care programs, one that receives federal money and follows federal law and one that receives only state money and thus need not, the whole foster-care system must comply with federal requirements, or else the State must eschew federal funds altogether. Choices by the State in the operation of the foster-care system are not, therefore, a circuit-breaker for federal responsibility.

Finally, Mrs. Maddonna is challenging both HHS's and the State's actions; and she is requesting relief that would fully redress the injuries from both. The redressability requirement is satisfied. *See WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) ("[T]he mere existence of multiple causes of an injury does not defeat redressability" (citing *Massachusetts*, 549 U.S. at 525–26)); *Judd*, 718 F.3d at 315–16 (recognizing that "the concept of concurrent causation" applies to standing).

* * *

In a case brought by a couple denied the opportunity to be foster parents based on religious criteria that they did not satisfy, the court in *Marouf v. Azar*, 391 F. Supp. 3d 23 (D.D.C. 2019), recently rejected the very standing arguments that HHS raises here, concluding that HHS was responsible for the couple's injury "both by creating a system that permits religiously affiliated grant recipients to deny federally funded services to same-sex couples *and* by failing to take any action after" becoming aware of it. *Id.* at 37. To conclude that HHS "cannot be held to account for a grantee's known exclusion of persons" from a governmental program on an impermissible basis would be an "astonishing outcome." *Id.* at 34. "Surely," the court reasoned, "the government would not take this position if, say, Plaintiffs . . . were excluded from fostering a child based on their . . . religious faith." *Id.* Yet that is just what the government argues here. HHS cannot "avoid the responsibility that comes with being good stewards of federal funds." *Id.*

II. MRS. MADDONNA'S CLAIMS ARE REVIEWABLE.

Mrs. Maddonna alleges that HHS's class-wide exemption of South Carolina's child-placement agencies from federal antidiscrimination requirements is arbitrary, capricious, an abuse of discretion, and not in accordance with law (*see* 5 U.S.C. § 706(2)(A)) and is contrary to constitutional rights (*see id.* § 706(2)(B)). Compl. ¶¶ 142, 147. And she alleges that the global notice of nonenforcement of HHS's antidiscrimination regulations is similarly contrary to constitutional rights. *Id.* ¶ 143.

HHS contends that both the class-wide exemption and the global notice are in effect individual enforcement determinations, akin to a prosecutor's discretion about whether to indict, and thus judicial review is foreclosed by *Heckler v. Chaney*, 470 U.S. 821 (1985). *See* ECF No. 34-1, at 15–19. But neither agency action is an individual, retrospective enforcement determination based on the specific facts and circumstances of the violation. Rather, the exemption is a class-

wide, prospective policy that governs the activities of all current and future South Carolina child-placement agencies by directing that HHS's antidiscrimination regulations do not and will not apply to any of them. And the notice of nonenforcement is a comprehensive, prospective abdication of HHS's enforcement responsibility with respect to those antidiscrimination requirements, applicable nationwide to *all* regulated entities and subgrantees. Hence, the actions are not the sorts of agency nonenforcement determinations that *Heckler* leaves to agency discretion. And in all events, *Heckler* does not bar judicial review when, as here, the plaintiff alleges that the challenged agency actions violate the Constitution. Whatever *Heckler*'s reach, therefore, it does not bar the Court from reviewing Mrs. Maddonna's claims that the exemption, notice of nonenforcement, and ongoing federal funding of religious discrimination are unconstitutional and therefore also violate § 706(2)(B).

A. The exemption and notice are not individual enforcement decisions subject to nonreviewability under *Heckler*.

Agency action is generally subject to judicial review. *See Elecs. of N.C., Inc. v. Se. Power Admin.*, 774 F.2d 1262, 1266 (4th Cir. 1985). It is nonreviewable only if judicial review is precluded by statute (5 U.S.C. § 701(a)(1)) or the challenged action is "committed to agency discretion by law" (*id.* § 701(a)(2)), the instances of which are "rare" (*Elecs. of N.C.*, 774 F.2d at 1267). *Heckler* held that an agency's decision "not to prosecute or enforce, whether through civil or criminal process," in an individual case is presumptively immune from judicial review under § 701(a)(2). 470 U.S. at 831. That is because, as with a prosecutor's decision not to indict, a decision not to take enforcement action in a specific instance against a particular regulated entity is "regarded as the special province of the Executive Branch." *Id.* at 832.

The *Heckler* rule is a narrow one. The *Heckler* Court did not hold that an agency has absolute discretion categorically to refuse to enforce *all* violations of a legal requirement, even though it has discretion to decline to enforce the requirement in a particular case; and neither did

the Court give agencies free rein to authorize violations of the law prospectively and permanently. Quite the contrary: *Heckler* made clear that "Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Id.* at 833. Nor, importantly, did the Court deny reviewability when an agency "'consciously and expressly adopt[s] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc) (per curiam) (agency's wholesale failure to enforce Title VI of the Civil Rights Act of 1964 through desegregation of public schools was not committed to agency discretion)); *see also, e.g.*, *N. Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 745 (7th Cir. 1986) ("[W]e do not think that the Commission can essentially abandon its regulatory function . . . under the guise of unreviewable agency inaction."). Indeed, Justice Brennan wrote separately in *Heckler* to underscore the narrowness of the decision, further explaining that the Court was not addressing whether nonenforcement decisions might evade judicial review when "(1) an agency flatly claims that it has no statutory jurisdiction to reach certain conduct"; "(2) an agency engages in a pattern of nonenforcement of clear statutory language"; "(3) an agency has refused to enforce a regulation lawfully promulgated and still in effect"; or "(4) a nonenforcement decision violates constitutional rights." 470 U.S. at 839 (Brennan, J., concurring); *see also infra* Section II.B.

In keeping with these limitations, and the logic of the prosecutorial-discretion analogy underlying them, the courts have drawn a line between "single-shot non-enforcement decision[s]" like the one in *Heckler*, which are presumptively immune from judicial review, and an agency's "general policy of refusing to enforce [a] provision of substantive law," which is reviewable. *Casa de Md. v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 699 (4th Cir. 2019) (quoting *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 811–12 (D.C. Cir. 1998)), *petition for cert. filed* (U.S. May 24, 2019) (No. 18-1469). Whereas individual enforcement decisions involve "the sort of

mingled assessments of fact, policy, and law" that are "peculiarly within the agency's expertise and discretion," general enforcement policies "are more likely to be direct interpretations of the commands of . . . substantive statute[s]." *Id.* (quoting *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994)). Only the former are presumptively nonreviewable. *Id.*

1. *Heckler* does not bar review of HHS's class-wide exemption of South Carolina and its faith-based child-placement agencies from antidiscrimination regulations.

HHS issued a written, class-wide exemption extending to all current and future South Carolina child-placement agencies, prospectively authorizing them to violate HHS's antidiscrimination regulations. *See* Compl. ¶¶ 70–71. The exemption is not a case-specific determination based on individualized assessment of all the facts with due consideration of the case's strengths and the agency's enforcement priorities. *Cf. Casa de Md.*, 924 F.3d at 699; *Sierra Club v. Larson*, 882 F.2d 128, 130–33 (4th Cir. 1989). Rather, it is a general declaration that the agency's rules will henceforth not apply to a whole swath of regulated entities. It is, in short, entirely new policy through exemption—rulemaking through subterfuge—and thus is reviewable.

This conclusion is consistent with determinations by courts and scholars alike that exemptions of the sort here are as a legal matter entirely unlike the case-by-case retrospective enforcement decisions for which *Heckler* bars review. Although both involve decisions by federal officials "not to apply the literal terms of the law," exemptions like this one "are more like the royal grant of permission in that they are formal, written, affirmative agency actions." Sean D. Croston, *An Important Member of the Family: The Role of Regulatory Exemptions in Administrative Procedure*, 64 Admin. L. Rev. 295, 297 (2012) (internal quotation marks omitted). And given the "broad manner" in which exemptions may be provided, they "are generally subject to judicial review" under the APA. *Id.* (citing *Honeywell Int'l v. Nuclear Regulatory Comm'n*, 628 F.3d 568, 578 (D.C. Cir. 2010) (reviewing challenge to agency denial of exemption under APA's

arbitrary-and-capricious standard); *Yetman v. Garvey*, 261 F.3d 664, 669 (7th Cir. 2001) (reviewing Federal Aviation Administration's policy summarily to deny exemptions from rule requiring pilots to be younger than sixty)). In short, "[t]he granting of an exemption from statutory requirements is not an area of agency discretion traditionally unreviewable." *Beno v. Shalala*, 30 F.3d 1057, 1067 (9th Cir. 1994) (internal quotation marks omitted).

HHS insists that *Sierra Club v. Larson*, 882 F.2d at 128, is "on all fours here." ECF No. 34-1, at 18. It is not. That case involved a regulatory scheme in which the Federal Highway Administration could take enforcement action—including withholding federal funding—against states that it determined were not maintaining "effective control" over outdoor advertising as contemplated by the Highway Beautification Act. *See* 882 F.2d at 129. The court of appeals held under *Heckler* that the agency's specific determination not to withhold funds from South Carolina was nonreviewable. *Id.* at 132. But while HHS is correct that in that case, as here, a federal agency decided to distribute federal funds despite violations of the terms of the grant (*see* ECF No. 34-1, at 18), HHS ignores two core features of the decision that underscore why the nonenforcement determination there, but not here, is unreviewable under *Heckler*.

First, the case concerned an individual nonenforcement decision with respect to a single regulated entity, the State of South Carolina. *See* 882 F.2d at 129–30. Here, by contrast, while South Carolina may have been the entity that requested the exemption, the exemption itself covers not just a single actor that has fallen short in complying with federal regulations, but an entire class of regulated entities—namely, all current and future child-placement agencies in South Carolina. Second, and more importantly, the nonenforcement determination there was an agency decision not to impose a financial penalty on South Carolina for past noncompliance in light of the State's current actions. *See id.* at 130, 132–33. Nowhere does the court suggest that the government's leniency toward South Carolina was an invitation for the State to continue disregarding statutory

requirements. On the contrary, the individualized determination not to withhold highway funding was based in part on the fact that the government was "satisfied with actions already taken or planned courses of action by South Carolina . . . in assuring compliance with federal requirements for outdoor advertising." *Id.* at 130 (internal quotation marks omitted). That is, the federal agency determined that it need not impose a financial penalty on South Carolina to achieve the federal regulatory objectives because the State was already making adequate progress toward complying.

Here, by contrast, HHS did not just decline to impose a financial penalty on a particular recipient or subrecipient of federal funds for violating a regulation; nor has it determined that the recipient is already taking adequate steps toward compliance to achieve the objectives of the antidiscrimination regulation (which are frustrated, not furthered, by the exemption). Instead, HHS affirmatively, prospectively, and categorically exempted *all* faith-based entities in South Carolina from *ever* having to comply, while allowing them to continue receiving federal funds. The exemption here, in other words, changed HHS policy. Far from dictating that the exemption be deemed an individual enforcement decision, *Sierra Club v. Larson* demonstrates why categorical, prospective exemptions from compliance like this one are reviewable while individual, retrospective nonenforcement determinations are not.

2. *Heckler* does not bar review of the notice of nonenforcement.

For similar reasons, *Heckler* does not bar judicial review of HHS's broad, nationwide notice of nonenforcement. The notice is a prospective, categorical refusal to enforce the antidiscrimination requirements of 45 C.F.R. § 75.300(c), which are supposed to be applicable to all recipients and subrecipients of HHS funds. *See* Compl. ¶ 76. Though styled as a "nonenforcement" measure, it thus is not a case-specific determination resting on an individualized assessment of facts and agency enforcement priorities. *Cf. Casa de Md.*, 924 F.3d at 699; *Sierra Club v. Larson*, 882 F.2d at 130–133. Rather, it is a "refus[al] to enforce a regulation lawfully

promulgated and still in effect" (*Heckler*, 470 U.S. at 839 (Brennan, J., concurring)), and hence "abandon[ment of HHS's] regulatory function" (*N. Ind. Pub. Serv. Co.*, 782 F.2d at 745). Like the earlier South Carolina-wide exemption, it is a statement of general enforcement policy that nullifies the rules for the class of regulated entities. It is agency rulemaking by another name, and therefore it is subject to judicial review.

Casa de Maryland is controlling Circuit precedent. There, the court of appeals held that the Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals policy was reviewable agency action, for DHS was neither "exercis[ing its] discretion in an individual case" nor determining that its resources would be best spent pursuing one violation over another. 924 F.3d at 698–99. Instead, the agency had rescinded "a general enforcement policy in existence for over five years and affecting hundreds of thousands of enrollees based on the view that the policy was unlawful." *Id.* at 699. Its decision was therefore reviewable. So too here, where HHS has as a matter of policy categorically and prospectively refused to enforce its own regulations "with respect to any grantees" (84 Fed. Reg. at 63,811).

HHS's insistence that the notice of nonenforcement is like the action in *Heckler* (*see* ECF No. 34-1, at 19) is simply wrong. In *Heckler*, the Court declined to disturb a determination by the FDA not to enforce a statute that it administered when applied to the specific context of lethal injections. 470 U.S. at 830. Here, HHS has not merely exercised agency discretion under the rules but instead has wholly abdicated its responsibility to enforce the law and has rescinded a valid notice-and-comment rule without notice-and-comment rulemaking. *Cf. Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015) ("[Section] 1 of the APA . . . mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."). *Heckler* does nothing to foreclose judicial review in situations like this one. *See* 470 U.S. at 839 (Brennan, J., concurring).

B. Even if the exemption and notice of nonenforcement were nonreviewable for illegality under § 706(2)(A), they, and HHS's funding of religious discrimination generally, are reviewable for unconstitutionality.

Even if the Court were to hold that the challenged exemption and notice of nonenforcement were discretionary nonenforcement decisions that are unreviewable for illegality under 5 U.S.C. § 706(2)(A), there is no bar to review of Mrs. Maddonna's claims that HHS's actions are unconstitutional (and thus also violate 5 U.S.C. § 706(2)(B)).

Heckler did not address whether the presumption of nonreviewability might apply to agency action or inaction that is alleged to violate the Constitution. *See* 470 U.S. at 838. But the Court took pains to point out that "[n]o colorable claim [has been] made . . . that the agency's refusal to institute proceedings violated any constitutional rights of respondents." *Id.* And Justice Brennan further underscored that the Court's holding did not address the scope of reviewability where "a nonenforcement decision violates constitutional rights." *Id.* at 839 (Brennan, J., concurring). For as he explained: "It may be presumed that Congress does not intend administrative agencies . . . to ignore clear jurisdictional, regulatory, statutory, or constitutional commands . . . ." *Id.* (Brennan, J., concurring). In other words, unless Congress says otherwise—and indeed, even if it does—agency action should be reviewable for unconstitutionality.[3]

In this Circuit, that reading of *Heckler* is binding precedent: The court of appeals has held that even "'agency action which is committed to agency discretion by law' is not completely shielded from judicial review." *See Elecs. of N.C.*, 774 F.2d at 1267 (brackets omitted). "[C]ourts may review agency actions for certain types of errors that fall within the APA's Section 701(a)(2)

[3] As Professor Sunstein has pointed out, the day before *Heckler* was decided the Supreme Court held that prosecutorial discretion is cabined by constitutional constraints; so the prosecutor analogy just underscores that HHS's actions here are reviewable for unconstitutionality. *See* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 676 & n.131 (1985) (citing *Wayte v. United States*, 470 U.S. 598 (1985)). HHS's reading of *Heckler* cannot be squared with the Supreme Court's contemporaneous holding in *Wayte*.

exception to judicial review. For example, an agency decision that violates a statutory or constitutional command . . . is not immune from judicial review" even when a "lawful exercise" of that agency decision would be immune. *Id.* As the court explained, that limitation on nonreviewability is consistent with earlier precedent setting the bounds of agency discretion. *See id.* ("[E]ven where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations." (quoting *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981))); *see also, e.g.*, *WWHT, Inc. v. FCC*, 656 F.2d 807, 815 n.15 (D.C. Cir. 1981) ("In no event would a finding of nonreviewability on the ground that an action is committed to agency discretion preclude judicial review when constitutional violations have been alleged.").

In short, when colorable claims of unconstitutionality are made, agency action is reviewable. *Cf., e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988) (interpreting statute to permit constitutional claims, thus "avoid[ing] the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim" (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986))); *Reg'l Mgmt. Corp. v. Legal Servs. Corp.*, 186 F.3d 457, 461 n.3 (4th Cir. 1999) (constitutional claims are among the class of "exceptional cases" identified by the Supreme Court "where judicial review of agency action would always be available, even if Congress did not specifically authorize it (through the APA or otherwise) or actually precluded it explicitly, or at least . . . . where the presumption in favor of judicial review is particularly strong"); *Collins Music Co. v. United States*, 21 F.3d 1330, 1336–37 (4th Cir. 1994) (analyzing regulatory action by IRS for procedural-due-process violation but concluding that, because plaintiff's constitutional claim was not colorable,

Heckler's presumption of nonreviewability applied).[4]

Mrs. Maddonna alleges that HHS's exemption, notice of nonenforcement, and ongoing funding of religious discrimination are all unconstitutional and thus also violate 5 U.S.C. § 706(2)(B). Judicial review is available as a matter of law.

III. MRS. MADDONNA HAS STATED A CLAIM UNDER THE ESTABLISHMENT CLAUSE.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. Government must remain "neutral[] between religion and religion, and between religion and nonreligion." *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (internal quotation marks omitted). Hence, it "may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (plurality opinion).

A. The Establishment Clause tests.

The Supreme Court has developed multiple tests to determine the metes and bounds of the Establishment Clause—including the *Lemon* test, the endorsement test, the coercion test, and the *Larson* test. Failure to satisfy any one is an Establishment Clause violation. *See, e.g.*, *Mellen v. Bunting*, 327 F.3d 355, 370–71 (4th Cir. 2003).

1. *Lemon*: Governmental action violates the Establishment Clause if (1) its primary purpose is religious rather than secular; (2) its principal effect is to advance or inhibit religion; or (3) it excessively entangles government with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13

[4] This principle also disposes of the core problem on which the doctrine of nonreviewability is premised: that courts cannot review agency action when there is no judicially manageable standard, i.e., when there is "no law to apply" (*see Sierra Club v. Larson*, 882 F.2d at 131, 132). The Constitution provides the applicable legal standard. *See Nat'l Fed'n of Fed. Workers v. Weinberger*, 818 F.2d 935, 941 n.11 (D.D.C. 1987) ("Here, there is clearly 'law to apply'—the Constitution."); Sunstein, 52 U. CHI. L. REV. at 676 (same).

(1971); *see also Mellen*, 327 F.3d at 372–75. The test is disjunctive: Failure to satisfy any one part is a constitutional violation. *See Koenick v. Felton*, 190 F.3d 259, 265 (4th Cir. 1999).

Purpose is determined from the standpoint of an "objective observer" familiar with the facts and circumstances surrounding the official action. *McCreary*, 545 U.S. at 862–64. Secular purposes must "be genuine, not a sham, and not merely secondary to a religious objective." *Id.* at 864. The question is not whether a state has "any" secular purpose, but whether there is an actual secular purpose that is the "preeminent" or "primary" one. *Id.* at 864, 865 n.13 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 590, 594 (1987)). Effect is determined "irrespective of government's actual purpose," by considering whether an objective observer aware of all the facts and circumstances would perceive that "the principal effect of [the challenged] action . . . suggest[s] government preference for a particular religious view or for religion in general." *Mellen*, 327 F.3d at 374 (internal quotation marks omitted). And excessive entanglement occurs when a state "delegate[s] a governmental power to religious institutions" such that religious tenets may be applied in exercising governmental authority. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123, 125–26 (1982); *accord Bd. of Educ. v. Grumet*, 512 U.S. 687, 696–97 (1994).

2. Endorsement: The endorsement test is a framework for determining impermissible religious effect. It asks "whether a reasonable, informed observer would conclude that government . . . has endorsed a particular religion or religion generally." *Wood v. Arnold*, 915 F.3d 308, 316 (4th Cir. 2019). Official action impermissibly endorses religion if it sends a message to "nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

3. Coercion: The bare-minimum guarantee of the Establishment Clause is that "government may not coerce anyone to support or participate in religion or its exercise" (*Lee v. Weisman*, 505 U.S. 577, 587 (1992)), for "the machinery of the State" must not be used "to enforce a religious orthodoxy" (*Santa Fe*, 530 U.S. at 312). "The type of coercion that violates the Establishment Clause need not involve . . . the forcible subjection of a person to religious exercises or the conditioning of relief from punishment on attendance at church services." *DeStefano v. Emergency Hous. Grp., Inc.*, 247 F.3d 397, 412 (2d Cir. 2001). Rather, "subtle coercive pressure" is sufficient. *Lee*, 505 U.S. at 592. For government and those whom it funds "may no more use social pressure to enforce orthodoxy than [they] may use more direct means" (*id*. at 594).

4. *Larson*: Because "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," denominational preferences are subject to strict scrutiny under *Larson v. Valente*, 456 U.S. at 244, 246. They are presumptively invalid and cannot stand unless the government conclusively establishes both that preferring or disfavoring a faith or denomination serves a compelling governmental interest, and that its actions are narrowly and precisely tailored to serve that compelling interest.

B. Mrs. Maddonna has adequately alleged Establishment Clause violations.

Under every test, Mrs. Maddonna has adequately alleged that HHS violated the Establishment Clause. Because the tests and pertinent facts are overlapping, we analyze them together.

1. HHS impermissibly acted with a religious purpose and effect.

Like the State, HHS has actively facilitated Miracle Hill's religious discrimination by funding that discrimination, exempting Miracle Hill and all other South Carolina child-placement

agencies from federal antidiscrimination regulations, and issuing a global notice of nonenforcement of those regulations.[5]

a. HHS asserts that its purpose here is to ensure the continued availability of child-placement agencies in South Carolina to "serve the welfare of children" in the foster-care system. ECF No. 34-1, at 26. But if its principal aim were genuinely to serve the children, it would not fund and expressly authorize agencies throughout the State to turn away otherwise-qualified families like the Maddonnas just because they are Catholic or some other disfavored faith. That *diminishes* the number of available foster families, reduces foster-care placements, and deprives needy children of safe, loving homes—a result that instead bespeaks the aim to protect, defend, and promote religious discrimination in the foster-care program. *Cf. McCreary*, 545 U.S. at 864 ("the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective"). Moreover, Mrs. Maddonna does not ask that religious entities be categorically barred from receiving federal or state funds; and a judgment in her favor would not prevent religious entities from serving as child-placement agencies—as long as they followed the law by refraining from discriminating on the basis of religion when performing the governmental service. Nor does it follow that requiring child-placement agencies to adhere to antidiscrimination laws will cause all (or any) to stop working with foster children; and the Court should not accept HHS's speculations that they might.

HHS also asserts the purpose of complying with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a). *See* ECF No. 34-1, at 26. But no federal statute may require (or authorize) what the Constitution forbids. *See Santa Fe*, 530 U.S. at 302 ("[T]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations

[5] Mrs. Maddonna does not challenge HHS's notice of proposed rulemaking to amend 45 C.F.R. § 75.300(c). *See* ECF No. 34-1, at 25 n.4. We note, however, that rescission of the regulation would not relieve the government of its constitutional duty not to fund religious discrimination.

imposed by the Establishment Clause." (quoting *Lee*, 505 U.S. at 587)). And to survive Establishment Clause scrutiny, any religious accommodation granted, under RFRA or otherwise, (1) "must lift 'an identifiable [government-imposed] burden on the exercise of religion'" (*County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 US. 573, 613 n.59 (1989) (quoting *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring))), and (2) must not unduly burden nonbeneficiaries (*Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)). For the reasons explained in Section III.B.4, *infra*, the exemptions here fail in both respects. Moreover, because an individualized showing that one's religious exercise has been substantially burdened is a statutory prerequisite to religious accommodation (*see* 42 U.S.C. § 2000bb-1(c)), RFRA does not authorize these broad, generalized exemptions. And because RFRA does not and as a matter of law cannot authorize HHS's actions, compliance with it is not a valid secular purpose here.

b. HHS's actions likewise lack a predominantly secular effect and instead impermissibly endorse religion by communicating that the government privileges Miracle Hill's religious beliefs over Mrs. Maddonna's. HHS doesn't just turn a blind eye to religious discrimination in the use of federal funds to perform a governmental service; by affirmatively issuing the categorical exemption and notice of nonenforcement, it actively and concretely authorizes recipients of those funds to discriminate with impunity. It thus sends the unambiguous message that those, like Mrs. Maddonna, who do not subscribe to the favored religious beliefs are outsiders who do not deserve equal treatment or equal opportunity to participate in the governmental program. And contrary to HHS's suggestion (*see* ECF No. 34-1, at 27–28), the message of religious endorsement is not tempered by the fact that any religious organization (of whatever denomination) that receives federal funds may likewise discriminate against members of any faith that *it* dislikes. For the exemption from and nonenforcement of religious-nondiscrimination requirements will unconstitutionally disfavor each family that is denied service based on religion, regardless of

whether someone of another faith would be disfavored and rejected elsewhere. "Catholics Need Not Apply" does not become constitutionally permissible for a federally funded government service in Greenville just because "No Jews Allowed" might be the policy in Columbia and "Baptists Not Welcome" may be the policy in Charleston. And in all events, authorizing religious criteria for participation in a federally funded program communicates the impermissible message that the government prefers religion over nonreligion. *Mellen*, 327 F.3d at 374.[6]

2. HHS impermissibly funds and supports foster-care agencies' discriminatory policies.

The Establishment Clause requires that governmental benefits be allocated "on the basis of neutral, secular criteria," and that the recipients of those benefits not be defined "by reference to religion." *Agostini v. Felton*, 521 U.S. 203, 231, 234 (1997). Funding or providing support to institutions that use public money "for religious purposes" or "to advance . . . religious objectives" violates the Establishment Clause. *Mitchell v. Helms*, 530 U.S. 793, 844, 857 (2000) (controlling opinion of O'Connor, J.); *see Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 & n.1 (4th Cir. 2001) (recognizing Justice O'Connor's *Mitchell* concurrence as controlling, and holding that "actual diversion of government aid to religious purposes is prohibited"). Thus, the Establishment Clause prohibits even private entities, if they receive governmental funding, from discriminating

[6] HHS's reliance on *Amos* (*see* ECF No. 34-1, at 28) is misplaced. That case concerned a church's firing of an employee who was not in religious good standing. The exemption from Title VII's bar on religious discrimination was not unconstitutional religious favoritism because it avoided interference with church autonomy and internal governance protected by both Religion Clauses of the First Amendment. Those interests are not implicated here. And the cases that HHS cites concerning grant awards to religious entities (*see* ECF No. 34-1, at 28–29) have no bearing because, as explained, Mrs. Maddonna does not object to governmental partnerships with faith-based organizations to perform social services. Rather, she objects to the use of federal and state dollars to provide those services in a religiously discriminatory manner. HHS points to no cases, and we are aware of none, that uphold government funding of government programs that apply religious criteria to discriminate in whom the programs will serve.

based on religious criteria when determining whom they will serve. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 614–15, 621 (1988); *Bradfield v. Roberts*, 175 U.S. 291, 298–99 (1899).

Here, HHS impermissibly funds and authorizes South Carolina child-placement agencies' use of public money to advance religious objectives by offering government-funded public services solely to those who share the agencies' religious beliefs. HHS suggests that it is shielded from liability because the federal dollars pass through the State before reaching those entities. ECF No. 34-1, at 23–24. But the Constitution mandates that government cannot fund religious discrimination—not directly, and not through intermediaries that it hires to deliver a government-funded service. *See, e.g.*, *Bowen*, 487 U.S. at 620–21 (remanding for district court to consider whether grantees were "us[ing] materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith"); *Mitchell*, 530 U.S. at 840 (controlling opinion of O'Connor, J.) ("[A]ctual diversion of secular government aid to religious indoctrination . . . is constitutionally impermissible."). HHS is giving federal dollars to South Carolina that it knows the State will use—indeed, it expressly authorizes the State to use—to contract for religiously discriminatory foster-care services. There is no hiding behind the State's actions.

3. HHS impermissibly authorizes the use of federal funds for religious coercion and proselytization.

Because the Establishment Clause bars government from "coerc[ing] anyone to support or participate in religion or its exercise," it also bars government from funding private institutions that use those funds to "coerce worship or prayer." *DeStefano*, 247 F.3d at 411–12 (internal quotation marks omitted). "What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990). For "a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (internal quotation marks omitted).

Here, Miracle Hill requires affirmance "in belief and practice" of its evangelical-Christian doctrinal statement as a precondition to becoming a volunteer mentor or foster parent. *See* Compl. ¶¶ 55–56, 59. For Mrs. Maddonna and those similarly situated, this government-funded, government-sanctioned scheme poses a quintessentially coercive choice: Hew to the dictates of your religious beliefs and forgo the publicly funded governmental program, or compromise your beliefs to participate on the same terms as everyone else. The coercive pressure exacted on prospective foster parents like Mrs. Maddonna is only exacerbated by Miracle Hill's stature as the most prominent child-placement agency in the area. Individuals are thus pressured to forfeit their religious beliefs to obtain access to a governmental program. This the Establishment Clause forbids. *See, e.g.*, *Lee*, 505 U.S. at 592 (even "subtle coercive pressure" constitutes an Establishment Clause violation).

Miracle Hill also expressly requires all foster parents to promote its favored religious views to the children placed with them. *See, e.g.*, Compl. ¶¶ 54, 57. While Miracle Hill may evangelize through its privately funded charitable work, it may not do so in performing a government-funded program, nor may it compel families to do so in order to participate in that program. HHS runs afoul of the Establishment Clause here not just by failing to ensure that federal funds are put only to permissibly nondiscriminatory purposes, though that would be enough to warrant relief, but also by expressly authorizing the federally funded discrimination to continue.

4. HHS impermissibly grants exemptions that burden third parties and that do not lift substantial government-imposed burdens on religious exercise.

Though government may in some circumstances accommodate religious institutions by exempting them from generally applicable legal requirements, "accommodation is not a principle without limits." *Grumet*, 512 U.S. at 706. To be constitutional, religious accommodations (1) must lift substantial, government-imposed burdens on the exercise of religion and (2) must not impose

material burdens on third parties. *See Allegheny*, 492 US. at 613 n.59; *Amos*, 483 U.S. at 348 (O'Connor, J., concurring). For if the government has not imposed a substantial burden on religious exercise to begin with, an exemption from a generally applicable law is an unconstitutional religious preference. *Texas Monthly*, 489 U.S. at 15 (plurality opinion); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985). And "[i]f, in purporting to accommodate the religious exercise of some, the government imposes costs and burdens of that religious exercise on others, it favors the faith of the benefitted over the benefits and rights of the burdened." *Irish 4 Reprod. Health v. U.S. Dep't of Health & Human Servs.*, 2020 WL 248009, at *19 (N.D. Ind. Jan. 16, 2020); *see Cutter*, 544 U.S. at 722; *Texas Monthly*, 489 U.S. at 15, 18 n.8 (plurality opinion); *Caldor*, 472 U.S. at 709–10. Neither requirement is met here.

a. Exempting child-placement agencies from adhering to generally applicable nondiscrimination laws does not alleviate an "exceptional government-created burden[] on private religious exercise" (*Cutter*, 544 U.S. at 720). As a matter of law, religious exercise is not substantially burdened by neutral, generally applicable legal requirements (such as the antidiscrimination requirements here) unless those requirements forbid an entity "to engage in conduct proscribed by [its] religious beliefs, []or . . . force[it] to abstain from any action which [its] religion mandates that [it] take" (*Goodall ex rel. Goodall v. Stafford Cty. Sch. Bd.*, 60 F.3d 168, 172–73 (4th Cir. 1995)).[7]

Though Miracle Hill may have religious reasons for choosing to provide foster-care services, acting on a religious motivation is insufficient as a matter of law to constitute a legally

[7] Whether religious exercise is substantially burdened by a neutral, generally applicable law is a legal question, not a factual one. *See Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011). Thus, even if conducting a governmental program under contract with South Carolina using federal and state funds could constitute Miracle Hill's religious exercise, which it does not, it would be up to this Court to determine whether that exercise was substantially burdened. It is not, for the reasons explained in text.

cognizable burden on religious exercise. *See Allegheny*, 492 U.S. at 613 n.59; *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1325 (10th Cir. 2010) (Gorsuch, J., concurring) (no substantial burden where complainant described "only a moderate impediment to—and not a constructive prohibition of—his religious exercise"); *Henderson v. Kennedy*, 253 F.3d 12, 16–17 (D.C. Cir. 2001) (ban on peddling on National Mall did not substantially burden religious exercise of plaintiffs who wished to sell religious T-shirts, in part because ban was "at most a restriction on one of a multitude of means" of fulfilling their mission "to spread the gospel by 'all available means'"). For there is no basis to conclude that Miracle Hill is *required* by its faith to contract with the government to deliver foster-care services. Rather, that is just "one of a multitude of means" (*Henderson*, 253 F.3d at 17) by which Miracle Hill might engage in its ministry. *Cf. How We Help*, MIRACLE HILL MINISTRIES, https://bit.ly/2UngKkN. The exemptions from the nondiscrimination requirements here thus cannot "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion" but instead impermissibly "convey a message of endorsement to slighted members of the community" (*Texas Monthly*, 489 U.S. at 15 (plurality opinion) (internal quotation marks omitted)), thus amounting to unconstitutional governmental preferences for Miracle Hill's religion.

Relatedly, while Miracle Hill may be entitled to serve only coreligionists when performing privately funded charitable activities, "the fact that a person has a constitutional right . . . does not necessarily impose upon the government an obligation to subsidize that right." *Goodall*, 60 F.3d at 172. "[I]f a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights." *Agency for Int'l Dev. v. Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). Not having one's religious mission underwritten with a government contract and government funding to deliver a government service is not even "a relatively minor burden" on

religion (*Locke v. Davey*, 540 U.S. 712, 725 (2004)); it is no cognizable burden at all. Hence, Miracle Hill and others like it are ineligible as a matter of law for a religious accommodation here.

b. The Establishment Clause also bars religious exemptions from neutral, generally applicable laws if the exemptions would shift costs or other harms to nonbeneficiaries. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014) ("Nor do we hold . . . that . . . corporations have free rein to take steps that impose 'disadvantages . . . on others' or that require 'the general public [to] pick up the tab.'"); *id.* at 729 n.37 ("detrimental effect[s]" on nonbeneficiaries must be considered); *Texas Monthly*, 489 U.S. at 18 n.8 (plurality opinion) (sales-tax exemption for religious periodicals impermissibly imposed on nonbeneficiaries the "burden . . . to offset the benefit bestowed on subscribers to religious publications"); *Caldor*, 472 U.S. at 710 (invalidating religious accommodation for Sabbath-observing employees in part because it imposed "substantial economic burdens" on employers and "significant burdens on other employees").

By categorically exempting all child-placement agencies from neutral, generally applicable antidiscrimination requirements, HHS permits and affirmatively enables Miracle Hill to discriminate in the delivery of a federally funded service against prospective foster parents who do not affirm its evangelical-Christian beliefs, to the detriment of prospective foster parents of all other faiths, including Mrs. Maddonna. Allowing Miracle Hill to turn away prospective foster parents because they have the 'wrong' religious beliefs impermissibly harms the parents by preventing them from participating in a government program and being considered for foster-care licenses on the same footing as religious adherents who are afforded preferred status. The harms to children in the foster-care system are even more devastating: With so critical a shortage of foster parents in South Carolina, every otherwise-qualified foster family that is turned away means one less home—one less loving family—for a child in need. And even for those children who do get placed, the exclusion of foster parents based on religion means that children who are not of the

faith practiced and preferred by the child-placement agency are more likely to be put with a family who will not raise them consistent with the religious beliefs of the children and their biological parents, contrary to South Carolina law (*see* S.C. Code Regs. § 114-550(H)(11)).

5. HHS impermissibly affords denominational preferences.

Finally, when government favors or disfavors a religious denomination, its action is subject to strict scrutiny and presumptively does not stand. *Larson*, 456 U.S. at 246; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (explaining Establishment Clause jurisprudence and extending it to Free Exercise Clause); *Koenick*, 190 F.3d at 264 (strict scrutiny applies under Establishment Clause when government has "facially discriminate[d] between religious denominations or between religion and non-religion").

HHS runs afoul of this strict prohibition in at least two respects. First, by authorizing and specifically inviting Miracle Hill and agencies like it to violate federal antidiscrimination regulations, HHS has preferred Miracle Hill's faith, evangelical Christianity, over all other faiths. And second, because government cannot accomplish through private actors what it is forbidden to do directly, Miracle Hill's express preference for evangelical Christians in the performance of a federally funded program constitutes a denominational preference by the government itself. Hence, HHS must show a compelling governmental interest in preferring evangelical Christian beliefs over all other faiths, as well as narrow tailoring of its actions to serve only that compelling interest. *See Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015); *Larson*, 456 U.S. at 247. Yet the motivating interests that HHS asserts—ensuring the welfare of children in foster care and complying with RFRA—are, as explained in Section III.B.1, not even plausibly legitimate here, much less compelling.

C. The state-action doctrine offers no excuse for HHS's unconstitutional conduct.

As explained, HHS violates the Establishment Clause by (1) furnishing federal dollars through the State to child-placement agencies that impose religious tests on those seeking

governmental services, (2) categorically exempting all South Carolina agencies from complying with HHS's own antidiscrimination requirements, and (3) refusing to enforce those requirements and the constitutional mandates that they reflect. HHS nevertheless contends that because Miracle Hill is not a state actor, the government is not liable for its discriminatory provision of government services. *See* ECF No. 34-1, at 20–23. But whether Miracle Hill is or isn't a state actor matters not for *HHS's* liability when the legal claim is that *HHS* is unconstitutionally funding forbidden discrimination. And in all events, HHS misapplies the state-action doctrine to foster care. Its arguments should be rejected.

A "nominally private entity" may be a state actor and thus subject to liability for constitutional violations when it has been delegated public functions by the state. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). Thus, if South Carolina child-placement agencies are state actors in administering the inherently governmental functions of the foster-care system, Miracle Hill is subject to the Establishment Clause's mandates. But the Court need not reach that question. For Mrs. Madonna has not sued Miracle Hill or asked that it be held liable; rather she seeks only to hold HHS and the State liable for their own actions.

The bulk of the case law to which HHS points concerns whether private entities named as defendants are state actors that are thus subject to liability for constitutional violations. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (defendant private insurer was not state actor); *Rendell-Baker v. Kohn*, 457 U.S. 830, 839–43 (1982) (defendant private school was not state actor); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358–59 (1974) (defendant private utility was not state actor). Those cases have no bearing.

As for *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Court there held that Medicaid patients could not bring a due-process challenge against the government over transfers and discharges from their private nursing homes. 457 U.S. at 1003, 1005. They challenged only the propriety of the

transfer and discharge determinations—that was the "gravamen of the complaint." *Id.* at 1003. And those determinations were made by medical personnel based solely on the plaintiffs' medical conditions, so there was nothing attributable to, and no challenge of, "particular state regulations or procedures." *Id.* Here, by contrast, the thrust of Mrs. Maddonna's Complaint is *not* any purely private decision by Miracle Hill to turn her away. Rather, it is the concerted action by federal and state authorities to fund, license, and clear the regulatory hurdles that bar religious discrimination in the provision of government-funded child-placement services. The question is whether HHS (and the State) violated the Establishment Clause, not whether Miracle Hill did. HHS's own funding and regulatory determinations are unmistakably and unequivocally governmental action. Whether Miracle Hill is also a state actor is, therefore, beside the point.

But even if it did matter whether Miracle Hill is a state actor, which it does not, HHS is wrong in contending (ECF No. 34-1, at 21–22) that the Fourth Circuit has held that the state-action doctrine precludes "foster-care-related claims." In *Milburn v. Anne Arundel County Department of Social Services*, 871 F.2d 474 (4th Cir. 1989), the court held that the plaintiff could not bring constitutional claims under § 1983 against his foster parents, whom he alleged had abused him, because *foster parents* are not state actors. *Id.* at 479. Individual foster parents are hardly the same as the State's child-placement agencies for purposes of state-action analysis. And at least three circuits have concluded that private institutions that contract with or are otherwise authorized by states to care for or place children with foster parents *are* state actors. *See Brent v. Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656, 676–77 (6th Cir. 2018); *Taylor v. First Wyo. Bank, N.A.*, 707 F.2d 388, 390 (9th Cir. 1983); *Duchesne v. Sugarman*, 566 F.2d 817, 822 n.4 (2d Cir. 1977).

IV. MRS. MADDONNA HAS STATED A CLAIM UNDER THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause mandates that government treat alike "all persons similarly situated." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). When it treats people

differently based on a suspect classification such as religion, its actions are subject to strict scrutiny. *See Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (recognizing religion as suspect classification)). As Justice O'Connor put it, "the Religion Clauses . . . and the Equal Protection Clause as applied to religion[]all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Grumet*, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in the judgment). Thus, for the same reasons that HHS's funding and authorization of discrimination in the provision of child-placement services violate the Establishment Clause, they require strict scrutiny and invalidation under the Equal Protection Clause. *Cf. Lukumi*, 508 U.S. at 540 ("equal protection mode of analysis" applies in determining whether governmental action is neutral with respect to religion under Religion Clauses (internal quotation marks omitted)).

Relying on standing principles, HHS asserts that equal-protection claims based on stigmatic harm require that the plaintiff be personally subjected to the harm, i.e., personally denied equal treatment on the basis of membership in a protected class. *See* ECF No. 34-1, at 29–30. And HHS argues that Mrs. Maddonna has not experienced any such denial of equal treatment at its hands. *Id.* But as explained above, "[a]ctivities that the federal government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons engaged in such activity." *See Nat'l Black Police Ass'n v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983). "A State's constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood*, 413 U.S. at 467. Thus, just as funding entities to discriminate in delivering a governmental service violates the Establishment Clause, so too does it violate equal protection. *See Brown v. Califano*, 627 F.2d 1221, 1235 (D.C. Cir. 1980) ("The Constitution's prohibition

against governmental support of . . . invidious discrimination is too obvious and well-established to require elaboration . . . .").

As described above, Mrs. Maddonna was turned away and remains excluded from governmental foster-care services based on her religious beliefs, and the denial of service was and is bought and paid for by HHS. The discrimination that she experienced firsthand is no less attributable to HHS because it was carried out under contract by a subrecipient of federal funds than if it had been done by an HHS employee directly.

CONCLUSION

The motion to dismiss should be denied.

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